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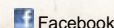
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Howard Bashman

The U.S. Supreme Court, in its just-completed term, issued a total of 75 signed opinions in argued cases. Five of those cases reached the Supreme Court directly from the 3rd U.S. Circuit Court of Appeals. In seven 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 2010-11 term will be divided into two parts. Today's column will review the outcomes of the cases that reached the U.S. Supreme Court directly from the 3rd Circuit. My August column will discuss how the 3rd Circuit performed in the seven other argued cases that involved circuit splits expressly involving the 3rd Circuit.

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the Supreme Court decided five or more cases on the merits last term, and the 3rd Circuit is tied for the second best affirmance rate among those six.

Three of the five cases that reached the Supreme Court directly from the 3rd Circuit were relatively newsworthy. In *Bruesewitz v. Wyeth*, the Supreme Court ruled 6-2, with Justice Elena Kagan recused, that the National Childhood Vaccine Injury Act of 1986 pre-empts all state law design defect claims against vaccine manufacturers brought by plaintiffs seeking compensation for injury or death caused by a vaccine's side effects. Justice Antonin Scalia wrote the majority opinion. Justice Sonia Sotomayor issued a dissenting opinion, in which Justice Ruth Bader Ginsburg joined.

In so ruling, the Supreme Court affirmed the decision that a three-judge 3rd Circuit panel had issued in 2009. Judge D. Brooks Smith wrote the 3rd Circuit's decision, in which now-Chief Judge Theodore A. McKee and Senior Circuit Judge Joseph F. Weis Jr. joined.

Unfortunately, in the other two noteworthy cases that reached the Supreme Court from the 3rd Circuit this term, the Supreme Court reversed the 3rd Circuit's rulings. The Supreme Court's decision in *Bond v. United States* was noteworthy not only because it involved whether someone charged with a federal criminal offense could invoke the 10th Amendment to the U.S. Constitution to challenge Congress' power to treat the matter as a federal offense, but also due to the provocative nature of the underlying facts.

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According to the Supreme Court's opinion in *Bond*, the case involved "a bitter personal dispute" between a woman, Carol Anne Bond, and her former close friend, who had become pregnant allegedly as the result of having had sexual relations with Bond's husband. Thereafter, Bond is alleged to have begun a campaign of retaliatory acts against her former friend, which included seeking to harm the former friend by exposing her to dangerous chemical substances. After the former friend was allegedly injured by some of those chemicals, federal law enforcement authorities charged Bond under a federal criminal statute enacted pursuant to an international treaty known as the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction.

On appeal to the 3rd Circuit, Bond sought to challenge the federal law under which she had been indicted as beyond Congress' power as limited by the 10th Amendment. The 3rd Circuit, however, held that Bond lacked standing to bring such a 10th Amendment challenge. Circuit Judge Thomas L. Ambro wrote the 3rd Circuit's ruling, in which Circuit Judges Marjorie O. Rendell and Kent A. Jordan joined.

The U.S. Supreme Court, in an opinion by Justice Anthony M. Kennedy, unanimously disagreed and held that Bond did have standing to raise a 10th Amendment challenge to the federal law under which she was charged with a crime. The Supreme Court, however, did not address whether the law in fact exceeded Congress' powers as limited by the 10th Amendment. Rather, that interesting question remains open for the 3rd Circuit to address on remand.

In *FCC v. AT&T Inc.*, the question presented in the Supreme Court was whether the "personal privacy" exemption for a federal governmental agency's declining to make documents available under the Freedom of Information Act could apply where that exemption was being invoked by a corporation. The 3rd Circuit had answered "yes," thereby allowing AT&T to invoke the "personal privacy" exemption to oppose the FCC's release of documents pertaining to AT&T in response to a third-party's request for the documents under the Freedom of Information Act. Circuit Judge Michael A. Chagares wrote the 3rd Circuit's ruling, in which Circuit Judge Julio M. Fuentes and Senior Circuit Judge A. Wallace Tashima, sitting by designation from the 9th Circuit, joined.

In an opinion for a unanimous U.S. Supreme Court (with Kagan recused) that was widely quoted for its clever wordsmanship, Chief Justice John G. Roberts Jr. disagreed with the 3rd Circuit's reasoning and held that AT&T, as a corporation, had no right to "personal privacy" under the Freedom of Information Act.

The 3rd Circuit's other affirmance this term came in a criminal case involving mandatory minimum sentencing for drug offenses involving the use of a firearm. In *Abbott v. United States*, the question presented was whether the mandatory minimum five-year prison sentence for committing a drug offense using a firearm was merely intended to produce a total sentence on all counts of conviction of at least five years or whether the statute necessitated an additional five years of imprisonment added on to whatever other sentence was being imposed on the remaining counts of conviction.

The 3rd Circuit held that the statute imposing a five-year mandatory minimum sentence for drug offenses involving the use of a firearm mandated that an additional five-year sentence be imposed beyond whatever sentence was being imposed for the other counts of conviction. In other words, the five-year sentence was to run consecutively, rather than concurrently. Circuit Judge Thomas M. Hardiman wrote the 3rd Circuit's ruling, in which Circuit Judges Dolores K. Sloviter and Anthony J. Scirica joined. Ginsburg wrote the Supreme Court's unanimous opinion (with Kagan recused) affirming the 3rd Circuit's decision in *Abbott*.

The 3rd Circuit's final reversal this term came in the case captioned *Borough of Duryea v. Guarnieri*. At issue in the case was whether a governmental employer's allegedly retaliatory actions against an employee could give rise to liability under the First Amendment's Petition Clause only if the employee's petition relates to a matter of public concern. In a non-precedential opinion that the 3rd Circuit issued in 2010, the 3rd Circuit ruled that the employee's petition did not have to relate to a matter of public concern in order for the governmental employer's allegedly retaliatory actions to give rise to liability. Sloviter wrote that non-precedential opinion, in which Fuentes and Hardiman joined.

By a vote of 8-1, the U.S. Supreme Court disagreed. Once again, it was Kennedy who wrote the opinion reversing the 3rd Circuit. In accordance with the approach that every federal appellate court other than the 3rd Circuit had previously taken, the Supreme Court ruled that only retaliatory acts in response to petitions concerning matters of public concern could give rise to public employer liability.

Although the 40 percent affirmance rate that the 3rd Circuit achieved in cases that reached the Supreme Court directly from the 3rd Circuit is admirable, next month's column will explain that the Supreme Court sided with the 3rd Circuit's approach in six of the seven cases presenting conflicts that expressly involved the 3rd Circuit but that reached the U.S. Supreme Court from another federal appellate court. Thus, the 3rd Circuit's overall rate of success this term, in which the Supreme Court agreed with the 3rd Circuit in eight out of 12 cases, is remarkably good.

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