

NEW YORK COURT OF APPEALS ROUNDUP

ABSENT CLASS MEMBER ACCESS TO COUNSEL FILES, BENEFITS FOR ALIENS, YOUTH CURFEW

ROY L. REARDON AND MARY ELIZABETH MCGARRY*
SIMPSON THACHER & BARTLETT LLP

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Class actions received the Court of Appeals' attention in two of the cases we report on this month. In one case, the Court held that unnamed plaintiffs in class actions will not be presumed to have access to class counsel's documents gathered in preparing the case. In the other, the Court found no constitutional violation from the unequal amount of disability benefits provided to legal aliens who had not become citizens within seven years than to other legal aliens and citizens. In another matter, the Court overturned a municipal curfew as violative of the substantive due process rights of both minors and their parents.

Access to Attorney Files

Following the Court's 1997 decision in [Matter of Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn](#), the law was clear that a party to a litigation had a presumptive right to access his counsel's files within relatively broad limits after the representation terminated. Recently, in [Wyly v. Milberg Weiss Bershad & Schulman, LLP](#), the Court was caused to consider the issue in the context of a class action. It concluded that absent class members do not possess a "Sage Realty" right to the attorneys' files, and that the Appellate Division had not abused its discretion in denying access. Accordingly, the Court affirmed, in an opinion by Judge Susan Phillips Read, with a dissent by Judge Robert S. Smith (Chief Judge Jonathan Lippman taking no part).

The decision arose out of a special proceeding brought under CPLR Article 4 by petitioner Sam Wyly, who was an absent class member in two consolidated securities class actions brought in federal court against the software company Computer Associates International Inc. Mr. Wyly was a major shareholder in the company. After a fairness hearing, the federal court certified the plaintiff classes that included Mr. Wyly, and approved a settlement. Almost a year later, Mr. Wyly, through new counsel, began efforts to challenge the federal court settlement as having been possibly procured by fraud. In order to support his claims, Mr. Wyly sought access to documents in the possession of the attorneys for the plaintiff classes that had been developed in

* Roy L. Reardon and Mary Elizabeth McGarry are partners at Simpson Thacher & Bartlett LLP.

prosecuting the suits. While those efforts were proceeding, Mr. Wyly commenced the Article 4 summary proceeding in Supreme Court, New York County, to obtain the same files.

[The Supreme Court concluded](#) that Mr. Wyly, as a member of the class, was sufficiently similar to the client in Sage Realty to afford him the same presumption of access. [The Appellate Division, First Department, unanimously reversed](#) and dismissed the petition.

The Court of Appeals concluded that the unique aspects of class action litigation, including the pooling of the claims of absent class members, the different relationship of class counsel to absent class members (who do not become individual clients), and the typical role a court plays supervising a class action, rendered the relationship of class counsel-absent class member to be “too unlike” the traditional attorney-client relationship to extend Sage Realty’s holding to such plaintiffs.

The dissent acknowledged that not every class member should have a right to review class counsel’s files, but argued that a Sage Realty right should be extended to a class member who pays more than a de minimus amount of the legal fees. Due to his large holdings, Mr. Wyly contributed 1 percent—or \$400,000—to class counsels’ fees. Affording such a right to absentee class members with “weighty” interests could help address the “recurrent danger in class action practice...that the lawyers’ interests and those of the class members will not be well aligned,” Judge Smith wrote.

Alien Benefits

Plaintiffs in [Khrapunskiy v. Doar](#), legal aliens receiving a lower level of benefits for the aged, blind and disabled than otherwise similarly situated persons, instituted a class action against the Commissioner of the State’s Office of Temporary and Disability Assistance, asserting violations of Article I, §1 of the state constitution and the equal protection clauses of the state and federal constitutions. [The Supreme Court, New York County, certified the class](#) and granted summary judgment in plaintiffs’ favor. It directed the state to provide additional payments to class members in order to bring their benefits in line with those of other disabled New Yorkers. [The Appellate Division, First Department, affirmed](#) (3-2). The Court of Appeals reversed (5-2).

The opinion for the Court, by Judge Theodore T. Jones, reviewed the evolution of the benefits programs at issue. After the federal government established the Supplemental Social Security Income (SSI) program, New York replaced its previous benefits program for the aged, blind and disabled with a program of additional state payments (ASP) to supplement SSI benefits. At that time, citizens and aliens who had not been determined by the federal government to be residing in the United States illegally were eligible to participate in both SSI and ASP.

In 1996, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act (the “Welfare Reform Act”), which rendered legal immigrants who had not become citizens within seven years ineligible to receive SSI benefits. The statute authorized states to do the same, and New York conformed the requirements for ASP eligibility to those of SSI. Aliens who

were excluded from participation in ASP were provided benefits by the state under an alternative program, safety-net assistance (SNA). SNA provided plaintiffs with monthly benefits with a value of \$352, whereas those participating in SSI/ASP received over twice that in combined federal/state benefits, or \$761.

New York's Constitution contains a provision, Article XVII, §1, with no equivalent in the federal Constitution, which imposes an affirmative duty upon the government to assist the needy. It mandates that: "[t]he aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine." As the majority pointed out, interpreting this provision to require the Legislature to appropriate sufficient funds for SNA participants to equal the total payments to SSI/ASP participants would take the determination of the level of state aid out of the hands of the Legislature, because New York would have to match whatever payments the federal government provided to those eligible for its SSI program. The Court held that Article XVII, §1 does not "compel the state to assume the federal government's obligation when an elderly or disabled person becomes ineligible for continued SSI/ASP benefits."

The dissent, by Judge Carmen Beauchamp Ciparick, in which Chief Judge Jonathan Lippman joined, decried this result as "inconsistent with the long tradition in New York of fully providing assistance to the poor aged, blind and disabled," and contrary to the Court's precedent applying Article XVII, §1.

The majority and dissent agreed on the standard by which equal protection claims should be evaluated: aliens are a suspect class, and laws calling for different distribution of economic benefits to aliens than to others are therefore subject to strict scrutiny and will only be upheld if the state shows the classification drawn along a suspect line furthers a "compelling state interest by the least restrictive means practically available." The Court's division over plaintiffs' equal protection claims essentially came down to whether this standard should be applied to the federal Welfare Reform Act or to New York's conforming statutes.

The Court reasoned that it was the federal government, not New York, which created the system that excluded plaintiffs. Because New York merely brought its eligibility requirements in line with those of SSI, strict scrutiny was inapplicable to the state's action. As a result, the Court held, there was no basis for plaintiffs' equal protection clause claims.

The dissent, in contrast, focused on New York's decision to amend the ASP eligibility requirements. The result of this action was a statutory scheme that provides a different level of assistance to citizens and certain aliens than to other aliens who have not become citizens within seven years, for which, according to the dissent, defendant had failed to demonstrate a compelling government need.

Curfew Invalidated

The primary issue in [Anonymous v. City of Rochester](#) was the level of scrutiny applicable to the substantive due process challenge to a youth curfew adopted by the Rochester City Council.

The Court's opinion, by Judge Jones, in which Chief Judge Lippman and Judges Ciparick and Read joined, applied intermediate scrutiny and concluded that the curfew was not substantially related to its stated goals and therefore unconstitutional.

In 2006, Rochester enacted §45-6 of its City Code to impose a curfew on minors up to age 17 between 11 p.m. and 5 a.m. during the week and between midnight and 5 a.m. on weekends. The provision made it a violation for a minor to be on the street between those hours unless accompanied by a parent or responsible adult, involved in an emergency, for an employment-related purpose, to attend a recreational activity sponsored by a school or by a religious, civic or public entity, exercising his or her First Amendment rights, or engaged in interstate travel. Unlike the curfew ordinances of many other municipalities, however, §45-6 did not create a parental consent exception.

The enactment authorized police officers to "detain" or "take into custody" any person whom they reasonably believed to be a minor on the street in violation of the curfew because none of the exceptions applied. It was supplemented by a Police Department order that established procedures for searching, handcuffing and transporting such minors, and identified locations to which an officer could bring a minor taken into custody, including to the home of a parent or responsible adult, to a curfew facility, or into protective custody.

Plaintiffs, a father and son, challenged §45-6 on various statutory and constitutional grounds. Because the Court concluded that the entire appeal could not be disposed of on non-constitutional grounds, it proceeded to analyze whether the ordinance violated substantive due process, and determined that it did.

Noting that other courts have done so, Judge Jones' opinion applied the intermediate scrutiny level of review, pursuant to which the defendants were required to show that §45-6 was "substantially related" to an "important" government interest. The issue, then, was whether the defendants had established a "substantial nexus" between the laudable goals of preventing minors from committing or becoming victims of crimes and promoting parental supervision of children, and the burdens imposed on constitutional rights in order to realize those goals.

In the majority's view, defendants' evidence failed to sufficiently connect the restrictions on due process rights with the stated goals. For example, while the City Council purportedly was spurred to action by the deaths of three minors, two of those deaths occurred outside of the curfew's hours and the third was of a youth already subject to an individual curfew. In addition, while crime statistics introduced by defendants demonstrated that minors are substantially more likely to commit or be victims of crimes on weekend nights, the curfew began later on weekends than weekdays.

Without empirical evidence to support the effectiveness of the restrictions on the rights of minors to freedom of movement, the ordinance was supported only by "justifications made by the Mayor and the Chief of Police...based primarily on opinions," which were inadequate to show the requisite substantial relationship. With respect to the rights of adults to raise their children as they see fit, without an exception for minors whose parents gave them permission to

be out on the streets, the curfew lacked a substantial connection to the goal of promoting parental supervision.

Judge Victoria A. Graffeo concurred in a separate opinion that did not reach the constitutional issues. The Family Court Act limits the instances in which the police may take children younger than 16 into custody to those involving crimes. Because the Rochester ordinance authorized the police to take children younger than 16 into custody for mere violations, Judge Graffeo reasoned, it conflicted with the state statute and was therefore preempted.

Judges Eugene F. Pigott Jr. and Robert S. Smith dissented. They argued that because parents can control the movement of their children, minors do not have a fundamental right to free movement, and governmental restrictions on the movements of minors are therefore subject to the rational basis test. In the dissenters' view, the statistical evidence in the record supported a relationship between the curfew and the prevention of crime by and against minors. The dissenting judges agreed with the majority that intermediate scrutiny was the correct level of review for the ordinance's restrictions on parental rights, but considered the restrictions to be "merely a minimal intrusion" on such rights, and therefore justified.

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