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Home > High Court Report Card: How the 3rd Circuit Fared in the 2009-10 Term

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High Court Report Card: How the 3rd Circuit Fared in the 2009-10 Term

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Howard Bashman

Upon Further Review

The U.S. Supreme Court, in its just-completed term, issued a total of 72 signed opinions in argued cases. Five of those cases reached the Supreme Court directly from the 3rd U.S. Circuit Court of Appeals. In eight other argued cases that the Supreme Court decided in its recently completed term, the high court noted that it was resolving conflicts that involved the 3rd Circuit.

Given the abundance of material to discuss in this year's 3rd Circuit Report Card, my description of how the 3rd Circuit fared in the 2009-10 term will be divided into two parts. Today's column will review the outcomes of the cases that reached the

Supreme Court directly from the 3rd Circuit. My August 2010 column will discuss how the 3rd Circuit performed in the eight other argued cases that involved circuit splits expressly involving the 3rd Circuit.

In the five cases that reached the Supreme Court directly from the 3rd Circuit, the Supreme Court affirmed the 3rd Circuit three times and disagreed with the 3rd Circuit twice. The 3rd Circuit's 60 percent affirmance rate places ranks it third-best among all federal appellate courts. Moreover, the 3rd Circuit is one of seven federal appellate courts from which the Supreme Court decided five or more cases on the merits last term, and the 3rd Circuit is the only one of those seven federal appellate courts to have an affirmance rate of greater than 50 percent. Indeed, the second highest affirmance rate among federal appellate courts whose rulings the Supreme Court reviewed on the merits in five or more cases last term belongs to the 9th Circuit, which achieved a 27 percent affirmance rate.

The 3rd Circuit's most noteworthy affirmance of the just-concluded term issued in the case captioned *United States v. Stevens*. That case involved a First Amendment challenge to a federal statute that criminalized the commercial creation, sale or possession of certain depictions of animal cruelty. The en banc 3rd Circuit, by a vote of 10-3, had ruled that the law represented an unconstitutional restriction on free speech. Circuit Judge D. Brooks Smith was the author of the majority opinion, which issued in July 2008.

By a vote of 8-1, the Supreme Court affirmed in a decision issued April 20. Chief Justice John G. Roberts Jr. wrote the majority opinion agreeing that the challenged law was invalid under the First Amendment. Interestingly, the lone dissenter on the Supreme Court was former 3rd Circuit Judge Samuel A. Alito Jr.

The 3rd Circuit only had to wait one week to receive its next affirmance from the Supreme Court. On April 27, the Supreme Court issued its ruling in *Merck & Co. v. Reynolds*. The case consisted of a securities fraud lawsuit against the drugmaker Merck, which was being sued over allegations that it had knowingly misrepresented the heart-attack risks associated with its drug Vioxx. The trial court had dismissed the lawsuit as having been filed too late, after the applicable statute of limitations had expired.

The 3rd Circuit, in an opinion issued in September 2008, reversed the dismissal, concluding that the lawsuit had been filed within the time allowed under the so-called discovery rule applicable to lawsuits filed under the federal securities law statute in question. Circuit Judge Dolores K. Sloviter wrote the majority opinion on behalf of a divided

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three-judge 3rd Circuit panel.

The Supreme Court unanimously agreed with the 3rd Circuit's decision in *Merck*. Justice Stephen G. Breyer wrote the majority opinion, in which a total of six justices joined in full. Justices John Paul Stevens and Antonin Scalia (the latter joined by Justice Clarence Thomas) each issued opinions concurring in part and concurring in the judgment.

The 3rd Circuit achieved its third and final affirmance of the term on June 17, when the Supreme Court issued its decision in *Dillon v. United States*. The case arose as a challenge to the result of a criminal resentencing that occurred because of the decision of the U.S. Sentencing Commission to reduce the base offense level under the federal sentencing guidelines for crack cocaine offenses.

At issue was whether, in such a resentencing, a federal district court had to impose the lesser sentence that the guidelines as amended would dictate, or whether the district court could depart from the guidelines' result in light of the Supreme Court's ruling from 2005 in *United States v. Booker* that the guidelines were advisory rather than mandatory.

In a ruling that issued in June 2009, a unanimous three-judge 3rd Circuit panel held that *Booker* did not apply to resentencings based on the retroactive amendment to crack cocaine guidelines and, thus, the district court lacked authority to impose a sentence below the minimum amended sentencing guidelines range. Circuit Judge Julio M. Fuentes was the author of the 3rd Circuit's ruling in *Dillon*.

The Supreme Court affirmed the 3rd Circuit's ruling in *Dillon* by a vote of 7-1, with Alito not participating. Justice Sonia Sotomayor issued the majority opinion. Stevens was the lone dissenter.

The Supreme Court's 2009-10 term did not start off on a positive note for the 3rd Circuit, as on Dec. 8 — the very first day of the term on which the Supreme Court issued signed opinions — the Supreme Court vacated and remanded a ruling of the 3rd Circuit in a case captioned *Beard v. Kindler*.

The case arose on federal habeas corpus review of a Pennsylvania state court conviction. The question presented was whether Pennsylvania's so-called fugitive disentitlement doctrine, whereby a fugitive from justice is not entitled to have his or her post-verdict motions resolved on the merits, constituted an adequate, independent state ground for denying federal habeas corpus review.

In an opinion written by Chief Judge Theodore A. McKee that issued in September 2008, the 3rd Circuit had answered that question "no," because Pennsylvania courts have discretion on a case-by-case basis whether to apply or not apply the doctrine. By a vote of 8-0, with Alito not participating, the Supreme Court, in an opinion by Roberts, held that a state procedural rule is not automatically inadequate under the adequate state ground doctrine — and therefore unenforceable on federal habeas review — because the state rule is discretionary rather than mandatory.

The second and final opinion in which the Supreme Court disagreed with the 3rd Circuit during the 2009-10 term issued on June 17 in a case captioned *Schwab v. Reilly*. The case involves a rather esoteric issue of bankruptcy law arising under Chapter 7 of the Bankruptcy Code.

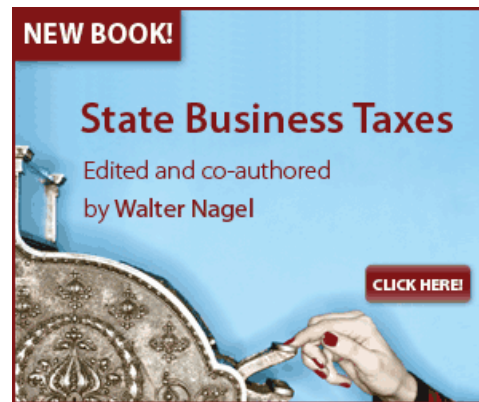
When a debtor files for bankruptcy under Chapter 7, the debtor's assets become property of the bankruptcy estate, subject to the debtor's right to reclaim certain property as exempt. The question presented in the case was whether an interested party must object to a claimed exemption in order to preserve the estate's ability to recover value in the asset beyond the dollar value that the debtor expressly declared exempt.

The 3rd Circuit, in an opinion that Circuit Judge Thomas L. Ambro issued in July 2008, ruled that such an objection was necessary. The Supreme Court, by a vote of 6-3, disagreed in an opinion by Thomas.

The 60 percent approval rating that the 3rd Circuit achieved from the Supreme Court in cases that were accepted for review directly from the 3rd Circuit is a remarkable record of achievement. Next month's column will examine whether the 3rd Circuit fared as favorably in cases originating from other circuits where the 3rd Circuit was expressly involved in the division of authority that caused the Supreme Court to grant review. And next month's column will conclude with an examination of the 3rd Circuit's overall success rate for the 2009-10 Supreme Court term. •

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