Report Card From the U.S. High Court

How the 3rd Circuit Fared in the 2008-2009 Term

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By Howard J. Bashman
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Howard J. Bashman

Upon Further Review

The Supreme Court of the United States, in its just-completed term, issued a total of 74 signed opinions in argued cases. Two of those cases reached the Supreme Court directly from the 3rd U.S. Circuit Court of Appeals. In one of those cases, the Supreme Court unanimously affirmed, while in the other the Supreme Court vacated and remanded the 3rd Circuit's judgment by a 5-4 vote.

In five other argued cases that the Supreme Court decided in its last term, the high court noted that it was resolving conflicts that involved the 3rd Circuit. In those cases, the Supreme Court approved of the 3rd Circuit's approach twice and disagreed with the 3rd Circuit's approach the remaining three times.

The 50 percent affirmance rate that the 3rd Circuit achieved in the 2008-2009 term ties the 3rd Circuit for the second best success rate among all federal appellate courts. Only the Atlanta-based 11th Circuit, which had all three of its directly reviewed decisions affirmed, achieved a better rate of success in the recently completed term.

Ten other federal appellate courts had a less than 50 percent affirmance rate last term, and seven of those 10 federal appellate courts achieved no affirmances at all. The San Francisco-based 9th Circuit was affirmed in full only once last term and reversed a whopping 13 times.

The case in which the U.S. Supreme Court affirmed the 3rd Circuit's decision last term was *Nijhawan v. Holder* , an immigration law case decided June 15. At issue was a federal statute providing that an alien convicted of an aggravated felony is subject to deportation. The definition of aggravated felony includes fraud offenses in which the loss to the victims exceeds $10,000. The question presented was whether an immigration judge could decide the amount of loss caused to victims of an alien's fraud offense if neither the jury nor the judge in the earlier criminal proceeding had expressly calculated that loss.

In a decision issued in May 2008, the majority on a divided three-judge 3rd Circuit panel held that the immigration judge may perform the fraud loss calculation under those circumstances. Circuit Judge Marjorie O. Rendell wrote the majority opinion, in which Senior U.S. District Judge Joseph E. Irenas of the District of New Jersey joined. Senior Circuit Judge Walter K. Stapleton dissented, maintaining that the immigration judge should not be allowed to determine the amount of loss caused.

After briefing and oral argument, the U.S. Supreme Court unanimously sided with the 3rd Circuit's majority opinion in holding that an immigration judge may decide, based on the underlying facts of the earlier fraud conviction, whether the loss to the victims exceeded $10,000. Justice Stephen G. Breyer delivered the opinion on behalf of a unanimous court.

The case in which the Supreme Court, in the 2008-2009 term, vacated and remanded the 3rd Circuit's ruling was *Corley v. United States* . At issue was whether the U.S. Congress, by means of a law enacted in 1968, intended to overrule or merely limit the effect of two earlier U.S. Supreme Court decisions holding that an arrested person's confession is inadmissible if given after an unreasonable delay in bringing him before a judge. In an opinion issued April 6, the Supreme Court ruled by a 5-4 margin that Congress had merely intended to limit, but not entirely overrule, those earlier cases.

Justice David H. Souter wrote the majority opinion, in which Justices John Paul Stevens, Anthony M. Kennedy, Ruth Bader Ginsburg and Breyer joined. Justice Samuel A. Alito Jr. wrote a dissenting opinion in which Chief Justice John G. Roberts Jr. and Justices Antonin Scalia and Clarence Thomas joined. The dissenters would have held that the federal statute allowed the admission of a voluntarily given confession, regardless of any unnecessary delay in bringing the arrestee before a judge.

The 3rd Circuit's decision in this case issued in August 2007 was delivered by a divided three-judge panel. Circuit Judge Thomas L. Ambro wrote the majority opinion, in which Senior U.S. District Judge Anne E. Thompson of the District of New Jersey joined.

In Ambro's view, a 3rd Circuit ruling from 1974 had already resolved that the federal statute in question rendered

admissible any voluntarily given confession, regardless of delay in taking the arrestee before a judge. Circuit Judge Dolores K. Sloviter dissented. In her view, the earlier 3rd Circuit ruling on which the majority relied was not dispositive, and the federal statute in question did not entirely eliminate unreasonable delay in bringing an arrestee before a judge as a ground for excluding the arrestee's voluntary confession.

Turning next to the two cases in which the Supreme Court last term approved of a 3rd Circuit decision that had given rise to a circuit conflict, the first of those cases was *Nken v. Holder* , another immigration decision. In *Nken* , the Supreme Court held by a 7-2 margin that traditional stay factors, and not a more difficult to satisfy statutory standard, govern a federal appellate court's authority to stay an alien's removal from the United States pending judicial review. The chief justice wrote the majority opinion, while Alito wrote a dissent that Thomas joined.

In holding that traditional stay factors governed, the Supreme Court approved of the 3rd Circuit's 2004 ruling in *Douglas v. Ashcroft* . Sloviter wrote the *Douglas* opinion, in which Circuit Judge Theodore A. McKee and then-Senior Circuit Judge Edward R. Becker joined.

Locke v. Karass was the other Supreme Court decision from last term approving a 3rd Circuit ruling. The Supreme Court had previously ruled that government employees who do not wish to join a union can nevertheless be required to pay service fees to the union that serves as their exclusive bargaining agent. At issue in *Locke* was whether the union may charge non-members for the cost of litigating cases affecting similarly situated employees located elsewhere in the nation.

Breyer, in a unanimous opinion, answered in the affirmative, thereby approving the result that a three-judge 3rd Circuit panel had reached in 2003. Ambro was the author of that 3rd Circuit ruling, in which Stapleton and Senior U.S. District Judge Thomas N. O'Neill Jr. of the Eastern District of Pennsylvania joined.

The first of the three cases in which the Supreme Court disapproved of 3rd Circuit decisions this past term was *Fitzgerald v. Barnstable School Committee* , decided Jan. 21. At issue was whether the federal law known as Title IX precluded a federal civil rights lawsuit asserting a claim of unconstitutional gender discrimination against a school district arising from alleged student-on-student sexual harassment.

Alito, in a unanimous opinion, held that Title IX does not preclude such a federal civil rights lawsuit brought under the provision known as Section 1983. In so ruling, the Supreme Court disapproved of a 3rd Circuit ruling from 1990. Senior Circuit Judge Ruggero J. Aldisert was the author of that decision, in which then-Chief Judge A. Leon Higginbotham Jr. and current Chief Judge Anthony J. Scirica joined.

The time for appeal in a federal False Claims Act lawsuit in which the federal government had chosen not to intervene as a party was the question the Supreme Court confronted in *United States ex rel. Eisenstein v. City of New York* . In a civil case in which the federal government is not a party, the time for appeal is ordinarily 30 days. In a civil case in which the United States is a party, the time for all parties to appeal is expanded to 60 days.

In the *Eisenstein* case, the Supreme Court, in a unanimous opinion by Thomas, ruled on June 8 that if the United States has chosen not to intervene in a federal False Claim Act suit, then the time to appeal is only 30 days. That ruling disapproved of a 3rd Circuit decision from December 2008 allowing a 60-day appeal period under those same circumstances. Ambro was the author of that 3rd Circuit decision, in which Senior Circuit Judges Joseph F. Weis Jr. and Franklin S. Van Antwerpen joined.

The third and final case in which the Supreme Court disapproved of a 3rd Circuit ruling last term was *Kennedy v. Plan Administrator* , an ERISA case presenting several rather obscure issues of federal pension plan law. The precise question on which the Supreme Court disagreed with the 3rd Circuit was whether a divorced spouse could waive pension plan benefits through a divorce decree that did not satisfy the formal requirements specified in federal law to constitute a "qualified domestic relations order." Souter's unanimous opinion for the Supreme Court answered that question "yes."

By contrast, the majority on a divided three-judge 3rd Circuit panel had answered that question "no" in a decision issued in 2005. Van Antwerpen wrote that decision, in which Becker had joined. Circuit Judge Julio M. Fuentes dissented, advocating a view that the Supreme Court ultimately found meritorious.

To summarize, the 3rd Circuit tied for the second best success rate for affirmances among all federal appellate courts in cases directly reviewed by the Supreme Court. And in cases involving conflicts expressly implicating the 3rd Circuit, the 3rd Circuit's decisions were approved of nearly as often as they were disapproved. In all, the 2008-2009 U.S. Supreme Court term demonstrates that the 3rd Circuit continues to perform admirably in deciding even the most complex cases. •

Howard J. Bashman *operates his own appellate litigation boutique in Willow Grove, Pa., and can be reached by telephone at 215-830-1458 and via e-mail at hjb@hjbashman.com. You can access his appellate blog at http://howappealing.law.com.*

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