Case of the Month—September, 2011

Goldmark v. McKenna, 2011 WL 3849527, __Wn.2d __, __ P.3d __.

Key concepts: 1) Who controls a state agency's litigation strategy? 2) Mandamus.

Goldmark confronted the Washington State Supreme Court with the question of whether the Commissioner of Public Lands and the Chief Executive Officer of the Washington State Department of Natural Resources ("DNR"), could compel the Office of the Attorney General ("AG") to represent his agency in an appeal of a condemnation matter. By a 7-2 vote, the State Supreme granted the requested writ of mandamus and ordered the AG to represent the DNR. Justice Stephens, joined by Justice Pro Tem Sanders, wrote a strong dissent. The AG filed a motion for reconsideration which had not yet been ruled on as of October 1, 2011.

The *Goldmark* majority determined that the question was one of first impression clearly resolved by unambiguous statutes. *Goldmark*, at *2 (¶ 7) (noting that "[w]e have never been squarely presented with an instance of the attorney general refusing to represent a state officer on an appeal. The plain language of the statutes, however, leaves little to question"). RCW 43.10.040 states that "[t]he attorney general shall . . . represent the state and all its officials . . . and agencies . . . in *all* legal or quasi legal matters, hearings, or proceedings" (emphasis added). More particularly, with regard to the Commissioner of Public Lands, RCW 43.12.075 states that "[i]t *shall* be the duty of the attorney general, to institute, or defend, *any* action or proceeding to which the state, or the commissioner or the bard, is or may be a party . . . *when requested so to do by the commissioner*" (emphasis added). According to the majority, it follows that the AG cannot simply refuse to represent the commissioner in an appeal. The majority also concluded that since the AG could not properly refuse to represent the commissioner, the court could properly order him to do so.[1]

In contrast, the two justices in dissent argued that the underlying issue was not one of first impression, and hence should be resolved on the basis of the courts' "long-held recognition that the attorney general may exercise broad discretion as the state official charge with directing the course of litigation." *Goldmark*, at *9 (¶ 30) (Justice Stephens, dissenting). According to the dissenters, the cases acknowledging the AG's discretion are ultimately based on constitutional considerations that trump even clear statutory language to the contrary.[2] The dissent also implicitly argued that even if the AG had

[1] *Goldmark*, at*4-7.

[2] I was not persuaded by the dissent's attempt to give its position a constitutional basis. For instance, the question "[h]ow can the attorney general adequately fill his constitutional role as 'legal adviser of the state officers' yet be utterly powerless to guide litigation," seems to admit a straightforward answer: An advisor advises, but does not necessarily have to have the last say. Compare *Goldmark* at *9 (¶ 30). And a private attorney representing a private client is not "utterly powerless" to guide litigation. This obviously does not mean that there is no strong constitutional argument for AG discretion, even vis-à-vis heads of state agencies—just that no such argument was presented by the dissent.

a duty to represent the commissioner, the court should prudentially decline to order the AG to perform that duty.[3]

Assuming *Goldmark* remains good law, what will it mean for appellate practitioners? For some attorneys litigating against a state agency, *Goldmark* may help clarify who is really calling the shots for the other side. According to Justice Stephens,

> If we compel the attorney general to file an appeal on the grounds that it is a mandatory, nondiscretionary duty, there is no limiting principle that would allow us to avoid mandamus where the state officers disagree on other steps in litigation. What if the attorney general wants to settle a lawsuit and the commissioner does not? What if the commissioner insists on pursuing a claim that the attorney general believes is unwarranted? . . . . Under the majority's analysis, the attorney general's role is reduced to asking "how high" when the state officer he represents says "jump."

Goldmark at *11 (¶¶ 36-37). Prior to *Goldmark*, it surely made sense to think that who calls the shots for the state in any given litigation matter depended on an array of case-specific circumstances, ranging from the personalities of the responsible AAG and agency personnel, to the extent of specialized agency expertise on the issue in question. Surely the AAG had more clout in slip and fall cases originating at Husky Stadium than she had in cases involving discipline for faculty member who allegedly committed research misconduct. Under *Goldmark*, the balance of power on the state side of the table will shift in favor of the agency representative and against the AAG, along the lines of "My boss gets the last word on whether we settle, not yours." But at least as far as opposing counsel will be able to tell, cases where this sort of dynamic comes into play will probably be few and far between.

Another possible effect of *Goldmark* is on mandamus practice. Prior to *Goldmark*, it was commonly held that mandamus was only available when "the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment."[4] In other words, the law recognized circumstances where a state officer had a duty to perform, but where mandamus would not be available because the officer was left with some degree of discretion. *Goldmark* will give those seeking mandamus a new argument that mandamus should issue whenever there is an official duty unperformed, even if there is some discretion about how to carry it out. I expect this argument to be of little use—at least for attorneys not representing state agencies—as the Supreme Court will almost certainly try to distinguish *Goldmark* and restore the original limits to mandamus.

[3] *See, e.g., Goldmark* at *8, ¶ 28 (suggesting that the court should not "use the writ [of mandamus] to choose sides in a dispute between two officers of the executive branch"), and *11, ¶¶ 36-37 (arguing that any mandamus to the AG will be impossible to adequately police).

[4] *SEIU Healthcare 775NW v. Gregoire*, 168 Wn.2d 593, 599, 229 P.3d 774 (2010) (internal quotation marks omitted).