STATE COURT
Docket Watch®

Washington Union Fees Law Goes to Supreme Court

by Andy Cook

The United States Supreme Court will decide this term an important case involving the use of union fees for political purposes. Specifically, the Court will determine the constitutionality of a Washington law which requires unions to obtain affirmative authorization from non-members prior to using their fees for political purposes. At issue is whether the Washington Supreme Court erred when it ruled that the state's "opt-in" provision violates unions' First Amendment rights.[1]

The Washington "Opt-in" Statute

Washington is one of a number of states that authorizes union security agreements. These agreements require both union and non-union members to contribute dues for costs related to collective bargaining. The non-union members' dues are referred to as "agency shop fees," but are functionally equivalent to union dues.[2] A portion of all the member and non-member dues are used to support political and ideological causes. Non-members opposed to these causes can receive a rebate after going through a lengthy process.

In 1992, Washington voters passed Initiative 134, which, among other things, required unions to seek "affirmative authorization" from non-union members prior to using their money for political purposes. The initiative was codified as Wash. Rev. Code § 42.17.760 ("§760").

The law provides that labor organizations "may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual." This provision is known as the "opt-in" procedure. Instead of requiring non-union members to first object, or opt-out, the statute places the burden on the unions to seek authorization before using the fees for political purposes.

Washington Education Association's Use of Nonmember Dues for Political Purposes

The Washington Education Association (WEA) is the statewide union which

Continued on page 14

Missouri Supreme Court Extends Workers Compensation Litigation

by John Hilton

Fred Schoemehl sustained an on-the-job knee injury in May 2001, and filed a claim for workers' compensation benefits against his employer and against the Treasurer of the State of Missouri in her capacity as custodian of the state's Second Injury Fund.[1] Because of the severity of his injury, Mr. Schoemehl was awarded Permanent Total Disability (PTD) benefits for the rest of his life, beginning in December 2003. One month later, however, Mr. Schoemehl died of causes unrelated to the knee injury. His

Continued on page 12

THE FEDERALIST SOCIETY
Building the Next Generation
Advancing the Rule of Law
1982 • 25th ANNIVERSARY • 2007

April 2007

INSIDE

THIS ISSUE

FROM THE EDITOR

In an effort to increase dialogue about state court jurisprudence, The Federalist Society presents *State Court Docket Watch*. This newsletter is one component of the State Courts Project, presenting original research on state court jurisprudence and illustrating new trends and ground-breaking decisions in the state courts. These articles are meant to focus debate on the role of state courts in developing the common law, interpreting state constitutions and statutes, and scrutinizing legislative and executive action. We hope this resource will increase the legal community's interest in tracking state jurisprudential trends.

In this issue, we update our readers on the gay marriage controversy spreading throughout the courts, with Professor John Shu providing the third article in a series, focusing on New Jersey. Andy Cook gives us a synopsis of a case that will go before the U.S. Supreme Court out of Washington, involving the use of union fees for political purposes. W. Ryan Teague reports on the Supreme Court of Georgia's recent decision to strike down a state congressional act meant to curtail fraudulent asbestos claims. John Hilton summarizes a recent Missouri case, in which the state supreme court granted a widow's petition to claim her husband's worker compensation benefits post-mortem. And, finally, Jim Davis explores the Alabama Supreme Court's recent discussion of separation of powers.

As always, opinions are the authors', and we invite readers to submit responses, criticism or articles on cases in their respective states: info@fed-soc.org.

CASE IN FOCUS

Georgia Supreme Court Strikes Down Asbestos Litigation Reform

by W. Ryan Teague

The Supreme Court of Georgia, in *Daimler Chrysler Corp. et al v. Ferrante et al*,[1] unanimously struck down recently enacted asbestos litigation reform.[2] The court affirmed two trial court rulings that held the new asbestos litigation reform unconstitutional as applied to the appellees claims.

With the goal of requiring a greater level of causation for asbestos related tort claims, the 2005 Georgia General Assembly enacted House Bill 416 (the "Act"), legislation which required among other things that a plaintiff show that asbestos was a "substantial contributing factor" to the exposed person's medical condition.[3] The Act essentially increased the evidentiary requirements for maintaining an asbestos-related claim under Georgia law, requiring a stronger connection between the exposure to asbestos and the alleged injury. The Act required that the increased evidentiary requirements be applied to asbestos claims pending in Georgia on April 12, 2005.

The Supreme Court of Georgia accepted the appellees argument that this newly enacted legislation made changes to asbestos-related claims that affected "substantive rights" and therefore could not be applied retroactively to the appellees' cases. The court also rejected the appellants' argument that, at the very least, the court should sever the unconstitutional language from the Act and allow the remaining provisions to govern appellees' and future asbestos claims.

Statutory Scheme

As alluded to above, the 2005 Georgia General Assembly passed an asbestos litigation reform bill ("Act") based at least in part on significant concerns that plaintiffs who had no physical manifestation of an asbestos-related injury were filing claims solely on having been exposed to asbestos.[4] The Act implemented a specific, comprehensive scheme for asbestos-related claims. Among other changes, the Act added very specific evidentiary requirements for maintaining an asbestos-related claim.

For example, O.C.G.A. § 51-14-3 provided that prima facie evidence of physical impairment of the exposed person as defined in paragraph (15) O.C.G.A § 51-14-2 shall be an essential element of an asbestos claim, and that no person shall bring or maintain a civil action alleging an asbestos claim in the absence of prima facie evidence of physical impairment resulting from a medical condition for which exposure to asbestos was a "substantial contributing factor." Any person bringing

an asbestos claim would be required to file certain specific forms and information from verified sources to substantiate their claim that exposure to asbestos was a "substantial contributing factor to the person's medical condition.[5]

In an effort to leave open the option of filing an asbestos claim in the future if exposure to asbestos manifests into an injury, the General Assembly clarified that the limitations period on an any asbestos claim not barred as of April 12, 2005 would not begin to run until the exposed person discovers, or "through the exercise of reasonable diligence should have discovered" that he or she was physically impaired as defined above.[6]

As discussed in more depth below, at the heart of the *Ferrante* decision was the provision of the Act providing for dismissal of any asbestos claim pending on April 12, 2005, unless within 180 days from that date the plaintiff in a pending asbestos claim establishes "prima-facie evidence of physical impairment with respect to the asbestos claim.[7]

Constitutional Challenges

The *Ferrante* case arose out of multiple asbestos actions pending in the Cobb County Superior Court and Cobb County State Court. The Supreme Court of Georgia consolidated the appeals of various "virtually identical orders ruling that because the Act required plaintiffs to provide proof that exposure to asbestos was a substantial contributing factor in their medical condition, it unconstitutionally affected appellee's substantive rights by establishing a new element to [their] claim, one that did not exist when the original cause of action accrued."[8]

In its decision, the court noted that, "[p]rior to the passage of the Act, in order to establish a claim for asbestos related injuries, a plaintiff was required to show only that exposure to asbestos was a contributing factor in his or her medical condition."[9] The court concluded that the "substantial contributing factor" requirement added by the Act imposes upon the appellees a "greater evidentiary burden than was required under the law in effect at the time their actions were filed." In considering the constitutionality of this "greater evidentiary burden," the court pointed to the Georgia Constitution's ban on retroactive laws.[10] The court recognized its prior precedent on that constitutional provision, quoting from *Enger v. Erwin*[11] as follows: "Although legislation which involves mere procedural or evidentiary changes may operate retrospectively, legislation which affects substantive rights may operate prospectively only."[12]

The basic question put before the court was whether the retroactive application of the "greater evidentiary burden" was a procedural or evidentiary change or a change that affected the appellees' substantive rights. The court rejected appellants argument that the change was only procedural or evidentiary, concluding that "requiring appellees to produce evidence establishing that exposure to asbestos was a substantial contributing factor to their medical conditions affect appellee's substantive rights

Continued on page 8

Gay Marriage in the State Courts: New Jersey

Gay marriage litigation continues to occur in several states. On October 25, 2006 the Supreme Court of New Jersey decided *Lewis v. Harris*.[1] This article, the third in a series, will overview and summarize this case.

The New Jersey Supreme Court, Justice Barry Albin writing for the 4-3 majority, held that "[a]lthough we cannot find that a fundamental right to same-sex marriage exists in this state, the unequal dispensation of rights and benefits to committed same-sex partners can no longer be tolerated under our state constitution."[2] The court then gave the New Jersey Legislature 180 days to either amend the civil marriage statutes to include same-sex couples or come up with a parallel statutory structure which would give same-sex couples the same rights and benefits as marriage.

Background and Procedural History

The plaintiffs were seven same-sex couples to whom their respective municipalities denied marriage licenses. In June 2002 they sued in state court, challenging the constitutionality of New Jersey's marriage statutes under the New Jersey constitution. They did not make a federal claim.

The plaintiffs sought a declaration that the laws denying same-sex marriage violated Article I, Paragraph 1 of the current New Jersey Constitution, adopted in 1947, which states: "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and

happiness." The plaintiffs also sought injunctive relief compelling New Jersey's state officials to grant them marriage licenses.[3]

The trial court entered summary judgment in the state's favor and dismissed the complaint. It concluded in an unpublished opinion that marriage is restricted to the union of a man and a woman under New Jersey law, stating that the notion of "same-sex marriage was so foreign" to the legislature which passed the 1912 marriage statute that, for them, specifically banning same-sex marriage "hardly needed mention."

The appellate division affirmed, 2-1.[4] Notably, Judge Anthony Parrillo's concurrence stated that the plaintiff's requested relief was twofold: the right *to* marry and the rights *of* marriage. Interestingly, the New Jersey Attorney General did not rely on promotion of procreation and creating the optimal environment for raising children as a justification for limiting marriage to heterosexual couples as other state Attorneys General had done; New Jersey law specifically permits same-sex couples to adopt and raise foster children. Judge Donald Collester dissented, stating that in his view the majority's argument was circular: the plaintiffs have no constitutional right to marry because New Jersey's laws by definition do not permit same-sex couples to marry. Because there was a dissent, the case went before the New Jersey Supreme Court as an appeal as of right.

The questions before the New Jersey Supreme Court were (1) "whether persons of the same sex have a fundamental right to marry that is encompassed within the concept of liberty guaranteed by Article I, Paragraph 1 of the New Jersey Constitution," and (2) "whether Article I, Paragraph 1's equal protection guarantee requires that committed same-sex couples be given on equal terms the legal benefits and privileges awarded to married heterosexual couples, and, if so, whether that guarantee also requires that the title of marriage, as opposed to some other term, define [sic] the committed same-sex legal relationship."

No Fundamental Right To Same-Sex Marriage

The court, in assessing the plaintiffs' liberty claim, stated that it "must determine whether the right of a person to marry someone of the same sex is so deeply rooted in the traditions and collective conscience of our people that it must be deemed fundamental under Article I, Paragraph 1."

New Jersey courts, when attempting to discern whether a claimed right is fundamental, adopted the U.S. Supreme Court's general standard for construing the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. The New Jersey analysis involves a two-step inquiry: (1) the asserted fundamental liberty interest must be clearly identified; and (2) that liberty interest must be objectively and deeply rooted in the traditions, history, and conscience of the people of New Jersey.

The court carefully framed and defined the right in question as the right to same-sex marriage, citing *Washington v. Glucksberg*, a case which involved a challenge to the State of Washington's law prohibiting and criminalizing assisted suicide.[5] The *Glucksberg* Court defined the liberty interest at issue as the "right to commit suicide with another's assistance," not the "liberty to choose how to die." Thus, the Court concluded that the right to assisted suicide was not deeply rooted in the nation's history and traditions and therefore not a fundamental liberty interest under substantive due process.

The New Jersey Supreme Court chose to be careful, noting that *Glucksberg* (citing *Moore v. East Cleveland*)[6] advised caution when dealing with fundamental rights, "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court."

The court stated that marriage is a fundamental right under both the federal and New Jersey constitutions, although subject to reasonable state regulation. The court, however, stated that the "liberty interest at stake [in this case] is not some undifferentiated, abstract right to marriage, but rather the right of the people of the same sex to marry. Thus, we are concerned only with the question of whether the right to same-sex marriage is deeply rooted in this State's history and collective conscience."

The court examined the legal history of marriage in New Jersey. The plaintiffs agreed that the state may regulate marriage, such as prohibiting polygamy and placing restrictions based on consanguinity and age. They also agreed that New Jersey's civil marriage statutes, first enacted in 1912, limit marriage to heterosexual couples by using gender-specific language in the text. The court stated that "the framers of the 1947 New Jersey Constitution, much less the drafters of our marriage statutes, could not have imagined that the liberty right protected by Article I, Paragraph 1 embraced the right of a person to marry someone of his or her own sex." Even in the modern day, the state legislature explicitly acknowledged in the 2004 Domestic Partnership Act that same-sex couples cannot marry. The court went on to note that the laws of every state except for Massachusetts either explicitly or implicitly define marriage to mean the union of a man and a woman.

Continued on page 9

Alabama Supreme Court Considers Companion Separation of Powers Challenges

by Jim Davis

In 1998, the Alabama Legislature established a program of "Community Services Grants."[1] Criticized by some as pork-barrel legislation, the program was funded by annual appropriations ($11.7 million in 2004) and required that portions be distributed within each state house and senate district.[2] The legislation faced two recent constitutional challenges in the Alabama Supreme Court, with very different results, giving the court the opportunity to discuss at length the separation of powers doctrine and the manner in which the doctrine differs on the state and federal levels.

McInnish v. Riley

In its first incarnation, the Community Services Grants legislation established a "Joint Legislative Oversight Committee on Community Services Grants" ("the Committee"), made up of members of the Alabama Senate and Alabama House of Representatives. [3] As a member of the Committee testified in the trial court, an individual legislator applied for grants that would be distributed in his or her district, and the Committee voted on whether to approve the application:

> [The Committee meets] regularly to consider applications from members [of the legislature]. Each member as has been pointed out, gets "X" amount of dollars and they fill out this form that's prescribed. We review the forms. We discuss the forms. We either approve, deny, or modify. And once a form is approved, a check request is made and the legislator gets the money to spend for that particular purpose. . . . We turn down some. We modify some. We send some back for further clarification if we're not satisfied with the clarification. We ask the member to come personally; appear before the Committee.[4]

A taxpayer challenged the statute on constitutional grounds, specifically arguing that the Legislature, through its members' actions on the Committee, encroached upon the functions of the executive branch. The taxpayer argued that the Legislature has the authority to make appropriations, but "[o]nce a legislative body appropriates funds, *its role ends* and it is for the *executive* branch to make the discretionary decisions as to how appropriated funds should be expended."[5] The trial court upheld the statute but the Alabama Supreme Court reversed on appeal, striking the legislation on grounds that it violated the separation of powers doctrine.[6]

The court first noted that some constitutions, including that of the United States, do not specifically require that the separate branches maintain separate spheres of operation; instead, that requirement is merely implied by the structure of government.[7] In Alabama's constitution, however, as in many other states' constitutions, the separation of powers doctrine is expressly enshrined. One provision establishes the separate branches of government:

> The powers of the government of the State of Alabama shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.[8]

A second provision requires separation of their respective functions:

> In the government of this state, except in the instances in this Constitution hereinafter expressly directed or permitted, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men.[9]

The court next noted the U.S. Supreme Court's decision in *Bowsher v. Synar*.[10] That case involved the "Gramm-Rudman-Hollings Act," which provided for automatic reductions in the federal budget to be implemented by the comptroller general, who was an officer of the legislative branch and who served at the pleasure of Congress.[11] The court struck the legislation because Congress placed responsibility for *executing* the Act in the hands of an officer of Congress:

> The Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess. . . . To permit an officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto.[12]

Applying *Bowsher* to the statute at hand, the Alabama Supreme Court concluded that the Committee—made up exclusively of legislators who were empowered to direct the expenditure of appropriated funds—was in fact *executing* the law: "It is well established that 'handing out public money is a classically executive function.'"[13] The Committee's actions could not be construed as merely "ministerial," because the Committee itself held all the discretion.[14] Therefore, the challenged statutes were

an "encroachment of the executive powers specifically reserved to the executive branch of government by the Alabama constitution."[15]

The court distinguished its 1943 decision in *Opinion of the Justices No. 64*.[16] There the court considered the constitutionality of a "War Emergency Council," comprised of the Governor and eight members of the Legislature and which was charged with disbursing certain emergency appropriations.[17] That Council differed from the Committee at issue in *McInnish*, the court reasoned, because it included the Governor (a member of the executive branch), meetings were called only by the Governor, and the Governor held veto power over any decision of the Council.[18] The Committee in *McInnish*, conversely, was comprised solely of members of the state legislature and did not have "at least such executive-branch control as was contemplated in *Opinion of the Justices No. 64*.[19] The legislation was therefore unconstitutional.[20]

King v. Morton

The state legislature soon responded to the *McInnish* decision and amended the statutes struck down in *McInnish*.[21] The amendments transferred a portion of the money-spending process to the newly created Executive Commission on Community Services Grants ("Executive Commission"). The Legislature did not bow out completely: The former Committee, previously known as the Joint Legislative Oversight Committee, was renamed the "Legislative Advisory Committee on Community Services Grants" ("Advisory Committee"), but is still comprised solely of legislators. As before, a lump sum is appropriated for purposes of the grants program with the requirement that particular percentages be distributed within each house and senate district, and individual legislators submit applications to the Advisory Committee for grants to spend in their district.[22] However, the Advisory Committee does not approve or reject applications, but instead recommends approval or rejection, and the application is then forwarded to the Executive Commission.[23] The Executive Commission has "absolute discretion to award or reject any grant."[24]

By statute, the Executive Commission includes the State Superintendent of Education, the Lieutenant Governor, the State Treasurer, and the Commissioner of Agriculture and Industries.[25] Each of these state officers is an officer of the executive branch.[26] The Executive Commission did not, however, include the Governor, who is granted "supreme executive power."[27]

Alabama's Governor and Attorney General brought suit in state court to challenge the new incarnation of the program on separation of powers grounds, arguing that the changes wrought by the Legislature did not solve the problems that led to the statutes' demise in *McInnish*.[28] Both the trial court and the Alabama Supreme Court upheld the new version of the grants program and found that, on its face, the legislation did not violate the separation of powers doctrine.

1. Separation of Powers

The plaintiffs argued that even as amended, the grants program violates separation of powers. While the Legislature transferred portions of the process to members of the executive branch, grants applications are still made first to legislators, and in practice the Advisory Committee is the body that investigates applications and has sufficient information to judge the merits of an application.[29] The statutes, however, gave the Executive Commission both the right and the ability to investigate applications, and on a facial challenge, that right proved enough to uphold the statute.

The court noted that the Legislature has every right to decide which applicants should receive grants, *if* it makes that decision through legislation.[30] Moreover, the Legislature may delegate that role to another branch of government "so long as the delegation carries reasonably clear standards governing the execution and administration."[31] The flaw of the legislation at issue in *McInnish* was that the Legislature attempted to delegate that function to itself, "making that decision post-enactment, in a manner other than by enacting new legislation."[32] Conversely, the program as amended delegates the decision to the Executive Commission, which is not a part of the legislative branch and which is not required to follow the Advisory Committee's recommendations.[33]

The court noted that Alabama's constitution "provide[s] for a stricter application of the separation-of-powers doctrine than is compelled by the federal constitution."[34] Justice Harold See, in a concurring opinion, wrote that whenever one department of Alabama's state government exercises a power generally entrusted to another department, it must "point to an express constitutional direction or permission to do so."[35] That being the case, it was enough to uphold the statute that the Executive Committee, made up of members of the executive branch, held ultimate discretion to affirm or deny grant applications.[36]

2. The Role of the Chief Executive

The plaintiffs also argued that the statutes fail because they give the Governor—the chief executive—no role in the grants program, and that the legislation therefore violates the constitutional provision vesting the Governor

with "supreme executive power." [37] The Governor has no seat on the Commission or right to appoint members. He does not call meetings, holds no veto power, and has no vote.

As in many states, Alabama's constitution provides for a divided executive branch. Other officers within the executive department are expressly enumerated in the constitution, which provides for separate elections for Governor, Lieutenant Governor, State Treasurer, Commissioner of Agriculture and Industries, State Auditor, Secretary of State, and Attorney General.[38] Each of those officers is a member of the executive branch who has been given specific powers and duties by the constitution itself.[39] The Governor, thus, shares executive powers with other constitutional officers, none of whom serve at the Governor's pleasure. Even so, only the Governor is vested with "supreme executive power."

Plaintiffs did not attempt to articulate a standard or test for how great a role the Governor must be given with respect to a body or program within the executive branch. Rather, plaintiffs argued that the Governor must receive at least *some* meaningful role ("more than zero.").[40] The court held, however, that the Governor "is not totally without control of the Executive Commission" for three reasons: (1) "If the [plaintiffs are] correct that § 113 gives the Governor *supreme* control of the executive department, then the Governor perforce has a measure of control over the Executive Commission;"[41] (2) the constitution provides that the Governor may require reports from officers within the executive branch;[42] and (3) the Governor has the right by statute to institute an action to recover public funds that are wrongfully expended.[43] Because the plaintiffs argued only that the Governor must not be *completely* shut out of an arm of the executive branch and because the Governor does have at least *some* role in the grants program, the role (or lack of role) for the Governor was not grounds to strike the statute.[44]

The court did not hold that it was permissible to exclude the Governor from an executive function. That argument appears to remain open. However, a challenger must be able to show either that the Governor plays no role whatsoever in the challenged program, or must articulate a standard for how *much* of a role is required by the constitution.

Jim Davis is an Assistant Attorney General for the State of Alabama and is a graduate of the University of Virginia School of Law.

Endnotes

1 *See* Act No. 98-677, Ala. Acts 1998, originally codified at Ala. Code (1975) §§ 19-1-120 to -124.

2 The program was funded annually. The challenged $11.7 million appropriation was made in 2004 by Act No. 2004-456.

3 McInnish v. Riley, 925 So. 2d 174, 175 (Ala. 2005) ("*McInnish*").

4 *Id.* at 184.

5 *Id.* at 179.

6 *Id.* at 188.

7 *Id.* at 178.

8 Ala. Const. (1901) § 42.

9 Ala. Const. (1901) § 43.

10 478 U.S. 714 (1986).

11 *Id*. at 718, 731.

12 *Id.* at 726.

13 *McInnish*, 925 So. 2d at 182 (quoting Frank H. Easterbrook, "*Success" and the Judicial Power,* 65 Ind. L.J . 277, 281 (1990)).

14 *Id.* at 184.

15 *Id.* at 188.

16 244 Ala. 386, 13 So. 2d 674.

17 244 Ala. at 387-88, 13 So. 2d at 675-76.

18 *McInnish*, 925 So. 2d at 183.

19 *Id.* at 188.

20 The court declined to hold that the case presented a non-justiciable political question because the issue was not one of "discretion, but of *power*." *Id.* at 187.

21 Act No. 2006-511, amending Ala. Code §§ 29-2-121 and 29-2-123.

22 King v. Morton, ___ So. 2d ___, 2006 WL 2938636 *2 (Ala. Oct. 12, 2006)("*Morton*").

23 Ala. Code (1975) § 29-2-123.

24 *Id.*.

25 Ala. Code (1975) § 41-24A-1.

26 Ala. Const. (1901) § 112.

27 Ala. Const. (1901) § 113, which reads in full: "The supreme executive power of this state shall be vested in a chief magistrate, who shall be styled 'The Governor of the State of Alabama.'" The Governor is also the only officer in the executive branch who is charged with the duty to "take care that the laws shall be faithfully executed." Ala. Const. (1901) § 120.

28 *Morton*, *supra* note 22.

29 *Id.*

30 *Id.* at *4.

31 *Id.*

32 *Id.*

33 *Id.* at *5.

34 *Id.* at *6.

35 *Id.* at *8 (See, J., concurring).

36 *Id.*

37 *See* Ala. Const. (1901) § 113, supra note 27.

38 Ala. Const. (1901) §§ 112, 114.

39 Ala. Const. (1901) §§ 113, 120, 134, 137.

40 *Morton*, *supra* note 22, *6.

41 *Id.*

42 Ala. Const. (1901) § 121.

43 Ala. Code (1975) § 6-5-4.

44 *Morton*, *supra* note 22, *7.

Continued from page 3

and cannot retroactively be applied to their claims."[13]

The court's method for distinguishing between procedural or evidentiary changes and changes that are substantive lied in the ultimate result in this case. The court rejected the notion that retroactive application of the "prima facie evidence of physical impairment" requirement could be procedural given that plaintiffs cannot make the prima facie showing of causation under the new legislation; whereas, before passage of the Act, their claims would survive.[14] It was important to the court's reasoning that the substantial contributing factor showing is an "essential element" of the newly defined asbestos claim.[15] Thus, under the court's expressed logic, if the Legislature's change would not affect the plaintiffs' ability to maintain their asbestos claims then it is conceivable that the Act would not have been deemed substantive.

The appellants also argued that even if the new "prima facie evidence of physical impairment" requirement could not be applied to these particular appellees, the trial court should have just severed the unconstitutional language from the Act as applied to appellees without striking down the entire Act. The court noted its power to sever an unconstitutional portion of a statute and allow the remaining portion to survive; however, it stated that if "the objectionable part is so connected with the general scope of the statute that, should it be stricken out, effect cannot be given to the legislative intent, the rest of the statute must fall with it."[16]

Although the Act provided for a comprehensive scheme for handling asbestos claims going forward that appeared to be independent of the retroactive application piece provided for in O.C.G.A. § 51-14-5(a), the court concluded that the entire Act must fall, given that the prima facie evidence requirements, particularly the "substantial contributing factor" element, lie at the heart of the legislation and "severance from the Act would result in a statute that fails to correspond to the main legislative purpose, or give effect to that purpose."[17] It is important to recognize that the court, in the first part of its decision, held the retroactive application of the Act unconstitutional, not the requirement that plaintiffs establish "prima facie evidence of physical impairment" as that term is defined in the Act. Nonetheless, rather than determining whether the retroactive application of the Act was "so connected with the general scope" of the Act for severance purposes, the court appears to have focused on the prima facie evidentiary requirements in seeking to determine whether the unconstitutional portions of the Act were severable. It is not entirely clear whether the court merely failed to sever the unconstitutional portions of O.C.G.A. § 51-14-5 from that provision or refused to sever the unconstitutional portions of § 51-14-5 from the entire Act.[18] It would appear that there could be various arguments as to the exact scope of the court's decision on the issue of severability; thus, it would appear to be entirely possible that the court will have to address the scope of its decision on severability in a subsequent case.

Endnotes

1 281 Ga. 273, 637 S.E.2d 659 (2006).

2 Justice Harold Melton did not participate in the decision.

3 O.C.G.A. § 51-14-2(15); O.C.G.A. § 51-14-3(b).

4 Codified at O.C.G.A. §51-14-1 et seq.

5 This medical condition includes pleural or peritoneal mesothelioma, cancer or a nonmalignant disease related to asbestos. O.C.G.A. § 51-14-2(15).

6 O.C.G.A. § 51-14-4.

7 O.C.G.A. § 51-14-5(a).

8 Quotations from the trial court orders omitted. *Id.* at 273, 637 S.E.2d at 661. The court heard these appeals based on the trial courts having issued certificates of immediate review and having granted the appellee's applications for interlocutory appeal. O.C.G.A § 6-5-34(b).

9 Citing John Crane, Inc. v. Jones, 278 Ga. 747, 604 S.E.2d 822 (2004).

10 Ga. Const., Art. I, § I, Par. X.

11 345 Ga. 753, 754, 267 S.E.2d 25 (1980).

12 *Id.* at 274, 637 S.E.2d at 661.

13 *Id.*

14 *Id.* at 274 fn. 1, 637 S.E.2d at 661.

15 *Id.* at 274, 637 S.E.2d at 661.

16 Citing City Council of Augusta v. Magelly, 243 Ga. 358, 363(2), 354 S.E.2d 315 (1979).

17 *Id.* at 275, 637 S.E.2d at 662 (citations and quotations omitted).

18 It is worth noting that the Act had a severability clause. The Court discussed this point, noting that "[t]he presence of a severability clause reverses the usual presumption that the legislature intends the Act to be an entirety, and creates an opposite presumption of severability. However, the severability clause does not change the rule that in order for one part of a statute to be upheld as severable when another is stricken as unconstitutional, they must not be mutually dependent on one another." *Id.* at 275, 637 S.E.2d at 662 (quoting City Council of Augusta v. Mangelly, 243 Ga. 358, 363-64, 254 S.E.2d 315 (1979).

Same Sex Marriage in the State Courts: New Jersey

Continued from page 4

The court also noted, however, that "[t]imes and attitudes have changed" towards homosexuals; New Jersey had several laws and judicial decisions prohibiting discrimination against homosexuals in several different areas. The plaintiffs in contrast relied on *Romer v. Evans*[7] and *Lawrence v. Texas,*[8] as examples where the U.S. Supreme Court struck down laws that unconstitutionally targeted homosexuals for disparate treatment, and thus as support for their argument that they have a fundamental right to marry.

The court disagreed. It noted that Justice O'Connor's *Lawrence* concurrence strongly suggested that a state's legitimate interest in "preserving the traditional institution of marriage" would permit distinguishing between heterosexuals and homosexuals without offending equal protection principles. The court further stated that, although "those recent cases openly advance the civil rights of gays and lesbians, they fall far short of establishing a right to same-sex marriage deeply rooted in the traditions, history, and conscience of the people of this State."

The plaintiffs also cited *Loving v. Virginia,* where the U.S. Supreme Court struck down Virginia's anti-miscegenation statute as offensive to the Due Process and Equal Protection clauses of the Fourteenth Amendment.[9] The court distinguished *Loving* from this case, noting that the heart of the *Loving* case was "invidious discrimination based on race, the very evil that motivated passage of the Fourth Amendment," and stated that "[f]rom the fact-specific background of that case, which dealt with intolerable racial distinctions that patently violated the Fourteenth Amendment, we cannot find support for plaintiffs' claim that there is a fundamental right to same-sex marriage under [the New Jersey] Constitution." The court further noted that all of the U.S. Supreme Court cases which the plaintiffs cited involved heterosexual couples.

Thus, despite the many recent advances homosexuals achieved towards social acceptance and legal equality, the court found that same-sex marriage was not a fundamental right.[10]

Equal Protection

Although New Jersey's constitution does not specifically state that every person shall be entitled to the equal protection of the laws, New Jersey courts construe the expansive language of Article I, Paragraph 1 to include equal protection.

New Jersey courts weigh three factors when analyzing an equal protection claim: the nature of the right at stake, the extent to which the challenged statutory scheme restricts that right, and the public need for the statutory restriction. The test measures the importance of the right against the need for the governmental restriction and is more flexible than the three-tiered federal equal protection analysis methodology of strict scrutiny, intermediate scrutiny, and rational basis.

The New Jersey Supreme Court analyzed two questions: (1) whether committed same-sex couples have the right to the statutory benefits and privileges conferred on heterosexual married couples, and (2) if so, whether committed same-sex couples have a constitutional right to define their relationship with the word "marriage," which historically characterized the union of a man and a woman.

The court noted New Jersey law protects homosexuals and domestic partners from discrimination in a number of areas such as employment, housing, and adoption. New Jersey law also makes it a "bias crime" for a person to commit certain offenses with the purpose to intimidate an individual on account of sexual orientation and provides a civil cause of action against the offender.

One of those laws was the 2004 Domestic Partnership Act, which made available certain, but not all, rights and benefits that are accorded to married couples. The court stated that "the Act has failed to bridge the inequality gap between committed same-sex couples and married opposite-sex couples" in a number of ways. It also disadvantaged children of same-sex domestic partners in ways that children of married couples are not. Furthermore, same-sex couples were also subject to more stringent requirements to enter into a domestic partnership than opposite-sex couples entering into marriage.

The court stated that the question was only whether same-sex couples were entitled to the same rights and benefits as married couples, not changing the traditional definition of marriage to include same-sex marriage.

The court found that, besides sustaining the traditional definition of marriage, the state failed to articulate a legitimate public need for depriving same-sex couples of marriage's benefits. The court found no rational basis for giving homosexuals full civil rights in their status as individuals, but not in their status as same-sex couples. The court was particularly concerned about the disparate effect on children of same-sex couples, stating that there "is something distinctly unfair about the State recognizing the right of same-sex couples to raise natural and adopted children and placing foster children with those couples, and yet denying those children the financial and social

benefits and privileges available to children in heterosexual households."

The court therefore held that "under the equal protection guarantee of Article I, Paragraph 1 of the New Jersey Constitution, committed same-sex couples must be afforded on equal terms the same rights and benefits enjoyed by married opposite-sex couples."

The Remedy

The court stated that the legislature had 180 days to either amend the existing marriage statues to include same-sex couples, or it could create a separate and parallel statutory structure, such as a civil union, affording same-sex couples all of the same rights and responsibilities as heterosexual married couples. The court noted that Connecticut's and Vermont's civil union statutes, and California's domestic partnership statute, do exactly that.[11]

The court practically laid out a constitutional civil union roadmap for the legislature to follow. It first provided assurance that a civil union statute would not be presumed unconstitutional. It then stated that

> [i]f the Legislature creates a separate statutory structure for same-sex couples by a name other than marriage, it probably will state its purpose and reasons for enacting such legislation. To be clear, it is not our role to suggest whether the Legislature should either amend the marriage statutes to include same-sex couples or enact a civil union scheme. Our role here is limited to a constitutional adjudication, and therefore we must steer clear of the swift and treacherous currents of social policy when we have no constitutional compass with which to navigate… [h]owever the Legislature may act, same-sex couples will be free to call their relationships by the name they choose and to sanctify their relationships in religious ceremonies in houses of worship.

The court, apparently looking to head off a future "separate but equal" challenge, noted that the plaintiffs had already argued that a parallel structure not called marriage would be unsatisfactory. The court agreed with the state's argument that

> if the age-old definition of marriage is to be discarded, such change must come from the crucible of the democratic process [and] the power to define marriage rests with the Legislature, the branch of government best equipped to express the judgment of the people on controversial social questions... we cannot escape the reality that the shared societal meaning of marriage—passed down through the common law into [New Jersey] statutory law—has always been the union of a man and a woman… [o]ur decision today significantly advances the civil rights of gays and lesbians… the great engine for social change in this country has always been the democratic process. Although courts can ensure equal treatment, they cannot guarantee social acceptance, which must come through the evolving ethos of a maturing society.

Dissent

Chief Justice Deborah Poritz, on the day of her retirement, authored the dissent, stating that in her view the plaintiffs had a fundamental right to marry. She noted that the plaintiffs were concerned not only with marriage's rights and benefits, but also with its "deep and symbolic significance." She stated that civil unions would send the message that "what same-sex couples have is not as important or as significant as 'real' marriage, that such lesser relationships cannot have the name of marriage… [w]hat we 'name' things matters, language matters."

Chief Justice Poritz further stated that

> [o]f course there is no history or tradition including same-sex couples. If there were, there would have been no need to bring this case to the courts. As Judge Collester points out in his dissent below, "[t]he argument is circular: plaintiffs cannot marry because by definition they cannot marry ... Had the United States Supreme Court followed the traditions of the people of Virginia, the Court would have sustained the law that barred marriage between members of racial minorities and Caucasians … the Court did not frame the issue as right to interracial marriage, but, simply, as a right to marry sought by individuals who had traditionally been denied that right.

In direct contrast to the majority's caution, Chief Justice Poritz cited Justice Kennedy's *Lawrence* opinion, stating that "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." Interestingly, she also cited Alexander Hamilton's *Federalist* No. 78, stating that the courts are "'the bulwarks of a limited Constitution against legislative encroachments' because [Hamilton] believed that the judicial branch was the only branch capable of opposing 'oppressions [by the elected branches] of the minor party in the community.' Our role is to stand as a bulwark of a constitution that limits the power of government to oppress minorities."[12]

New Jersey's Civil Unions

New Jersey's new civil union law went into effect on February 19, 2007. New Jersey Attorney General Stuart Rabner issued an opinion for New Jersey's Department of Health and Senior Services, the entity responsible for

registering civil unions, stating that under the new law same-sex couples who were legally married elsewhere, such as Massachusetts, will have all the rights and responsibilities of married people in New Jersey, but may not call themselves "married." Instead, New Jersey will recognize those couples as civil unions. Couples who have domestic partnerships with lesser obligations and benefits than marriage, such as those in Maine and Washington, D.C., will be considered domestic partners in New Jersey. As of this writing, Massachusetts, Canada, the Netherlands, South Africa and Spain are the only jurisdictions which have same-sex marriage. Vermont and Connecticut have civil unions, and California has domestic partnerships, very similar to civil unions.

It is possible that litigation over New Jersey's civil union law will occur; many same-sex marriage advocates believe that the civil union structure amounts to a constitutionally impermissible "separate-but-equal" structure.

CONCLUSION

Gay marriage litigation continues to be an active and controversial area which future articles in the series will continue to cover. For example, cases from Connecticut and California are still pending. While the parties and the justices in *Lewis v. Harris* took slightly different approaches than those in other state gay marriage litigations, a continuing common thread is the majority judges' extra effort to not come across as anti-homosexual, and to insulate themselves personally from the legal rulings.

Endnotes

1 908 A.2d 196 (N.J. 2006).

2 The New Jersey Supreme Court is the highest court in New Jersey. It has a chief justice and six associate justices. The governor appoints the justices and confirmed by the state senate for an initial term of seven years. On reappointment, they are granted tenure until they reach the mandatory judicial retirement age of 70. Governor James E. McGreevey (D-NJ) nominated Justice Albin to the court on July 20, 2002. Governor McGreevey left office on November 15, 2004, approximately three months after admitting that he had had an extramarital affair with a male employee.

3 The name defendant, "Harris," is Gwendolyn L. Harris, who at the time was Commissioner of the New Jersey Department of Human Services.

4 While plaintiffs' appeal was pending before the appellate division, the legislature enacted and Governor McGreevey signed the Domestic Partnership Act, which became effective on July 10, 2004. The act afforded certain rights and benefits to same-sex couples who enter into domestic partnerships, but not the same rights and benefits as heterosexual married couples.

5 521 U.S. 702 (1997).

6 431 U.S. 494 (1977).

7 517 U.S. 620 (1996).

8 539 U.S. 558 (2003).

9 388 U.S. 1 (1967).

10 The court noted that no state has found a fundamental right to same-sex marriage, not even Massachusetts, which never reached the fundamental right analysis because it found no rational basis for denying same-sex couples the right to marry under the Massachusetts constitution.

11 Connecticut's civil union statute is currently under challenge, and that case will be covered in the next installment of this series.

12 *Federalist* No. 78 also states that

> Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power… It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove any thing, would prove that there ought to be no judges distinct from that body.

Missouri Extends Worker Compensation

Continued from cover...

widow, Annette, claimed that she should receive her husband's benefits for the rest of *her* life. The Missouri Labor and Industrial Relations Commission rejected Mrs. Schoemehl's claim, and the Missouri Court of Appeals affirmed.[2] As a case of first impression, the Supreme Court of Missouri reversed in a four-to-three decision.[3]

Mrs. Schoemehl's claim rested on her understanding of three sections of Missouri workers' compensation law.[4] Schoemehl also argued that the law violated the Equal Protection Clauses of the state[5] and federal[6] constitutions by treating recipients of PTD benefits differently than recipients of permanent partial disability benefits. Because the court awarded Mrs. Schoemehl's claim through the statutes, it did not reach her constitutional arguments.

Under section 287.200.1, "Compensation for permanent total disability shall be paid during the continuance of such disability for the lifetime of the employee at the weekly rate of compensation in effect under this subsection on the date of the injury for which compensation is being made."[7] Section 287.020.1 defines "employee": "Any reference to any employee who has been injured shall, when the employee is dead, also include his dependents, and other persons to whom compensation may be payable."[8] And under the heading "Payment of compensation at death of employee—exceptions," section 287.230.2 reads, "Where an employee is entitled to compensation under this chapter for an injury received and death ensues for any cause not resulting from the injury for which he was entitled to compensation, payments of the unpaid accrued compensation shall be paid, but payments of the unpaid unaccrued balance for the injury shall cease and all liability therefore shall terminate unless there are surviving dependents at the time of death."[9]

Mrs. Schoemehl argued that because she was her husband's dependent, she was an "employee" under the statute. And, although the statute indicates that PTD benefits are payable only "during the continuance of such disability for the lifetime of the employee," she is still alive, and so Mr. Schoemehl's disability and benefits were not extinguished by his death. The state argued that benefits are only payable "for the continuation of such disability," and that Mr. Schoemehl's disability ceased when he died. The state noted that Mrs. Schoemehl's interpretation of the law allows for PTD benefits to continue indefinitely: if Mrs. Schoemehl can become an "employee" by virtue of being Mr. Schoemehl's dependent, then her dependents also can collect Mr. Schoemehl's benefits as "employees" when she dies, *ad infinitum*.

To reconcile these apparently-conflicting statutory provisions, Judge Richard B. Teitelman, writing for the majority, began by observing that the court's interpretation of a statute is informed by its purpose. Citing the statute itself for the proposition that Missouri workers' compensation law "shall be liberally construed with a view to the public welfare,"[10] Judge Teitelman cited precedent for the rule that "[a]ny doubt as to the right of an employee to compensation should be resolved in favor of the injured employee."[11]

The majority concluded that Mrs. Schoemehl is an employee under the statute. The majority rejected the state's interpretation as placing too much emphasis on "during the continuation of such disability," while ignoring the phrase "for the lifetime of the employee." Because "any interpretation rendering statutory language superfluous is not favored," Judge Teitelman rejected the state's approach, concluding, "[a]n entire clause of the statute should not be relegated to excess verbiage." The majority further argued that it is "unreasonable" to conclude that the legislature meant for surviving dependents of permanent partial disability recipients to receive the deceased worker's benefits, but to deny claims from surviving dependents of PTD benefit recipients. Judge Teitelman ultimately held, "The 'continuance of the disability' clause extinguishes PTD benefits in the event the injured worker recovers from his or her disability. The 'during the lifetime of the employee' clause provides that, if the worker does not recover, the 'employee' is entitled to compensation during his or her lifetime."

Judge Laura Denvir Stith, writing for the dissent, argued that Section 287.200.1 "requires two prerequisites to be met before an injured employee is entitled to permanent total disability payments: (1) the continuance of the permanent total disability and (2) the continuance of the employee's life." The dissent argued that, even if Mrs. Schoemehl is an employee under the statute, the majority's approach "improperly excises" from the statute the phrase "during the continuance of such disability." Judge Stith argued that, even if the second prerequisite is met by Mrs. Schoemehl assuming her husband's claim, the first is not, because the disability ended when he died (and she, even if an "employee," is not herself disabled). The dissent used rational basis review to address Mrs. Schoemehl's equal protection argument that the statute "operates to treat dependents of permanently totally disabled individuals worse than dependents of permanently partially disabled individuals." The court observed that because a "permanent *partial* disability is 'permanent in nature and partial in degree,' . . . [t]he benefits to be paid to a permanently partially disabled employee are of a finite, fixed amount, to be paid for a

predetermined number of weeks." PTD benefits, on the other hand, "are measured in terms of the continuance of the employee's life and disability that prevents the employee from working."

Although the dissent did not address it directly, this distinction also explains the phrase ". . . unless there are surviving dependents at the time of death" at section 287.230.2. In its decision on Mrs. Schoemehl's claim, the Missouri Court of Appeals explained, "[t]he key word is *entitled*." The court of appeals held that this section applied to permanent partial disability benefits, which were awarded at a set rate for a certain number of weeks. If the recipient dies before collecting all of his benefits (i.e., the benefits to which he is "entitled"), then his dependents can collect the remainder. The court of appeals held that to apply section 287.230.2 to PTD benefits "ignores a significant difference between compensation for permanent total disability and all other forms of compensation for work-injuries." "[T]here is no pre-determined ending date to payment" for PTD benefits. But for permanent partial disability, temporary total disability, and temporary partial disability benefits, the insurer "must only continue to make payments to the injured employee for the finite time period mandated by the respective provisions of the statute", and "the right to this finite amount of money survives to dependents of the injured employee when the employee dies of causes unrelated to the work-related injury."

Schoemehl is a controversial decision in Missouri. Employers worry that the cost of paying PTD benefits to deceased workers' dependents could be "unfathomable," and workers' compensation insurers predict that premiums will rise.[12] The head of the Missouri Bar Association's workers' compensation committee acknowledges that *Schoemehl* is "a big change in the law" and that "there will be more money paid out," but predicts it will not be too large as a percentage of all workers' compensation benefits.[13] Within three weeks of the court's decision, legislation was introduced in the Missouri House[14] and Senate[15] to overturn the holding of *Schoemehl*. Whether the rule of *Schoemehl* will stand is an open question in the Show-Me State.

John Hilton is a graduate of Harvard Law School and a member of the Kansas City Federalist Society chapter.

Endnotes

1 Section 287.200.2, RSMo 2000 ("In all cases in which a recovery against the second injury fund is sought for permanent partial disability, permanent total disability, or death, the state treasurer as custodian thereof shall be named as a party, and shall be entitled to defend against the claim.").

2 Schoemehl v. Treasurer of State, 2006 WL 1229637 (Mo. App. 2006).

3 Schoemehl v. Treasurer of State, 2007 WL 58370 (Mo. banc 2007).

4 Section 287.010 et seq., RSMo 2000.

5 Mo. Const., art. I, sec. 2.

6 U.S. Const., art. XIV, sec. 1.

7 Section 287.200.1, RSMo 2000.

8 Section 287.020.1, RSMo 2000.

9 Section 287.230.2, RSMo 2000.

10 Section 287.800, RSMo 2000.

11 Wolfgeher v. Wagner Cartage Serv., Inc., 646 S.W.2d 781, 783 (Mo. banc 1983).

12 David A. Lieb, "Supreme Court sets new precedent with workers' comp ruling," Southeast Missourian, 1/22/2007, *available at* http://www.semissourian.com/story/1186182.html (last viewed 3/5/2007).

13 *Id.*

14 House Bill 629, *available at* http://www.house.mo.gov/bills071/bills/hb629.htm (last viewed 3/5/2007).

15 Senate Bill 277, *available at* http://www.senate.mo.gov/07info/bts_web/Bill.aspx?SessionType=R&BillID=4850 (last viewed 3/5/2007).

Washington Labor Fees Law

Continued from cover...

represents nearly 70,000 Washington state education employees. In any given year the WEA has roughly 3,000 to 4,000 nonmember agency shop fee payers.

After §760's passage, the WEA continued to send out packets to each non-union member which included a letter explaining the non-member's right to object to fees being used for political purposes. The packets, known as "*Hudson* packets," are named after the U.S. Supreme Court decision outlining the minimum procedures unions must follow when notifying nonmembers of their right to withhold agency shop fees for political purposes.[3] The *Hudson* packet provides nonmembers three options: 1) pay the full amount of agency shop fees without a rebate; 2) object to paying the full amount and receive a rebate for fees used for political purposes; or 3) object to paying the full amount and challenge the union's calculation of the rebate.[4]

In 2000, the Washington Evergreen Freedom Foundation ("Evergreen") filed a complaint with the Washington Public Disclosure Commission arguing that the WEA violated §760. Evergreen argued that the WEA failed to seek the affirmative authorization of all nonmembers before using their fees for political purposes. Based on Evergreen's complaint, the State of Washington ("State") filed suit against WEA alleging that the union violated §760.

The trial court ruled in favor of the State declaring §760's opt-in requirement constitutional. In addition, the trial court found that WEA unlawfully used non-union member agency shop fees for political purposes. According to the lower court, the WEA violated § 760 because it did not first require non-union members to opt-in before using their fees for political purposes. The trial court issued a judgment of $590,375 against the WEA and forced the union to institute new procedures that would segregate the money collected from members and nonmembers.

On appeal, the court of appeals reversed the trial court, finding §760's opt-in requirement unconstitutional. The court of appeals ruled that an "affirmative authorization" requirement "unduly burdens unions," and thus violated the union's First Amendment right to free speech.[5]

The case was appealed to the Washington Supreme Court and consolidated with another case brought by a number of non-union educational employees seeking a refund of their agency fees that were used for political purposes.

Washington Supreme Court's Decision

In a 6-3 decision, the Washington Supreme Court upheld the appellate court ruling that §760's opt-in requirement was unconstitutional. The decision was authored by Justice Pro Tempore Faith Ireland, and joined by Justices Charles Johnson, Barbara Madsen, Bobbe Bridge, Tom Chambers, and Susan Owens.

The majority first determined whether WEA's *Hudson* process satisfied §760's affirmative authorization requirements. The State argued that §760 required each individual non-union member to provide actual consent, and that simply failing to respond to the *Hudson* packet did not constitute consent. The union, on the other hand, argued that its *Hudson* packet process satisfied the affirmative authorization requirement because it provided each individual non-member the opportunity to object, obtain a refund, or prevent their fees from being used for political purposes.

The court ruled that §760 required more than "a nonresponse to a *Hudson* packet."

Section 760 Declared Unconstitutional

The court next determined the constitutionality of § 760. The court began its analysis recognizing the competing interests at stake—the right of unions to organize versus non-union members' right to refuse compulsory dues used for political purposes.

The court first analyzed *International National Association of Machinists v. Street.*[6] In *Street*, the Supreme Court affirmed the union's right to collect fees from all employees benefiting from the union's collective bargaining activities. The Court also held that compulsory dues cannot be used to support political causes if the member disagrees with those causes. Portending its decision in favor of WEA, the Washington Supreme Court cited dictum in *Street* where the U.S. Supreme Court said, "[D]issent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee."[7] According to the Washington Supreme Court, this language suggests that the only way a dissenting employee may obtain a remedy is if that person explicitly opposes the use of funds for political purposes.

The court then discussed *Abood v. Detroit Board of Education,* which, it said, affirmed that the burden is on the employee—not the union—to make known his or her dissent to the use of union fees for political purposes.[8]

The court then analyzed the procedures established by the U.S. Supreme Court in *Hudson* and *Ellis*.[9] The majority reasoned these decisions affirmed that the burden is on the employee to register his or her dissent, not the

union. The court determined that an employee who is given a "simple and convenient method of registering dissent has not been compelled to support a political cause" and thus, "has not suffered a violation of his or First Amendment rights."[10]

The majority held that because §760 forces unions to seek affirmative authorization from non-members, the statute unconstitutionally violates the union's First Amendment right to free speech. According to the court, §760's built-in presumption that nonmembers automatically dissent unless they affirmatively authorize the use of their fees for political purposes violates the U.S. Constitution. In addition, the court ruled that the presumption of dissent not only violated the union's First Amendment rights, but also the right of those non-members who do not object.

Applying strict scrutiny as the standard of review, the court ruled that the restriction placed on WEA's First Amendment right to free speech must be justified by a compelling governmental interest.[11] According to the majority, the only interest asserted by the State was the additional First Amendment protection of nonmembers' rights above those already laid out in *Hudson*. The court dismissed this argument. It ruled there was no indication or argument that WEA was in fact compelling nonmembers to support political activities. Instead, the court determined that since WEA utilized the *Hudson* procedures, it was not violating the non-members' First Amendment rights. Thus, according to the court, §760 was not narrowly tailored.

The court expanded its analysis by applying *Boy Scouts of America v. Dale*.[12] In *Dale*, the U.S. Supreme Court held that New Jersey's public accommodation law requiring the Boy Scouts to admit a homosexual member violated the Boys Scouts' First Amendment right of expressive association. According to the Washington Supreme Court, when applying the *Dale* test to this case, the court was to evaluate whether §760's opt-in provision significantly burdened the WEA's expressive activity. Finding that the opt-in provision was a significant burden on the union's expressive activity, the court next analyzed whether §760's opt-in provision was narrowly tailored to support a compelling state interest that was "unrelated to the suppression of free speech."[13]

The court concluded that WEA's expressive activity was significantly burdened by §760's opt-in provision. According to the court, "any compelling state interest in protecting dissenters' rights could be met by less restrictive means other than the § 760 opt-in procedure."[14] Because WEA's *Hudson*—or "opt-out"—procedure was a "constitutionally permissible alternative" that adequately protected both the rights of the union and non-members, §760's "opt-in" procedure was not narrowly tailored.

Justice Sanders's Dissent

In a strongly worded dissent, Justice Richard Sanders, joined by Chief Justice Gerry Alexander and Justice Mary Fairhurst, strongly criticized the majority. Justice Sanders argued that the majority's decision "turn[ed] the First Amendment on its head."[15] The dissent further castigated the majority by citing to Thomas Jefferson, who once said: "that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical."[16]

Justice Sanders argued that the unions only have a statutory right to require employers to withhold membership dues from members and nonmembers. Without this mechanism, the dissent argued, unions have absolutely no constitutional right to withhold nonmembers' dues and use them for political purposes.

Justice Sanders further questioned the majority's decision that §760's opt-in procedure violated the union's First Amendment rights:

> Given that the legislature could constitutionally repeal the whole statutory scheme allowing withholding in the first place, I find it nearly beyond comprehension to claim that the legislature, or the people acting through their sovereign right of initiative, could not qualify these statutes to ensure their constitutional application.[17]

The dissent next criticized the majority's argument that §760's opt-in requirement violated the union's First Amendment associational rights under *Dale*. Justice Sanders argued that "association is a two way street that requires a mutual desire to associate by all concerned."[18] In this case, the employees elected not to associate. Thus, according to the dissent, §760's opt-in requirement could not have violated the union's First Amendment associational rights because, "it [the union] had no constitutional right to compel membership much less monetary support from nonmembers in the first place."[19]

U.S. Supreme Court

The U.S. Supreme Court heard oral arguments on January 10. Although it is nearly impossible to predict the case's outcome based on the Justices' remarks and questions, it appears as though the union's victory may be short-lived. A number of legal commentators, including those sympathetic to unions, are predicting a reversal based on the questions and comments of the Justices during oral arguments.[20]

Most notable was Justice Anthony Kennedy's remarks. Justice Kennedy was skeptical of the union's argument:

> I mean, you—you begin by talking about the First Amendment but you, you proceed as if there are no First Amendment rights of, of workers involved at all.[21]

A decision will be issued before the Supreme Court adjourns in July for summer recess.

Endnotes

1 Washington ex. rel. Washington State Pub. Disclosure Comm'n v. Washington Educ. Ass'n, 156 Wash.2d 543, 130 P.3d 352 (2006).

2 Wash. Rev. Code § 41.59.100.

3 Chicago Teachers Union v. Hudson, 475 U.S. 292, 106 S.Ct. 1066 (1986).

4 *See supra* note 1, at 550.

5 State ex rel. Wash. State Pub. Disclosure Comm'n v. Wash. Educ. Ass'n, 117 Wash.App. 625, 71 P.3d 244 (2003).

6 367 U.S. 740, 81 S.Ct. 1784 (1961).

7 *Id*. at 774.

8 431 U.S. 209, 97 S.Ct. 1782 (1977).

9 Ellis v. Bhd. of Ry., Airline & S.S. Clerks, 466 U.S. 435, 104 S.Ct. 1883 (1984).

10 156 Wash.2d at 559.

11 *Id*. at 565.

12 530 U.S. 640, 120 S.Ct. 2446 (2000).

13 156 Wash.2d at 567.

14 *Id*.

15 *Id*. at 571.

16 *Id*.

17 *Id*. at 573.

18 *Id*. at 578.

19 *Id*. at 579.

20 Jess Bravin, *Unions' Policy Test*, Wall St. Journal, Jan. 8, 2007; *see also* http://electionlawblog.org/archives/007606.html, http://lawprofessors.typepad.com/laborprof_blog/2007/01/oral_transcript.html, and http://volokh.com/archives/archive_2007_01_07-2007_01_13.shtml (Professors Rick Hasen, Paul Secunda, and Eugene Volokh predicting reversal by the U.S. Supreme Court.)

21 *See* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-1589.pdf.

The Federalist Society takes seriously its responsibility as a non-partisan institution engaged in fostering a serious dialogue about legal issues in the public square. We publish original scholarship on timely and contentious issues in the legal or public policy world, in an effort to widen understanding of the facts and principles involved and to continue that dialogue. Positions taken on specific issues in publications, however, are those of the author, not reflective of an organization stance. State Court Docket Watch presents articles on a number of important issues, but these are contributions to larger ongoing conversations. We invite readers to submit opposing perspectives or views to be considered for publication, and to share their general responses, thoughts and criticisms by writing to us at info@fedsoc.org. Additionally, we happily consider letters to the editor.

The Federalist Society
for Law and Public Policy Studies
1015 18th Street, N.W., Suite 425
Washington, D.C. 20036