The Legal Intelligencer
THE OLDEST LAW JOURNAL IN THE UNITED STATES

Upon Further Review

The 3rd Circuit's Report Card From the U.S. Supreme Court - Part II

Howard Bashman | Contact | All Articles
The Legal Intelligencer | August 09, 2011


Howard Bashman

In last month's column, I reported that the U.S. Supreme Court agreed with the outcomes that the 3rd U.S. Circuit Court of Appeals arrived at in two of the five cases that reached the Supreme Court directly from the 3rd Circuit in the recently completed 2010-11 term. Today's column examines how the 3rd Circuit fared last term in another seven cases that did not originate from the 3rd Circuit but in which the Supreme Court expressly noted that it was resolving conflicts that involved the 3rd Circuit.

In those other seven cases, the 3rd Circuit compiled a remarkable success rate, as the Supreme Court agreed with the 3rd Circuit's side of a circuit split six times and only disagreed with the 3rd Circuit once. Notably, the one instance in which the Supreme Court did not agree with the 3rd Circuit's approach came in an opinion by Justice (and former 3rd Circuit Judge) Samuel A. Alito Jr., who ruled in favor of a state prisoner who was seeking to establish the timeliness of his federal habeas corpus action.

Now, on to the specifics, beginning with the cases in which the Supreme Court approved of the 3rd Circuit's rulings.

RELATED ITEMS

- For Whom the Post-Judgment Motion Tolls:
- Defining and Identifying Greatness in Appellate Advocacy

In *Tapia v. United States,* the Supreme Court considered whether a federal district judge may lengthen a criminal defendant's sentence of imprisonment solely to make the defendant eligible to participate in a drug treatment program while in prison. The Supreme Court unanimously answered "no," thereby agreeing with the result that the 3rd Circuit reached in 2007 in United States v. Manzella. Judge Thomas L. Ambro wrote the 3rd Circuit's opinion in Manzella, in which Circuit Judge Marjorie O. Rendell and District Judge Michael M. Baylson, sitting by designation, joined.

In *Erica P. John Fund Inc. v. Halliburton Co.,* the Supreme Court unanimously ruled that securities fraud plaintiffs need not prove loss causation to obtain class certification. That decision, which issued on June 6, 2011, agreed with the 3rd Circuit's ruling issued on March 29, 2011, in In re DVI Inc. Securities Litigation. Circuit Judge Anthony J. Scirica wrote the 3rd Circuit's opinion in DVI, in which Ambro and District Judge John E. Jones III, sitting by designation, joined.

Not one but two proposed class actions gave rise to the Supreme Court's ruling in *Smith v. Bayer Corp.* After a federal district court based in Minnesota denied a motion for class certification in a suit concerning Bayer's sale of

an allegedly hazardous prescription drug called Baycol, the plaintiffs in a similar case pending in a West Virginia state court sought class certification of a suit brought on behalf of West Virginia-based Baycol purchasers. At Bayer's request, the Minnesota-based federal district court issued an injunction that prohibited the West Virginia state court from considering the class certification motion.

In reviewing the 8th Circuit's affirmance of that injunction, the Supreme Court held that the Minnesota-based federal district court had exceeded its authority in issuing an injunction to prevent the West Virginia state court from considering whether to grant class certification. Among other things, the Supreme Court ruled that the plaintiff who sought class certification in West Virginia state court was not a party to the federal suit in Minnesota district court because the West Virginia class representative was not a named plaintiff in the Minnesota case and class certification had been denied in the Minnesota case. As a result, the Supreme Court recognized, the Minnesota decision did not bind nonparties.

In so ruling, the Supreme Court unanimously agreed with the 3rd Circuit's decision from 1998 in I*n re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, where the 3rd Circuit held that individuals who would have been class members if class certification had been granted cannot be bound by the result in a case in which class certification was denied. Circuit Judge Edward R. Becker wrote the General Motors opinion, in which Circuit Judge Carol Los Mansmann and District Judge William M. Hoeveler, sitting by designation, joined.

In P*epper v. United States,* the Supreme Court ruled by a vote of 7-1, with Justice Elena Kagan not participating, that when a defendant's sentence has been set aside on appeal, a district court at resentencing may consider evidence of the defendant's post-sentencing rehabilitation to support a downward variance from the advisory federal sentencing guidelines range.

In *Pepper*, the Supreme Court resolved a circuit split in favor of the approach that the 3rd Circuit adopted in 2006 in *United States v. Lloyd*. Senior Circuit Judge Morton I. Greenberg wrote the opinion in *Lloyd*, in which Circuit Judges Dolores Sloviter and Michael A. Chagares joined.

The Supreme Court's decision in *Pepper* appears to allow even greater consideration of post-sentencing rehabilitation than the 3rd Circuit's ruling in Lloyd would have allowed. But because the circuit split implicated in Pepper involved those federal appellate courts that allowed no consideration of post-sentencing rehabilitation and those that allowed such evidence to be considered, I have classified Pepper as another instance in which the Supreme Court approved of the 3rd Circuit's approach.

In *Fowler v. United States,* the Supreme Court considered the meaning of a federal witness tampering statute that made it a crime "to kill another person, with intent to ... prevent the communication by any person to a law enforcement officer ... of the United States" of "information relating to the ... possible commission of a Federal offense."

The Supreme Court's ruling in Fowler approved in large measure of the approach that the 3rd Circuit took in 1997 in *United States v. Bell.* Then-Circuit Judge Alito wrote the opinion in Bell, in which Greenberg and Senior Circuit Judge Collins J. Seitz joined. Because *Fowler* seems to come down on the same side of a circuit conflict as Bell, it is noteworthy that Alito was one of two justices who dissented from the Supreme Court's ruling in Fowler.

In *Schindler Elevator Corp. v. United States ex rel. Kirk,* the Supreme Court granted review to decide whether a federal agency's written response to a Freedom of Information Act request for records constitutes a "report" within the meaning of the False Claims Act's public disclosure bar. In answering that question in the affirmative by a 5-3 vote (with Kagan recused), the Supreme Court sided with the 3rd Circuit's 1999 ruling in *United States ex rel. Mistick PBT v. Housing Authority of Pittsburgh*. Alito was the author of that 3rd Circuit's ruling, in which Senior Circuit Judge Ruggero J. Aldisert joined. Then-Chief Judge Becker dissented from the 3rd Circuit's ruling in Mistick. Alito was also among the five-justice majority in Schindler Elevator.

The one instance last term when the Supreme Court did not agree with the 3rd Circuit's approach in a case that reached the high court from another circuit occurred in *Wall v. Kholi.* In *Wall*, the Supreme Court considered whether a state prisoner's state court motion for leniency, seeking a reduced sentence, has the effect of tolling the one-year limitations period for filing a timely federal habeas corpus action. The Supreme Court answered "yes," thereby disagreeing with the result that the 3rd Circuit reached in 2007 in Hartmann v. Carroll.

Senior Circuit Judge Jane R. Roth wrote the 3rd Circuit's decision in Hartmann, in which Circuit Judge Maryanne Trump Barry and District Judge Joseph E. Irenas joined. Alito wrote the Supreme Court's decision in Wall on behalf of a nearly unanimous court.

In the 2010-11 term, the Supreme Court agreed with the 3rd Circuit in eight out of 12 cases, which is a remarkably good rate of success. This nearly 67 percent approval rate includes both the six out of seven cases from other circuits in which the Supreme Court approved of the 3rd Circuit's approach and the two affirmances in the five cases

that reached the Supreme Court last term directly from the 3rd Circuit.

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 Web log at http://howappealing.law.com*