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Civil Procedure—Abstention

Dispute Over Off-Track Betting Facilities Not Appropriate For Younger Abstention

A dispute involving the New Jersey Racing Commission and construction of off-track betting facilities did not qualify for Younger abstention, because a parallel state proceeding was not ''quasi-criminal'' in nature, the U.S. Court of Appeals for the Third Circuit held March 31 (*ACRA Turf Club, LLC v. Zanzuccki*, 2014 BL 88779, 3d Cir., No. 13-3064, 3/31/14).

The plaintiffs entered into an agreement to obtain licensing rights for an allocated number of wagering facilities, the court said. Subsequent amendments to the state's Off-Track and Account Wagering Act required those with licensing rights to make a $1 million deposit for each allocated facility not yet licensed, unless they demonstrated progress toward obtaining such licenses.

The plaintiffs argued in district court that the amendments were unconstitutional. The lower court dismissed the complaint under the Younger abstention doctrine.

The Third Circuit, in an opinion by Judge D. Brooks Smith, applied *Sprint Commc'ns, Inc. v. Jacobs*, 82 U.S.L.W. 4027, 2013 BL 340442 (2013) (82 U.S.L.W. 1433, 4/1/14), and reversed the district court. There was no evidence that a parallel state licensing proceeding was initiated to sanction a wrongful act, making the parallel proceeding unlike a quasi-criminal proceeding that would have met the standard for abstention, the Third Circuit said.

An attorney whose law journal article was cited in the decision told BNA that the opinion is consistent with other circuits that have applied *Sprint*. Another attorney told BNA in an e-mail that the decision confirms Younger abstention's narrower applicability post-*Sprint*, but that the boundaries of what constitutes a ''quasi-criminal'' state proceeding have yet to be defined fully.

Younger Abstention Narrowed. Joshua G. Urquhart, senior counsel at Gordon Rees Scully Mansukhani LLP, Denver, and author of a law journal article cited in the opinion, *Younger Abstention and Its Aftermath: An Empirical Perspective*, 12 Nev. L.J. 1 (2011), told BNA April 3 that before *Sprint*, ''the circuit courts and district courts were really treating Younger abstention as a rule of general applicability.''

Applying *Sprint*

Three other circuits (two in unpublished decisions) have discussed application of Younger abstention after *Sprint*:

■ In *Mulholland v. Marion Cnty. Election Bd.*, 2014 BL 76794, 7th Cir., No. 13-3027, 3/20/14 (82 U.S.L.W. 1433, 4/1/14), the Seventh Circuit reversed a district court's decision to abstain, regarding a county election board investigation and a dispute over election-day flyers. The appeals court said the investigation was ''too preliminary a proceeding to warrant'' Younger abstention, ''at least in the wake of *Sprint*.''

■ In a case involving a disbarred attorney's suit against a state court judge, *Neroni v. Becker*, 2014 BL 48149, 2d Cir., No. 13-263, *unpublished opinion* 2/21/14, the Second Circuit vacated a district court's decision to apply Younger abstention, and remanded with instructions to consider whether abstention was appropriate after *Sprint*.

The district court had applied an earlier test derived from *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982), which said that abstention is mandatory when there is a pending state proceeding implicating an important state interest, and that allows the federal plaintiff an opportunity for judicial review of constitutional claims. The appeals court said *Sprint* ''rejected this three-part test in favor of a categorical approach,'' while the Second Circuit appeal was pending.

■ In *Dandar v. Church of Scientology Flag Serv. Org., Inc*, 2013 BL 350418, 11th Cir., No. 13-11169, *unpublished opinion* 12/19/13, the Eleventh Circuit similarly vacated and remanded a district court's abstention decision for reconsideration due to *Sprint*. The appeals court said *Sprint* clarified that there are only ''three limited circumstances in which abstention is appropriate.''

The case involved a settlement agreement related to a wrongful death suit against the Church of Scientology Flag Organization.

''By that I mean they weren't really heeding the language dating back to'' *Younger v. Harris*, 401 U.S. 37 (1971), ''that abstention is an exception to the general—

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the phrase they used is an 'unflagging'—duty to exercise jurisdiction,'' he said.

As the Third Circuit said here, Urquhart's article found that between 1995 and 2006, parties seeking Younger abstention were successful ''51.6 percent of the time.''

Urquhart said that since *Sprint*, ''what we've seen is a handful of circuits,'' including the Second, Seventh, Eleventh and now the Third, ''have basically noted that *Sprint* kind of changed the rules when it comes to Younger abstention'' by limiting it to a narrow set of scenarios.

Similarly, Stephen Siegel, a partner with Novack and Macey LLP, Chicago and co-chair of the Commercial and Business Litigation Committee of the American Bar Association's litigation section, told BNA in an e-mail April 3 that the decision confirms the narrow availability of Younger abstention post-*Sprint*.

He said that after the high court's ruling, ''the abstention doctrine will enable state actors to avoid a federal court challenge to their conduct in just a few narrow and limited types of state proceedings.''

However, Siegel said, ''The dividing line between civil enforcement proceedings that are and are not 'quasi-criminal'—so as to justify a federal court from abstaining to hear an overlapping federal proceeding—remains to be fully defined.''

''It may develop that a federal defendant who requests that a federal court abstain in favor of a state civil enforcement proceeding must show that the state has actually charged the federal plaintiff with conduct that the state has proscribed as wrongful,'' he said.

Two Proceedings. The commission notified the plaintiffs, ACRA Turf Club LLC and Freehold Raceway Off Track LLC, of the deposit requirement in a January 2012 letter, the appeals court said. The plaintiffs submitted petitions to the commission, attempting to show that they had made the necessary progress toward opening the remaining facilities. They then filed the district court suit in May 2012, naming commission executive director Francesco Zanzuccki as the defendant, the Third Circuit said.

The commission later found that the plaintiffs had made sufficient progress, but also needed to continue making progress on an annual basis, the court said. The New Jersey Thoroughbred Horsemen's Association Inc., which would have been entitled to obtain licensing rights forfeited by the plaintiffs, contested the decision in state court.

The district court dismissed the plaintiffs' complaint on Younger abstention grounds, finding that the New Jersey proceeding implicated important state interests, the Third Circuit said.

Timely Decision. The Supreme Court decided *Sprint* while the plaintiffs' appeal from the district court decision was pending, the Third Circuit said.

Sprint reiterated that Younger abstention is appropriate with respect to only ''three narrow categories'' of state proceedings: criminal prosecutions, civil enforcement proceedings and civil proceedings that involve orders furthering the judicial function of state courts, the appeals court said. Only the ''state civil enforcement proceeding'' category was potentially applicable here, the court said.

The court said that pre-*Sprint* decisions offered guidance in addition to *Sprint*, because that decision was a restatement of prior precedent. However, *Sprint* supplied the ''framework'' for analysis here, the court said.

The Third Circuit said that under that decision, civil enforcement proceedings ''must be 'quasi-criminal' in nature'' to qualify for Younger abstention. *Sprint* set out several factors to consider, including whether a state commenced the action in its sovereign capacity, whether the proceeding was initiated to sanction ''some wrongful act'' and whether there were similarities to criminal actions such as an investigation and formal charges, the appeals court said.

Letter Analyzed. The court said the proceeding at issue had none of the hallmarks discussed in *Sprint* or its predecessors. The proceeding was not initiated by the state—it began when the plaintiffs submitted their progress petitions to the commission, the court said.

The court rejected Zanzuccki's argument that the commission's 2012 letter initiated the proceeding. Rather, the letter was only an informational document describing the amended statute, the court said. The letter did not demand action by the plaintiffs, but merely advised them of changes in the law, the court said.

No Formal Charges. Further, the letter did not resemble initiation procedures used by state actors in high court cases applying Younger abstention, the court said. ''Indeed, all of those cases involved'' some kind of formal complaint or charges, the court said.

The high court has not directly found that Younger abstention requires a complaint or formal charge by a state actor, the court said. However, Supreme Court precedent suggests that a state's ''initiation'' process must show more formality than a mere ''targeted advisory notice'' like the letter here, the appeals court said.

A footnote in the decision said that Judge Patty Shwartz, who joined the opinion, would find that the letter was ''sufficient to constitute the initiation of a proceeding by a state actor, particularly because'' the letter made clear that a failure to respond would result in forfeiting licensing rights or the deposit requirement.

Siegel said that therefore, ''the door remains open, at least slightly, for the possibility that a state could initiate quasi-criminal civil enforcement proceedings through informal means, before the filing of a formal judicial or administrative proceeding.''

Consequences, Not Sanctions. Zanzuccki argued that the state proceeding threatened quasi-criminal sanctions, in the form of a potential loss of licensing rights and the $1 million deposit requirement. The court disagreed, saying that ''negative consequences are not the same thing as sanctions.'' Sanctions are typically used

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to punish a party ''for some wrongful act,'' the court said, quoting *Sprint*.

Here, no party suggested that the plaintiffs' conduct in failing to establish wagering facilities was wrongful, the court said. It contrasted high court precedent applying Younger abstention regarding civil enforcement proceedings, which involved allegations of wrongful conduct such as obscenity in *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), a civil fraud action in *Trainor v. Hernandez*, 431 U.S. 434 (1977), and in *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619 (1986), employment discrimination.

Further, Zanzuccki admitted that the statutory amendments were intended to incentivize the plaintiffs to open their remaining facilities, rather than punish them, the court said. It was significant that even if the plaintiffs had failed to show the necessary progress, they would not have been obligated to make the deposits, the court said. Rather, the plaintiffs would have simply had a choice of whether to pay the deposit as a ''cost of doing business,'' the court said.

Judge Anthony J. Scirica joined the opinion.

Kellen F. Murphy and John M. Pellecchia, both of Riker, Danzig, Scherer, Hyland & Perretti, Morristown, N.J., represented the plaintiffs.

Julia Barnes and Stuart M. Feinblatt, both of the office of the attorney general of New Jersey, Trenton, N.J., represented Zanzuccki.

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Full text at http://www.bloomberglaw.com/public/document/ACRA_Turf_Club_LLC_v_Zanzuccki_No_133064_2014_BL_88779_3d_Cir_Mar