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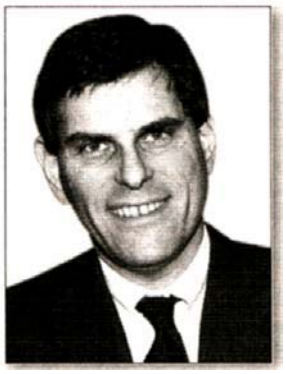
Appellate Practice: Holiday Symbols to Subway Searches



This year the Law Department's Appeals Division, a group of 36 attorneys led by longtime Chief Leonard Koerner, has so far briefed and argued approximately 650 cases in the state and federal appellate courts on an extraordinary range of issues.

In this year-end review, I will discuss several appellate decisions that have significant impact on municipal law, including decisions in three disputes that have received substantial attention: same-sex marriage, random bag searches in the city's subways, and public disclosure of taped 911 phone calls made on Sept. 11, 2001.

First, however, given the season, is a discussion of the latest learning on the perennial issue of public displays of holiday symbols.

Public Displays of Holiday Symbols

The New York City Department of Education's policy on winter holiday displays in city schools permits display of menorahs as a symbol representing Chanukah, the star and crescent to symbolize Ramadan, and items such as Christmas trees and Santa Claus to depict Christmas. The policy does not permit the display of crèches and nativity scenes.

A parent of public school children sued the city over that prohibition, alleging that it violated the Free Exercise and Establishment clauses of the First Amendment to the U.S. Constitution. In a 2-1 decision, the U.S Court of Appeals for the Second Circuit upheld the policy after analyzing it under the Supreme Court's three-part "*Lemon* Test." *Skoros v. City of New York*, 437 F3d 1 (2d Cir. 2006), petition for cert. pending. Judge Reena Raggi, wrting for the majority, found that the holiday displays were intended for a secular educational purpose and that the displays' mix of religious and secular symbols would lead a reasonable member of the community to perceive them as secular. It upheld the Department of Education's decision not to allow crèches, reasoning that a crèche directly depicts a deity, and a child could more readily interpret it as endorsing a particular religion. It also ruled that the city had not excessively entangled government with religion because the city was regulating only its own speech, "with no government authorities intruding into religious affairs and no religious authorities intruding into civic affairs." Id. at 42. Dissenting, Judge Straub contended that singling out crèches for exclusion conveyed government endorsement of some religions over others. He also argued that the Department of Education was excessively entangled in religion because, in the course of drafting its policy, the department decided whether certain holiday symbols should be characterized as secular or religious.

• ***Same-Sex Marriage:*** Both the Law Department and the state Attorney General's Office argued cases this year in which plaintiffs claimed that it was unconstitutional to prohibit same-sex marriage in New York State. In *Hernandez v. Robles*, 7 NY3d 338 (2006), the Court of Appeals ruled, 4-2, that the Equal Protection and Due Process clauses of the New York State Constitution are not violated by New York's statute permitting marriage only by heterosexual couples.

In a three-judge plurality opinion, Judge Robert Smith defined the decisive legal question as whether limiting the advantages of marriage to heterosexual couples "can be defended as a rational legislative decision." 7 NY3d at 358. Judge Smith identified two rational bases for the statute, both derived from "the undisputed assumption that marriage is important to the welfare of children." Id. at 359. First, according to the opinion, the Legislature could have chosen to foster stability among heterosexual couples because "[h]eterosexual intercourse has a natural tendency to lead to the birth of children; homosexual intercourse does not." Id. at 359. Moreover, the Legislature could have decided to encourage child rearing in families with "living models of what both a man and a woman are like." Id. Chief Judge Judith Kaye's strong dissent, joined by Judge Carmen Beauchamp Ciparick, argued that the statute had to be subjected to a more demanding level of scrutiny than rational basis but failed in any event under the more deferential standard. The dissent emphasized that couples often marry for reasons unrelated to children and the child-related benefits of marriage do not depend on denying its tangible and symbolic advantages to same-sex couples. Id. at 391-94. With this decision, provision for same-sex marriage in New York State will be a matter for legislative resolution.

Random Bag Searches in Subways

Two weeks after the terrorist attack on the London Underground, New York City's Police Department began a program of floating checkpoints in selected subway stations. At checkpoints, randomly selected passengers were required to allow their bags to be inspected to gain entrance to the subway. In *MacWade v. Kelly*, 460 F3d 260 (2d Cir. 2006), a unanimous Second Circuit, affirming U.S. District Judge Richard Berman of the Southern District of New York, upheld the program and dismissed a suit brought by the New York Civil Liberties Union claiming that it violated the Fourth Amendment to the U.S. Constitution. One key issue was whether the inspections qualified as "special need" searches, thereby avoiding the requirement that a search be justified by individualized suspicion. Plaintiffs argued that "special need" analysis was limited to situations - such as boarding an airplane - where the searched individual has a diminished expectation of privacy. The Court disagreed, finding that a "special need" could be shown "[w]here, as here, a search program is designed and implemented to seek out concealed explosives in order to safeguard a means of mass transportation from terrorist attack." 460 F3d at 271.

Appellate Practice: Holiday Symbols to Subway Search

After weighing factors such as the degree of danger, riders' expectations of privacy, and intrusiveness and efficacy of the searches, the Court upheld the program. Rejecting plaintiffs' contention that the checkpoints were useless, Judge Chester J. Straub, writing for the Court, ruled that "the expert testimony established that terrorists seek predictable and vulnerable targets, and the program generates uncertainty that frustrates that goal, which, in turn, deters an attack." Id. at 274.

911 Calls on Sept. 11, 2001

In a stark illustration of the tension that can arise between the public's right to know the workings of its government and an individual's right to privacy with regard to highly personal information given to the government, the Court of Appeals, in *New York Times Co. v. City of New York Fire Dept.*, 4 NY3d 477 (2005), sought to resolve several disputes under the Freedom of Information Law about media access to 911 phone calls made on Sept. 11, 2001, particularly callers' statements.

The Court agreed with the city that, absent consent from the caller or surviving family members, the city was not required to disclose portions of 911 tapes containing callers' voices because "the public interest in the words of the 911 callers is outweighed by the interest in privacy of those family members and callers who prefer that those words remain private." 4 NY3d at 487. The Court, however, upheld the Appellate Division holding that statements made to the Fire Department by firefighters who participated in the World Trade Center response were disclosable, since they were government employees, with the exception of certain material which might be "exceedingly personal in nature." Id. at 490.

The Court's decision did not entirely end the controversy. In view of the Court's holding regarding the privacy of portions of 911 tapes containing callers' voices, the Fire Department has declined to release statements by 911 operators identifying callers, on the ground that the same privacy concerns apply when the 911 operator is repeating the callers' identifying information. The New York Times disagreed with this view of the decision, and the issue is sub judice in the Appellate Division, First Department.

• ***Taxation of Foreign Missions:*** As headquarters city for the United Nations, the city has occasion to litigate issues not often encountered by other municipalities. For many years, the city has levied property taxes on portions of foreign missions to the U.N. that are used as residential quarters for embassy personnel. The offices of India's United Nations Mission occupy the first six floors of a 26-story building, and the city is seeking over $16 million in property tax arrears for the 20 floors of the building occupied as residences. In *City of New York v. Permanent Mission of India*, 446 F3d 365 (2d Cir. 2006), petition for cert. pending, the Second Circuit rejected India's claim that it cannot be sued in American courts.

The Foreign Sovereign Immunity Act generally precludes lawsuits against foreign governments, but an exception allows suits involving "immovable property." The government of India argued that the exception applies only when title or possession are directly at issue, while the city contended that enforcement of its tax lien triggered the exception. The Court reviewed the legislative history as well as practices in other countries and held that the "immovable property" exception allows American courts to assert jurisdiction where, as here, the suit arises from "the foreign country's obligations arising directly out of . . . rights to or use of the property." 466 F3d at 374.

Delinquency Proceedings

• ***Pleading Requirements in Delinquency Proceedings Alleging Violation of Probation:*** Petitions initiating juvenile delinquency proceedings, filed in New York City by the Family Court Division of the Law Department, have been held to be jurisdictionally defective if they do not contain sworn, nonhearsay allegations alleging that the juvenile has committed a crime. These defects cannot be cured by amendment, and a dismissal for insufficient pleading often precludes a new petition based on the same acts.

Last September, in a New York City juvenile delinquency proceeding, the Court of Appeals held that more flexible standards apply to petitions alleging that an adjudicated juvenile delinquent violated the terms of his probation. *In re Markim Q.*, 7 NY3d 405 (2006). The juvenile argued on appeal that the violation petition was insufficient because certified school attendance records did not qualify as sworn, nonhearsay allegations of truancy. He further asserted that the defect was jurisdictional and did not have to be raised in the Family Court.

The Court of Appeals concluded to the contrary that an objection in the Family Court was required because defects in probation violation petitions are not jurisdictional and may be cured by amendment. Having found that objection to the alleged defect had been waived by the juvenile, the Court did not address its merits.

Finally, in a decision impacting the adoption of local legislation in New York City, the Court of Appeals upheld the mayor's refusal to enforce a local law, adopted by the City Council over his veto, on the ground that the measure was inconsistent with state law and pre-empted by federal statute. The City Council commenced an Article 78 proceeding seeking a writ of mandamus and argued that, since the local law was entitled to a presumption of validity, the Court should issue the writ without considering the mayor's objections.

In a 4-3 ruling, the Court of Appeals disagreed, holding that the mayor has a "duty to implement *valid* legislation," but "[w]here a local law seems to the Mayor to conflict with a state or federal one, the Mayor's obligation is to obey the latter, as the Mayor has done here." *Council of the City of New York v. Bloomberg*, 6 NY3d 380, 389 (2006) (emphasis in original).

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