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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

The Biggest NJ Court Decisions Of 2015: Midyear Report

By **Martin Bricketto**

Law360, Jersey City (July 2, 2015, 2:40 PM ET) -- The U.S. Supreme Court has already left its mark on 2015, but the New Jersey Supreme Court has issued several heavyweight opinions of its own, from allowing Gov. Chris Christie to cut more than \$1 billion in pension funding to cementing potential new hurdles for discrimination and whistleblower plaintiffs.

Big decisions in the first half of 2015 have also come from New Jersey's Appellate Division, especially in the class action arena. That includes the appellate court's recent rejection of controversial class identification requirements — and Third Circuit jurisprudence — as part of lower-value consumer class actions.

"There are important decisions every year, but this year in particular we saw a number of decisions of significant import to business and public policy," said Bruce Greenberg of Lite DePalma Greenberg LLC.

Here are seven state Supreme Court and appellate decisions that attorneys say will have a significant impact going forward:

Burgos v. State of New Jersey

In a bitter dispute implicating major constitutional questions, a 5-2 majority of the Supreme Court in June found that a 2011 law providing public workers with a contractual right to annually required pension contributions from the state **couldn't bind** legislators and the governor to a legally enforceable financial obligation down the road.

The decision was a blow to public employee unions that argued that reduced pension funding under Christie's budget for fiscal year 2015 violated Chapter 78, which also increased pension deductions from workers' paychecks. The protected contractual rights that unions thought they had won as part of the law would run afoul of the debt limitation and appropriations language in the state constitution, the majority found.

"I think the court faced a dilemma in that everyone believed at the time that a contract had been entered into and the employees carried out their side of the contract," Greenberg said. "But the court was faced with constitutional clauses that the majority concluded meant that, regardless of intentions, the contract could not be binding on subsequent legislatures, and that's an important principle of state constitutional law going forward."

The decision reinforces that multiyear spending commitments could require a public referendum to pass constitutional muster and has the potential to influence how policymakers address problems such as funding for transportation infrastructure, according to Stuart Lederman, a partner with Riker Danzig Scherer Hyland & Perretti LLP.

"It's going to require the Legislature and the governor to potentially go to the voters more often, particularly as we are still in financial distress," Lederman said.

Council on Affordable Housing

While Christie came out on the winning end of the pension decision, a unanimous court in March **ruled against the administration** on the oversight of towns' affordable housing responsibilities.

Confronted with the administration's failure to meet court-mandated deadlines for new regulations, the justices found that the voluntary, administrative process that the state Council on Affordable Housing oversees for towns to meet their affordable housing obligations was broken. Towns were shielded from affordable housing suits as part of that process, but COAH's inaction meant that "there no longer exists a legitimate basis to block access to the courts," the opinion said.

"This was a signal to me that our Supreme Court remains independent and remains not just a strong institution but one of the strongest supreme courts in our nation," said Michael S. Stein of Pashman Stein PC.

Once-protected towns were given a grace period to file court actions seeking judicial approval of their affordable housing plans. However, any town that doesn't bring a declaratory judgment action by July 8 could face suits from developers and housing advocates.

The decision resolves the state's 15-year failure to adopt valid affordable housing rules, but the path going forward is pocked with unknowns, according to James L. Lott Jr. of Riker Danzig.

"There's not a lot of clarity, for municipalities particularly," Lott said. "They obviously need to file a declaratory judgment action by July 8, but the process as to how need is going to be allocated and what every municipality's fair share obligation will be is still somewhat uncertain."

Hargrove v. Sleepy's

The high court in January made the first in a series of important employment-related rulings when it **embraced a worker-friendly test** for determining employee or independent contractor status under state law.

In its decision, the court answered a question from the Third Circuit as it mulled the defeat of a putative class action against Sleepy's LLC for allegedly misclassifying delivery drivers to avoid providing employee benefits. The Third Circuit wanted guidance on how to determine employment status under the New Jersey Wage Payment Law and the New Jersey Wage and Hour Law.

The state court found that the appropriate standard was the three-part "ABC test." That test, which the state Department of Labor has used under the WPL and WHL, places the burden of proof on alleged employers. The Third Circuit in May revived the drivers' suit, since the district court had applied a different test.

"It certainly is a legal argument that needed to be resolved as to whether this was something that just applied in certain contexts but not in a pure wage-and-hour claim," said Peter Frattarelli, chair of Archer & Greiner PC's labor and employment department. "I think it's going to end the debate that you would look to some other test."

Aguas v. State of New Jersey

One month later, the court **seemingly gave employers a boost** when it made clear that, under the state's Law Against Discrimination, they can use an effective, enforced anti-harassment policy to defend against vicarious liability for a supervisor's sexual harassment.

A 5-2 majority made clear that an employer can fight claims by arguing that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior" and that "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." An employer couldn't use such a defense if the employee was subject to an adverse employment action.

However, the decision also poses liability concerns for employers by adopting an expansive view of who constitutes a supervisor as part of a harassment claim, attorneys said. The court ruled that anyone who controls a worker's day-to-day activities, not just someone with hiring and firing powers, can be a supervisor for harassment purposes, according to Peter Berk of Genova Burns.

"Employers really need to think hard about who they consider to be supervisors and make sure they get training to effectively respond to complaints," Berk said.

State v. Saavedra

A 6-1 majority of the court made **another attention-grabbing employment decision** in June when it preserved criminal charges against former North Bergen Board of Education employee Ivonne Saavedra for allegedly taking confidential records for her discrimination and whistleblower lawsuit.

The justices shot down Saavedra's argument that prosecutors improperly withheld evidence from the grand jury that she removed or copied 367 confidential student records to support claims under the state Law Against Discrimination and Conscientious Employee Protection Act. The court also refused to find that its 2010 decision in *Quinlan v. Curtiss-Wright Corp.*, which spelled out when the taking of documents is protected under the LAD, shielded Saavedra.

Plaintiffs attorneys have said the decision could dissuade legitimate whistleblowers from coming forward, but it also does nothing to protect an employer from a civil retaliation claim under *Quinlan*, according to Frattarelli.

Additionally, the opinion isn't an invitation for knee-jerk reactions from employers on going to the police when an employee takes documents, according to Berk, noting that records at issue in Saavedra involved statutory protections and concerns about student privacy.

Still, the court sent a message by detailing the regular procedures that a plaintiff can use in litigation to obtain discovery, according to Adam Saravay of McCarter & English LLP.

"The court is saying that a plaintiff who doesn't follow those procedures and instead engages in self-help is going to need to be able to justify why she has done that and why the established discovery procedures would have been insufficient," Saravay said.

New Jersey v. Perini Corp.

A decision from the court in April on **when the clock starts ticking** under a 10-year statute of repose for construction litigation came in the state's suit against contractors over an allegedly faulty hot water system for a 26-building prison, but its impact could be felt outside the world of government contracts.

The unanimous court sided with the state and found that the statute of repose started running when the system was connected to the final buildings of the multiphase project. Those buildings received certificates of substantial completion in 1998. Defendants unsuccessfully argued that state's claims left the starting line in 1997 when a central plant associated with the system commenced operation and the facility began housing prisoners.

The decision could be equally applicable to private construction projects, according to Jeffrey S. Mandel of Cutolo Mandel LLC.

"This can be very helpful for community association developments and common interest housing that are built in phases," Mandel said. "If the lawyer can link the work completed in an earlier phase to the work performed in a later phase by applying the reasoning in Perini, there will be an ability of residents in our state who live in community association developments and common interest housing to extend the 10 years beyond what was originally thought."

Daniels v. Hollister

The Appellate Division made waves in May when it **backed certification in a consumer class action** against clothing retailer Hollister Co. over expired gift cards and refused to weave the ascertainability doctrine — which concerns whether class members can be readily identified using objective criteria — into certification decisions.

Rejecting the Third Circuit's application of the doctrine, the appellate court said ascertainability can't play a role in the certification of consumer class actions that involve lower dollar amounts. It also openly doubted that the doctrine should play any role in state court.

Third Circuit cases have taken the doctrine too far, according to Greenberg.

"It's a case killer where defendants are able to say that because not every single class member can be identified, then no class action can occur and no one can be compensated," he said. "That means that wrongdoers can get away scot-free merely because there are some victims who cannot be identified."

But Alida Kass, chief counsel of the New Jersey Civil Justice Institute, said requiring ascertainability helps prevent fraudulent claims.

"Unless there is some reliable means of identifying who is or who is not a member of the class, that represents a problem both for the defendant in terms of paying out individual claims and other class members in terms of having their recovery diluted as a result of fraudulent claims," Kass said.

--Editing by Kat Laskowski and Mark Lebetkin.

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