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Mini-En Banc Review In the Second Circuit



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Much has been written about the Second Circuit's "tradition of hearing virtually no cases in banc."¹ The tradition extends back to Learned Hand, who "strongly disapproved" of en banc rehearings and "never voted to convene a court en banc."² As a result, the Second Circuit did not hear its first case en banc until 1956 (eight years after Congress codified a 1941 Supreme Court ruling allowing for the practice, and five years after Judge Hand stepped down as chief judge),³ and its chief judges have repeatedly defended this time-honored tradition.⁴ Not surprisingly, then, the Second Circuit consistently "hears the fewest cases en banc of any circuit by a substantial margin, both in absolute terms and when considering the relative size of [its] docket."⁵

Although we question the justifications for continuing this long-standing tradition—especially in those cases where en banc consideration is important to maintain uniformity of panel decisions or the proceeding involves issues of exceptional importance—this column is limited to (1) examining the "mini-en banc" process that the Second Circuit sometimes uses to avert the need for en banc rehearing, and (2) inquiring

whether that process could use improvement (as some commentators have suggested).⁶

There are two primary sets of circumstances in which the Second Circuit determines that one of its prior decisions should be reconsidered: (1) when an intervening Supreme Court decision changes the legal landscape, and the prior decision would likely have been decided differently had the issue arisen after the

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Supreme Court provided its further guidance, or (2) when intervening decisions by other courts, or other considerations, cast doubt upon whether the prior decision was rightly decided in the first place.

The first of these circumstances is firmly ensconced in Second Circuit jurisprudence. As the Second Circuit has repeatedly explained, a panel is "bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court."⁷ The Circuit has further explained that, "if there has been an intervening Supreme Court decision that casts doubt on our controlling precedent, one panel of this Court may overrule a prior decision

of another panel" even if the intervening decision does "not address the precise issue decided by the panel."⁸

Where, however, the Second Circuit desires to overrule one of its precedents but there is no intervening Supreme Court decision that it can point to for justification, the court has developed a practice, frequently referred to as "mini-en banc," that eliminates the need for full en banc review (consistent with Second Circuit tradition), but also gives the court the flexibility to overrule its outdated or otherwise-faulty precedents.

Mini-En Banc Review

In broad terms, mini-en banc review works as follows: A three-judge panel tentatively decides that a precedent should be overruled. One of the judges on the panel writes a draft opinion on behalf of the panel overruling the precedent. The draft opinion is then circulated to all of the Second Circuit's active judges, together with a note stating that the panel proposes to overrule a precedent. The panel then proceeds with overruling the precedent, presumably on the assumption that en banc review, while technically necessary, would have been a waste of time and resources in light of the views expressed by the active judges in response to the draft opinion.⁹

The Second Circuit has used the mini-en banc process on over 70 occasions over the past 50 years.¹⁰ Using mini-en banc review, the court has tackled a range of issues in recent years, from

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whether the Foreign Sovereign Immunities Act's noncommercial tort exception could be a basis for a suit arising from the Sept. 11, 2001 terrorist attacks¹¹ to the statutory requirements for filing a timely habeas petition under the Antiterrorism and Effective Death Penalty Act.¹²

Potential Disadvantages

As has been noted, however, this process does not have "any of the safeguards or formalities attending the en banc process."¹³ For example, commentators have expressed concern that "[l]itigants and potential amici generally have no notice of mini-en banc consideration ... and there is no apparent mechanism for litigants to address arguments being discussed behind the scenes."¹⁴ Because of this lack of notice, "[p]arties cannot be sure whether they should attempt to distinguish or limit contrary precedent or argue for informal en banc overruling."¹⁵ Nor can parties "be sure whether they can rely on established precedent," because there is always the possibility that "[t]hey may build a litigation strategy around circuit precedent only to have the panel unexpectedly overrule it."¹⁶

It is not just the parties who might suffer from the lack of safeguards and formalities, but the court as well. When the parties are unaware that a precedent might be overruled, they are unlikely to fully brief the issue of whether that precedent *should* be overruled, and the court will not have the benefit of the type of adversarial briefing that aids the court in crystallizing issues and fully understanding each position. And certainly the court's other active judges, who are merely provided with a draft opinion, do not have the benefit of adversarial briefing either.¹⁷

Below, we analyze how the Second Circuit has used mini-en banc review in a few recent cases to test whether these theoretical concerns have manifested themselves in practice.

'Espinoza v. Dimon'

The Second Circuit's most recent use of mini-en banc review was in *Espinoza v. Dimon*, a case arising from the so-called "London Whale" trading

debacle."¹⁸ A JPMorgan shareholder brought a derivative action on behalf of the company alleging that it had not done enough to go after those whom he deemed responsible. Before the action was filed, the JPMorgan board had rejected the shareholder's demand that the board take certain actions against the supposed wrongdoers. The shareholder's complaint asserted that the board's investigation into the allegations in his demand was unreasonably narrow. The district court dismissed the complaint, finding that the shareholder had not sufficiently pleaded facts showing that the board had wrongfully refused the demand.¹⁹

The shareholder appealed, and one of the issues on appeal was the standard of review to be used in evaluating the

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district court's decision. The Second Circuit explained that "[a] number of long-standing decisions in this Circuit hold that a district court's decision to dismiss a derivative action is reviewed only for abuse of discretion," not de novo.²⁰ However, the court explained that it "believe[d] this deferential review is not warranted" because "[r]eviewing the dismissal of a derivative action involves nothing more than reading the allegations in the complaint and deciding whether those allegations state a claim. No evidence is considered, no credibility determinations are made, and none of the other usual justifications for deferring to a district court are in play."²¹ In light of that analysis, the court stated that "the abuse-of-discretion standard of review for the dismissal of derivative action cases should be retired" and that "dismissals of derivative actions should be reviewed under the same de novo standard that we follow in all other similarly situated cases."²²

Nevertheless, the court suggested that it was not within its power to "retire"

what it believed to be an erroneous standard of review, and it therefore held that the abuse of discretion standard continued to apply and, applying that standard of review, affirmed the district court's judgment.²³

Following the Second Circuit's decision, the plaintiff sought en banc rehearing. The court did not request that the defendants respond to the en banc petition,²⁴ nor did it grant en banc rehearing. Instead, the court vacated its prior decision sua sponte, filed a new decision in its place, and denied the en banc petition as moot.

The new decision "revisit[ed] the standard of review and h[e]ld that dismissals of derivative actions are reviewed de novo."²⁵ In support of its decision, the court noted that (1) "[o]ver the past few years, ... numerous courts have expressed doubts about the wisdom of reviewing Rule 23.1 dismissals for abuse of discretion rather than de novo," (2) the "First and Seventh Circuits recently adopted a de novo standard," and (3) "the defendants conceded at oral argument that, were we writing on a blank slate, it would make sense for dismissals under Rule 23.1 to be reviewed de novo."²⁶ The court also referenced that "several decisions in our Circuit have voiced puzzlement over the abuse-of-discretion holdings."²⁷

The decision included two footnotes explaining that "[t]his opinion has been circulated to all judges of the court prior to filing."²⁸ Although this is not explicitly stated, presumably few or none of those judges objected to the court's decision to overrule its precedent concerning the standard of review, and thus the court determined that full en banc review would be a waste of time and resources.

'United States v. Elbert'

Although in *Espinoza* the defendants did not have an opportunity to respond to the en banc petition, the briefing in that case was still far more robust than the briefing in *United States v. Elbert*, another Second Circuit mini-en banc case. *Elbert* involved a defendant's guilty plea to distribution of child pornography, among other offenses. On appeal, defendant's counsel filed a motion pursuant to *Anders*

v. California, 386 U.S. 738 (1967) stating that there were no non-frivolous bases for an appeal in light of the defendant's "completely voluntary and knowing" guilty plea and the fact that the district court "imposed the mandatory statutory minimum sentence of twenty years, to be followed by a term of supervised release."²⁹ The government filed a motion for summary affirmance.³⁰

Rather than grant the government's motion for summary affirmance, however, the Second Circuit sua sponte ordered defense counsel to provide the court with "a copy of the district court's written statement of reasons for the sentence imposed" and requested certain supplemental briefing concerning whether that statement was adequate.³¹ The court explained that "[w]e have previously held that counsel will not be permitted to withdraw pursuant to *Anders* until [the written] statement [of reasons] has been made part of the record and considered as part of the *Anders* analysis," and that Second Circuit precedent "further requires that the statements of reasons in the written judgment include at least a simple summary of facts."³² Noting that the district court's statement of reasons appeared to have done "no more than incorporate by reference the reasons given for the sentence imposed that were articulated orally," the court requested the supplemental brief to ascertain "whether the statement presents any nonfrivolous appellate issue."³³

In the requested supplemental briefing, defense counsel reiterated that there was "no nonfrivolous appellate issue favorable to Defendant" but stated that the case should be remanded to the district court because, pursuant to binding Second Circuit precedent, "[c]ounsel may not waive the statutory requirement of a written statement of reasons for a sentence outside the sentencing guidelines range."³⁴ The section of defense counsel's brief concerning the latter issue was limited to a page and a half, the majority of which was a lengthy quotation from a prior Second Circuit decision.³⁵ The government did not submit a brief on the issue.

The court—after circulating the draft opinion to all of its active members—

abrogated its prior holding and held that, in the context of an *Anders* motion, remand is not necessarily required when the district court fails to provide a written statement of reasons.³⁶ The court explained that the "bright line rule" established in its precedent had the potential to "undermine, rather than serve, the goals of vigorous representation described in *Anders*," and therefore should be overruled.³⁷ In light of that determination, the court granted the government's motion for summary affirmance and granted defense counsel's motion to be relieved as counsel.³⁸

'Diebold Foundation v. Comm'r'

In *Diebold Foundation v. Commissioner of Internal Revenue*, as in *Espinoza*, the court engaged in mini-en banc review on an issue related to the standard of review. *Diebold* involved a decision from the U.S. Tax Court holding that Diebold Foundation (Diebold) "could not be held liable as a transferee of a transferee under 26 U.S.C. §6901."³⁹ Before reaching the merits, however, the court needed to ascertain what amount of deference, if any, to give to the Tax Court's decision.

The court explained that, pursuant to Second Circuit precedent, "mixed questions of law and fact are reviewed under a clearly erroneous standard when we review a decision of the Tax Court."⁴⁰ However, the court noted that that standard of review "is in direct tension with th[e] statutory mandate" that Courts of Appeals must "review the decisions of the Tax Court ... to the same extent as decisions of the district courts in civil actions tried without a jury" insofar as, in that latter context, mixed questions of law and fact are reviewed by the Second Circuit "de novo to the extent that the alleged error is based on the misunderstanding of a legal standard."⁴¹ The court cited the fact that "[t]wo recent panels of our Court have recognized this contradiction between our case law and [the statutory mandate] but did not resolve the tension."⁴²

After analyzing the issue, the court concluded that the standard of review it had been using for the past 22 years "was adopted in error." It traced that error

back to the fact that the Second Circuit had, in 1991, adopted the standard of review used by the Seventh Circuit without recognizing that the "Seventh Circuit uses the clearly erroneous standard of review for mixed questions of law and fact when reviewing both decisions of the Tax Court and those of the district courts. Its standard is thus not in tension with [the statutory mandate], unlike this Court's."⁴³

The Second Circuit therefore held that "the Tax Court's findings of fact are reviewed for clear error, but that mixed questions of law and fact are reviewed de novo, to the extent that the alleged error is in the misunderstanding of a legal standard."⁴⁴ Applying that new standard of review, the court vacated the Tax Court's decision.⁴⁵

Notably, the court did not solicit any supplemental briefing concerning the proper standard of review before initiating the mini-en banc process. Nor do the parties appear to have been aware that the court was reconsidering the long-established standard of review—*Diebold* devoted just one sentence in its brief to the question of the standard of review concerning mixed questions of law and fact, and the Commissioner of Internal Revenue did not raise the issue in either of its briefs.⁴⁶

Following the Second Circuit's decision, *Diebold* filed a petition for panel rehearing and rehearing en banc. *Diebold*'s brief argued that the panel had "unilaterally overturn[ed] the existing standard of review for Tax Court cases that the Court ha[d] applied for over twenty years" and that the new standard of review "gives no deference to the Tax Court's weighing of the evidence and findings as to knowledge, intent, and credibility, which violates the precedents of [the Second Circuit] and the Supreme Court."⁴⁷ The Second Circuit denied the petition.⁴⁸

Lessons

Before the Second Circuit overruled its precedents in *Espinoza* and *Diebold*, it had forecast, in numerous prior decisions, that those precedents may have been wrongly decided, thereby putting all parties on notice that those precedents

were ripe for reexamination. In *Elbert*, in contrast, there is no reason to think that the parties were aware that the Second Circuit was considering abrogating its prior holding.

Moreover, although in *Elbert* the court ordered supplemental briefing concerning what the Second Circuit's precedents required, in none of these cases did the court order supplemental briefing concerning whether the precedents should be overturned. Nor did the court alert the parties in any of these cases that it might initiate the mini-en banc process.

Conclusion

In situations where the court has stated in prior decisions that one of its precedents may have been mistaken, parties would be well-advised to include arguments for why the precedent should or should not be overruled in their briefs, as they may not have another opportunity to make those arguments if the court, sua sponte, decides to initiate the mini-en banc process. However, there is also always the possibility that the court might initiate the mini-en banc process, without notice to the parties, even in situations where the court has not previously questioned any of the relevant precedents.

We would urge the adoption of a local rule setting forth the mini-en banc procedure and providing notice to the parties when that process is initiated.⁴⁹ This would provide clarity, consistency, and transparency to the bar.

In conjunction with a new rule or not, in the event that the court is considering using the mini-en banc process in a particular case, it might aid the court's analysis if the court (1) informed the parties that it was considering initiating mini-en banc review, and (2) ordered supplemental briefing (whether in advance of oral argument or thereafter) concerning whether the precedents in question should be overruled. Such a process would provide parties with notice and the opportunity to be heard, and would provide the court's other active judges with briefing tailored to the particular question presented to them during the mini-en banc process,

which would promote the values behind en banc review.

1. *Ricci v. DeStefano*, 530 F.3d 88, 92 (2d Cir. 2008) (Jacobs, C.J., dissenting from the denial of rehearing en banc); see also *id.* at 89-90 (Katzmann, J., concurring in the denial of rehearing en banc) ("Throughout our history, we have proceeded to a full hearing en banc only in rare and exceptional circumstances.");

2. Wilfred Feinberg, "Unique Customs and Practices of the Second Circuit," 14 HOFSTRA L. REV. 297, 311 (1986); James Oakes, "Personal Reflections on Learned Hand and the Second Circuit," 47 STAN. L. REV. 387, 392 (1994-95).

3. Feinberg, *supra* note 2, at 311.

4. See Irving R. Kaufman, "Do the Costs of the En Banc Proceeding Outweigh Its Advantages," JUDICATURE June-July 1985, at 8, 57 ("I am firmly convinced that [the en banc proceeding's] costs are too great, and its advantages too few, to warrant its use in all but the rarest circumstances"); Wilfred Feinberg, "The Office of Chief Judge of a Federal Court of Appeals," 53 FORDHAM L. REV. 369, 376 (1984-85) ("My view ... is that for the most part in bancs are not a good idea ..."); Oakes, *supra* note 2, at 392-93 ("Our rule of thumb has been that most cases are either too unimportant or too important to en banc."); Jon O. Newman, "Foreword: In Banc Practice in the Second Circuit," 1989-1993, 60 BROOK. L. REV. 491, 502 (1994) ("the Second Circuit's pattern of rarely rehearing cases in banc has been a sound policy"); John M. Walker, Second Circuit Survey: Forward, 21 QLR 1, 14 (2001) ("the Second Circuit's approach to in banc review ... is sound"); *Ricci*, 530 F.3d at 89 (Katzmann, J., concurring in the denial of rehearing en banc "consistent with our Circuit's longstanding tradition of general deference to panel adjudication"); but see *Zhong v. U.S. Dep't of Justice*, 489 F.3d 126, 139 (2d Cir. 2007) (Jacobs, C.J., dissenting from the denial of rehearing en banc) (bemoaning that the Second Circuit's en banc practice has become "rusty and cumbersome").

5. *United States v. Taylor*, 752 F.3d 254, 255 n.1 (2d Cir. 2014) (Cabranes, J., dissenting from the order denying rehearing en banc); see also Walker, *supra* note 4, at 5 ("[A] litigant is four to five times more likely to receive an in banc hearing in the First Circuit, the circuit with the next lowest in banc rate, than in the Second Circuit.");

6. See *Turkmen v. Hasty*, 2015 WL 8593642, at *2 n.2 (2d Cir. Dec. 11, 2015) (Jacobs, Cabranes, Raggi, Hall, Livingston, and Droney, JJ., dissenting from denial of rehearing en banc) (citing remarks by Justice Ginsburg suggesting that the Second Circuit might be "a bit too resistant to en banc rehearing"); Second Circuit Courts Comm., "En Banc Practices in the Second Circuit: Time for a Change?" 19-23 (2011), available at http://www.federalbarcouncil.org/vg/custom/uploads/pdfs/En_Banc_Report.pdf; Amy E. Sloan, "The Dog That Didn't Bark: Stealth Procedures and the Erosion of Stare Decisis in the Federal Courts of Appeals," 78 FORDHAM L. REV. 713, 744-72 (2009); Michael B. de Leeuw & Samuel P. Groner, "En Banc Review in the Second Circuit," N.Y.L.J., Dec. 18, 2009.

7. *In re Zarnel*, 619 F.3d 156, 168 (2d Cir. 2010) (citations omitted).

8. *Id.*; see also *In re Arab Bank, PLC Alien Tort Statute Litig.*, 2015 WL 8122895, at *7, - F.3d - (2d Cir. Dec. 8, 2015) ("[F]or this exception to apply, the intervening decision need not address the precise issue already decided by our Court. Instead, there must be a conflict, incompatibility, or inconsistency between this Circuit's precedent and the intervening Supreme Court decision. The effect of intervening precedent may be subtle, but if the impact is nonetheless fundamental, it requires this Court to conclude that a decision of a panel of this Court is no longer good law.") (citations omitted).

9. See generally *En Banc Practices*, *supra* note 6, at 15-16; Sloan, *supra* note 6, at 725-26.

10. See Sloan, *supra* note 6, at 728 (71 mini-en banc cases between 1966 and 2007, compared to 52 full en banc cases during that period).

11. See *Doe v. Bin Laden*, 663 F.3d 64, 70 n.10 (2d Cir. 2011).

12. See *Harper v. Ercole*, 648 F.3d 132, 140 n.7 (2d Cir. 2011).

13. *In re Sealed Case*, 181 F.3d 128, 146 n.5 (D.C. Cir. 1999) (Henderson, J., concurring).

14. *En Banc Practices*, *supra* note 6, at 19; see also Sloan, *supra* note 6, at 744 (citing the "lack of meaningful opportunity for parties to participate in the process" as a disadvantage of mini-en banc review).

15. Sloan, *supra* note 6, at 758.

16. *Id.*

17. *In re Sealed Case*, 181 F.3d at 146 n.5 (Henderson, J., concurring) (criticizing the mini-en banc process for, among other things, forcing non-panel members to decide whether to concur "without benefit of briefing or argument.");

18. 790 F.3d 125, 127 (2d Cir. 2015).

19. *Id.*

20. *Id.*; see also *id.* at 130 ("Ordinarily, we review dismissals de novo. But there is an exception to this general rule for derivative actions. In our Circuit, a line of cases dating back more than three decades has held that determination of the sufficiency of allegations [under Rule 23.1] depends on the circumstances of the individual case and is within the discretion of the district court ... [and] [c]onsequently, our standard of review is abuse of discretion.") (citations omitted).

21. *Id.* at 127; see also *id.* at 132 n.4 ("The legal sufficiency of a complaint ... is a pure question of law.");

22. *Id.* at 127; see also *id.* at 131 ("We now add our panel's voice to the chorus of courts endorsing de novo review of dismissals under Rule 23.1.");

23. See *id.* at 127.

24. See Fed. R. App. P. 35(e) ("No response may be filed to a petition for an en banc consideration unless the court orders a response."). The defendants devoted only four pages to the issue in their original appellate brief and presumably would have more fully briefed the issue had the court permitted them to file a response to the en banc petition. See Brief for Defendants-Appellees at 21-25, No. 14-1754 (2d Cir. Nov. 10, 2014) [Dkt. 60].

25. 797 F.3d 229, 231 (2d Cir. 2015). Applying de novo review, the court "conclude[d] that Delaware law is unclear on how to handle [plaintiff's] argument that the scope of the board's investigation was too narrow" and "certifi[ed] the legal question necessary to decide the merits to the Delaware Supreme Court." *Id.* Following its receipt of the Delaware Supreme Court's answer to the certified question, the Second Circuit "conclude[d] that [plaintiff] ha[d] not sufficiently rebutted the presumption that JPMorgan's board acted in good faith in responding to his demand letter," and accordingly the Second Circuit affirmed the district court's dismissal of the complaint. 2015 WL 7774518, at *5, ___ F.3d ___ (2d Cir. Dec. 3, 2015).

26. 797 F.3d at 234-36 & n.7.

27. *Id.* at 235.

28. *Id.* at 231 n.2, 236 n.6.

29. 658 F.3d 220, 222 (2d Cir. 2011). In *Anders*, the Supreme Court held that where defense counsel finds the defendant's appeal "to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." 386 U.S. at 744.

30. 658 F.3d at 222.

31. Order at 2, No. 10-72-cr (2d Cir. May 23, 2011) [Dkt. 52].

32. *Id.* (citing *United States v. Hall*, 499 F.3d 152, 154, 155 (2d Cir. 2007)).

33. *Id.* at 2.

34. Supplemental Brief in Support of Counsel's Motion Pursuant to *Anders v. California*, 386 U.S. 738 at 12, No. 10-72-cr (2d Cir. June 29, 2011) [Dkt. 56].

35. *Id.* at 12-13.

36. 658 F.3d at 223.

37. *Id.*

38. *Id.* at 224.

39. 736 F.3d 172, 174 (2d Cir. 2013). "Section 6901 of the Internal Revenue Code authorizes the assessment of liability against both (a) transferees of a taxpayer who owes income tax and (b) transferees of transferees." *Id.* at 181.

40. *Id.* at 182.

41. *Id.* (citing 26 U.S.C. §7482(a)(1)).

42. *Id.* (citing *Scheidtman v. Comm'r*, 682 F.3d 189, 193 (2d Cir. 2012) and *Robinson Knife Mfg. Co. v. Comm'r*, 600 F.3d 121, 124 (2d Cir. 2010)).

43. *Id.* at 182-83 (emphasis added) (citing *Bausch & Lomb v. Comm'r*, 933 F.2d 1084, 1088 (2d Cir. 1991)).

44. *Id.* at 183.

45. *Id.* at 190. The court stated in a footnote that it had used the mini-en banc process and, unlike in *Espinoza* and *Elbert*, it specifically referenced that there was "no objection" from any other active member of the court to the draft opinion. *Id.* at 183 n.7.

46. Br. of Petitioner-Appellee at 17, No. 12-3225 (2d Cir. Jan. 28, 2013) [Dkt. 52]; see also Br. for the Appellant, *id.* (2d Cir. Nov. 21, 2012) [Dkt. 33]; Reply Br. for the Appellant, *id.* (2d Cir. March 4, 2013) [Dkt. 61].

47. Pet. for Panel Rehearing and Rehearing En Banc at 1, 5, *id.* (2d Cir. Dec. 30, 2013) [Dkt. 102].

48. Order, *id.* (2d Cir. July 14, 2014) [Dkt. 109].

49. Cf. 7TH CIR. R. 40(e).