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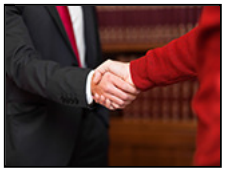
Civil Procedure

Settlement Could Continue Record Low Supreme Court Output (1)



By Kimberly Strawbridge Robinson

The U.S. Supreme Court may lose another case in an already light term.

The high court March 9 removed *Salt River Project Agric. Improvement & Power Dist. v. Tesla Energy Operations* after the parties March 8 notified the court that they "executed a memorandum of understanding (MOU), which they hope to form the basis of a final resolution of this litigation."

Snapshot

- Court removed, then added back on, civil procedure case from March argument calendar as parties move toward settlement
- Court on pace to continue record-low output

But the court indicated that it would reschedule the case for April, and did so March 12. The case is currently set for argument April 17, but presumably will be permanently removed if the parties can reach a settlement before that time.

The case is a technical one, asking when parties can appeal lower court decisions denying "state-action immunity" to public entities.

It would be the second time this term that a case has settled on the eve of oral argument. A securities case settled just weeks before the scheduled Nov. 6 oral argument.

In each of the last three terms the court has issued only 62 or 63 signed opinions in argued cases—the lowest in decades.

General Trend

There's been a general trend toward fewer Supreme Court decisions, Michael Kimberly, of Mayer Brown, Washington, told Bloomberg Law.

Forty years ago, the court regularly heard upwards of 150 cases. Now, the court hears closer to 70.

There's been a lot of speculation as to the reason for the downturn, including the preferences of new justices, the procedure by which the justices fill their docket, and the lack of legislation cranked out by Congress. No consensus has emerged as to the exact reason, according to the New York Times.

Output from the court for the 2015 and 2016 terms was the lowest since at least 1990, according to statistics complied by SCOTUSblog.

The court issued as many as 107 opinions during that time.

But in 2015, the court issued just 63 signed opinions in argued cases, the lowest for the period. In 2016, it was 62.

None of those figures include summary reversals.

If the court nixes *Salt River Project*, it would be on pace to once again hand down just 63 signed opinions in argued cases—assuming it can reach decisions in all remaining cases.

The Relist

The Supreme Court recently developed procedures to ensure that cases don't disappear from the already light docket once the court has agreed to hear it. When "a case settles late, it imposes costs both on the litigants (who must brief the case), and on the Court (which devotes resources to deciding whether to grant cert and perhaps in preparing for argument)," Supreme Court litigator John Elwood, of Vinson & Elkins LLP, Washington, told Bloomberg Law.

So starting during the 2013 term, the court started "relisting" cases before agreeing to hear them. That relist merely means that the justices consider the case in at least two private conferences before granting it.

"Relists appear to be a mechanism for avoiding improvident grants by allowing the justices and their clerks to double-check for procedural or other obstacles to the resolution of a case on the merits, known as vehicle problems, before granting," Kimberly and Elwood wrote in 2017.

No Solution

But there's not much the court can do about eleventh-hour settlements, Josh Blackman, of the South Texas College of Law Houston, told Bloomberg Law.

The simple fact that the Supreme Court has agreed to hear a case might actually bring the parties to the bargaining table, Kimberly said.

The Supreme Court's reversal rate is usually between 66 and 75 percent each term, Elwood said. Respondents on the winning side of a lower court decision might not want to roll the dice on that decision being reversed, especially if there's a lot of money on the line, Blackman said.

Mandated Mediation?

Elwood suggested that the court could do what many other courts of appeal have done: establish a mediation program.

Mandated mediation could occur after the court agrees to take up a case, since that's when the parties' calculus changes, he said.

The number of dismissals due to settlement is pretty low, though, Elwood said. "It's not that unusual during the term to have a single case settled and dismissed between the grant and argument date," he said.

So "the inconvenience of periodic dismissals after settlement is probably not worth the effort of establishing a mediation program," Elwood said.

Feels Big

Removing *Salt River Project* from its March argument calendar left just six cases for the March siting.

Not that long ago, these argument sittings would regularly accommodate 12 cases.

The cases the court has agreed to hear this term, though, are potentially game-changing, Kimberly said.

In particular, the court is considering cases involving the way voting districts are determined for federal and state elections, the Trump administration's controversial travel ban, and the intersection of privacy and technology.

With so many consequential cases, it doesn't feel like a light term, Kimberly said.

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