Appellate Law

High Court Report Card: 3rd Circuit's Record in Cases With Circuit Splits

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Upon Further Review

In last month's column, I reported on the laudable 60 percent affirmance rate that the 3rd U.S. Circuit Court of Appeals achieved in the 2009-10 term in cases that reached the U.S. Supreme Court directly from the 3rd Circuit. This month's column examines the 3rd Circuit's record of success in an additional eight argued cases from last term arising from other courts that presented circuit splits expressly involving the 3rd Circuit.

For purposes of my analysis, a circuit split expressly involves the 3rd Circuit when the U.S. Supreme Court's opinion explains that the justices granted review in a case arising from another court to resolve a split that includes a ruling from the 3rd Circuit.

Although eight opinions that the Supreme Court issued last term state that the court granted review to resolve a conflict that included the 3rd Circuit, in one of those eight cases — *Wood v. Allen* — the court found it unnecessary to resolve the conflict in question. As a result, last term the U.S. Supreme Court issued a total of seven decisions that actually resolved circuit splits expressly implicating the 3rd Circuit. And in four of those seven cases, the Supreme Court sided with the 3rd Circuit's approach.

Beginning with the cases in which the 3rd Circuit's approach prevailed, in *Jones v. Harris Associates L.P.* , the Supreme Court determined what a plaintiff must prove to prevail on a claim for breach of fiduciary duty against an investment adviser to a mutual fund whose compensation is alleged to be too high. Justice Samuel A. Alito Jr.'s opinion for the court sided with the approach that the 3rd Circuit took in a per curiam opinion from 2002 in the case of *Krantz v. Prudential Investments Fund Management LLC* . Although the author of the 3rd Circuit's ruling in *Krantz* is not known, the panel consisted of then-Chief Judge Edward R. Becker and Circuit Judges Jane R. Roth and Marjorie O. Rendell.

Sometimes a plaintiff must amend his or her complaint to add a defendant against whom the plaintiff did not originally file suit. If a separate suit against the new defendant would be time-barred at the time the amendment is proposed, the trial court must decide whether the addition of the new defendant will "relate back" to the time the original complaint was filed for statute of limitations purposes. In *Krupski v. Costa Crociere* , the court granted review to decide when the addition of a new defendant will relate back to the lawsuit's original filing date for statute of limitations purposes. The court's ruling in *Krupski* sided with the approach that the 3rd Circuit took in its 2006 ruling in *Arthur v. Maersk Inc.* Circuit Judge D. Michael Fisher was the author of that 3rd Circuit ruling.

The remaining two cases in which the Supreme Court sided with the 3rd Circuit last term were both immigration cases. In *Kucana v. Holder* , the court held that federal appellate courts possess jurisdiction to review rulings of the Board of Immigration Appeals on motions to reopen removal proceedings. The Supreme Court's ruling in *Kucana* sided with the 3rd Circuit's 2008 decision in *Jahjaga v. Attorney General* , which was written by Senior Circuit Judge Leonard I. Garth.

Lastly on the positive side of the ledger, in *Carachuri-Rosendo v. Holder* , the Supreme Court ruled that an otherwise lawful permanent resident's second simple drug possession conviction does not necessarily constitute an "aggravated felony" that would preclude the person from applying for discretionary cancellation of removal. In so ruling, the court sided with the 3rd Circuit's decision from 2002 in *Gerbier v. Holmes* . Becker wrote the *Gerbier* decision.

Turning now to the three decisions in which the Supreme Court sided against the 3rd Circuit's approach, it deserves to be noted that two of these three cases are particularly noteworthy. First, in *Hertz Corp. v. Friend* , the Supreme Court held that the so-called "nerve center" test should be used to determine a corporation's "principal place of business" for diversity jurisdiction purposes. Unfortunately, in 1960, the 3rd Circuit rejected the "nerve center" test in favor of a "center of corporate activities" approach in a case captioned *Kelly v. U.S. Steel Corp.*

As I previously reported in the December 2009 installment of this column, the Supreme Court's ruling in *Mohawk Industries Inc. v. Carpenter* held that orders requiring the disclosure in discovery of materials alleged to be protected by the attorney-client privilege do not qualify for immediate appeal under the collateral order doctrine. The Supreme Court's ruling in *Mohawk* expressly disagreed with the 3rd Circuit's decision from 1997 in *In re Ford Motor Co.* , which held that a collateral order appeal could be taken to obtain review of an order requiring the disclosure in discovery of materials allegedly protected under the attorney-client privilege. Becker was the author of the 3rd Circuit's ruling in the *Ford Motor Co.* case.

Last and perhaps least, in *Graham County Soil and Water Conservation Dist. v. United States ex rel. Wilson* , the Supreme Court considered the scope of the federal False Claims Act's "public disclosure" bar, which deprives federal courts of jurisdiction over qui tam suits when the relevant information has already entered the public domain via an administrative report. In *Graham* , the court ruled that the "public disclosure" bar applied whether the disclosure came in a federal administrative report or in a state or local administrative report. The court's ruling thus disagreed with the 3rd Circuit's decision from 1997 in *United States ex rel. Dunleavy v. County of Delaware* . Roth was the author of that 3rd Circuit ruling.

To summarize, the U.S. Supreme Court in the just completed term sided with the 3rd Circuit's approach in four of the seven cases that reached the Supreme Court from courts other than the 3rd Circuit. The Supreme Court also sided with the 3rd Circuit's approach in three of the five cases that reached the Supreme Court directly from the 3rd Circuit. Thus, the 3rd Circuit's overall success rate before the U.S. Supreme Court last term was slightly above 58 percent, which is a very respectable average. •

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