Justice Sotomayor's First Opinion May Impact Local Practice

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On Dec. 8, the U.S. Supreme Court issued its first four opinions in cases argued from the October 2009 term. In addition, the court's newest justice, Sonia Sotomayor, was the author of the very first opinion that the court announced this term. Sotomayor's opinion is noteworthy, among other reasons, because it is likely to have a direct impact on appeals pending before both Philadelphia's 3rd U.S. Circuit Court of Appeals and the Pennsylvania state appellate courts.

As is typical for appeals decided early in a new U.S. Supreme Court term, Sotomayor's opinion for the court in *Mohawk Industries Inc. v. Carpenter* was essentially unanimous. Every justice except Clarence Thomas joined the opinion in full, while Thomas joined the opinion in part and concurred in the judgment.

The appeal that the Supreme Court decided in *Mohawk* arose from a dispute between the parties over whether information that defendant Mohawk claimed was protected from disclosure under the attorney-client privilege should be turned over to the plaintiff in discovery. After the federal district court rejected Mohawk's claim of privilege and ordered that the information be turned over, Mohawk sought to take an immediate appeal to the 11th U.S. Circuit Court of Appeals in Atlanta.

Mohawk asserted that an immediate appeal was proper, despite the fact that the case remained pending before the district court, under the so-called "collateral order" doctrine, whereby otherwise interlocutory orders are treated as final for purposes of appeal if they are collateral to the merits of the case and too important to be denied immediate review. To qualify as a collateral order, an order must satisfy three criteria: it must be separate from the merits; the question involved must be of great importance, not just to the parties but also to the judicial system in general; and the matter at issue must be incapable of being remedied if review is postponed until after a final judgment exists in the case.

Before the U.S. Supreme Court's recent ruling in the *Mohawk* case, federal appellate courts had been divided over whether orders requiring the production of information allegedly covered by the attorney-client privilege could be immediately appealed under the collateral order doctrine. The 3rd Circuit was among those courts that permitted immediate collateral order review, in accordance with a ruling that then-Circuit Judge Edward R. Becker wrote for a unanimous three-judge panel in 1997 in a case captioned *In re Ford Motor Co.*

Two years later, in the case of *Ben v. Schwartz* , the Supreme Court of Pennsylvania, relying heavily on Becker's ruling in *In re Ford Motor Co.* , ruled unanimously that orders requiring that allegedly privileged material be turned over to the opposing party in discovery were immediately appealable under the collateral order doctrine in Pennsylvania state courts. Accordingly, for more than a decade, lawyers practicing before the state and federal appellate courts in Pennsylvania have had the ability to seek immediate appellate review of trial court orders requiring that allegedly privileged material be turned over to the opposing party in discovery.

As a result of the U.S. Supreme Court's ruling last week in the *Mohawk* case, however, immediate appellate review of such orders will no longer be available in the federal judicial system, and the Pennsylvania appellate courts may soon elect to follow course by similarly curtailing the availability of collateral order review. Sotomayor's opinion of the court in *Mohawk* reasons that because an erroneous order requiring the production of privileged material may ordinarily be remedied, following the entry of a final judgment, by an order granting a new trial at which the privileged material would not be admissible, collateral order review is not necessary to vindicate the privilege. The *Mohawk* opinion also makes clear that exceptions to the final order requirement for appellate review must be very narrowly construed.

Aside from reporting that Sotomayor is a frequent and persistent questioner at oral argument — which comes as no surprise to anyone who had seen her on the bench in the 2nd Circuit — the news media that regularly covers the Supreme Court has not had much to report about the court's newest justice thus far this term. It was therefore an unsurprising overstatement when a Bloomberg News report on the *Mohawk* case carried the headline "Sotomayor's First High Court Opinion Produces Business Defeat." The *Mohawk* decision was essentially unanimous, and one cannot seriously maintain that the entire U.S. Supreme Court is anti-business.

Here in our local geographic region, Sotomayor's first U.S. Supreme Court opinion is quite significant for what it actually holds. No longer will a party whose claim of attorney-client privilege is rejected as to materials being sought in discovery be entitled to an immediate appeal as of right in federal court under the collateral order doctrine. And because the Pennsylvania state appellate courts tend to follow the rulings of federal appellate courts in deciding if and when collateral order review will be available in state court, the Supreme Court of Pennsylvania may decide, sooner or later,

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to overrule its decision in *Ben v. Schwartz* now that the U.S. Supreme Court has overruled the 3rd Circuit's ruling in *In re Ford Motor Co* .

For lawyers who handle cases pending in federal courts or in the state courts of Pennsylvania, Sotomayor's first U.S. Supreme Court opinion is not important because it establishes that she is anti-this or pro-that. Rather, the opinion is important because it definitely will have an impact on the availability of collateral order review in the 3rd Circuit and may very likely have an impact on the availability of collateral order review in Pennsylvania state appellate courts. •

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