

RECENT DEVELOPMENTS IN APPELLATE
ADVOCACY

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I. INTRODUCTION

The appellate courts have undergone a number of important changes this year. One of the most significant changes was the appointment of Justice Sonya Sotomayor to the U.S. Supreme Court. In addition, a number of important decisions were issued by that Court, including the landmark *Caperton v. Massey Coal Company*¹ decision on judicial recusal. There have been important changes in appellate procedure as well. A new method for measuring days under the Federal Rules of Appellate Procedure has been adopted. Important appellate deadlines have been altered. A new Federal Rule of Appellate Procedure 12.1 standardizes the process for obtaining a remand for so-called indicative rulings by district courts during a pending appeal. This article provides the appellate practitioner with a survey of these important substantive and procedural changes.

II. OBSERVATIONS ON THE CHANGE IN THE U.S. SUPREME COURT

Any change in personnel on the nation's highest Court will foster speculation about how the new justice's approach to the law will affect the future trend the Court will take both in terms of political issues and in terms of its administrative approach to handling cases. The common wisdom regarding the replacement of Justice Souter with Justice Sotomayor is that the change will have little impact on the Court's jurisprudence, because with the appointment of Justice Sotomayor, a moderate liberal has replaced a moderate liberal.² A brief comparison of Justice Souter's term on the bench with the future predictions for Justice Sotomayor, based on her biography and professional career, suggests that the change may have a more profound impact on the Court, although that impact may be more evolutionary than revolutionary.

A. *Justice David Souter's Legacy*

Although Justice Souter was born in Melrose, Massachusetts, in 1939, he spent most of his later childhood and adolescent years in New Hampshire.³ After finishing high school, he attended Harvard College, graduating in 1961 magna cum laude and as a member of Phi Beta Kappa.⁴ He attended

1. 129 S. Ct. 2252 (2009).

2. See, e.g., Thomas Strode, *Senate Confirms Sotomayor*, 68-31, BAPTIST PRESS, Aug. 6, 2009, available at <http://www.sbc Baptist Press.org/bpnews.asp?id=31027>.

3. Tinsley E. Yarbrough, DAVID HACKETT SOUTER: TRADITIONAL REPUBLICAN ON THE REHNQUIST COURT 6 (2005).

4. *Id.*

Magdalen College in Oxford as a Rhodes Scholar, completing his master's degree.⁵ He studied law at Harvard Law School, graduating in 1966.⁶ After law school, Justice Souter served as attorney general of New Hampshire, associate justice of the Superior Court of New Hampshire and associate justice of the New Hampshire Supreme Court. In 1990, President H.W. Bush appointed him to the U.S. Supreme Court to fill the seat left by the "liberal lion," William Brennan.⁷

Justice Souter was regarded as an outsider on the U.S. Supreme Court. Former White House correspondent for National Public Radio, Linda Greenhouse, attributes his tendency to reclusiveness to his desire not to become a "creature of Washington," or to put it more clearly, to avoid becoming a captive of the privilege and power of his position on the Court.⁸ This mind set was, perhaps, responsible not only for his social independence, but also his intellectual independence from the factions that characterized the Court during his term.

Although it is often said that Justice Souter's record on the Court disappointed President Bush, who intended to appoint a conservative, the suggestion that Justice Souter moved from right to left is not wholly true. As Kermit Roosevelt notes,⁹ Justice Souter, who was a traditional Republican, simply maintained his judicial philosophy. The old Republican party had its roots in the Civil War and Reconstruction. By the time he resigned, he was serving with seven Republican appointees at a time when the Republican Party itself had moved steadily to the right. Unlike the traditional party, the new Republican Party "depends heavily on appeals to racially and politically conservative white southerners and religious fundamentalists for its success in presidential elections."¹⁰ By 2009, the Republican Party of the 1990s no longer existed.

Justice Souter's steadfast adherence to his traditional Republican background was responsible for a certain stability in his jurisprudence, but that stability is also attributable to his devotion to history. History and devotion to precedent serve as a stabilizing influence in the law. As Greenhouse observes, Justice Souter felt that history was a critical consideration in the decision making process.¹¹ He often countered Justice Scalia's originalist

5. *Id.*

6. *Id.* at 10.

7. Adam Liptak, *Souter's Exit Opens Door for More Influential Justice*, N.Y. TIMES, May 7, 2009.

8. Linda Greenhouse, *David H. Souter: Justice Unbound*, N.Y. TIMES, May 2, 2009.

9. Kermit Roosevelt, *Justice Cincinnatus*, SLATE, May 1, 2009.

10. Yarbough, *supra* note 3, at 259. Yarbough notes that Souter's great-great-grandfather had played a role in securing Lincoln's nomination and other ancestors worked in the Underground Railroad.

11. Greenhouse, *supra* note 8.

ideas with his own citations to the Constitution's historical origins.¹² His dissents often showed that constitutional history and text supported a different view of the Constitution. By grounding his decisions in the Constitution, he provided a sound foundation for the opinions generated by the more liberal wing of a deeply divided Court.¹³

An example of his attention to the historical context of the Court's decisions is his dissent in *Meredith v. Jefferson County Board of Education*,¹⁴ which invalidated the effort by Kentucky public schools to prevent resegregation by adopting a modestly-race conscious student assignment plan. The majority held that there was no compelling state interest in preserving the state's progress toward integration. Justice Souter felt that history compelled a different result.¹⁵ Similarly, his dissents in the so-called federalism cases recognized that Congress can properly exercise its power to remedy discrimination that is tolerated by states. His questions during the oral argument in *Northwest Austin Municipal Utility District No. 1 v. Holder*,¹⁶ a case that dealt with the potential dismantling of the 1965 Voting Rights Act, showed his thorough understanding of the interplay of race and politics in Southern states over the decades, and how that history formed the critical context in which the Act was passed and reauthorized.¹⁷

Justice Souter's respect for precedent paralleled his devotion to history. Whether he agreed with the original decision in *Roe v. Wade*, in the 1992 abortion cases *Planned Parenthood of Pennsylvania v. Casey*¹⁸ and *Gonzales v. Carhart*,¹⁹ he voted to uphold the core holdings of *Roe*. He did so because of his deep respect for the legal process and the Court's prior decisions.²⁰ As Stanford Professor Lawrence Lessig has observed, "[h]is fidelity was thus not just to the meaning of the Constitution, but also to the role of a judge, and the institution of the court on which he served."²¹

He was not immune to change, however. As Greenhouse notes, Souter felt that constitutional change "comes about because judges evaluate signif-

12. Aziz Huq, *Justice Souter's Jurisprudence*, NATION, May 1, 2009.

13. See, e.g., Edward Lazarus, CLOSED CHAMBERS: THE RISE, FALL AND FUTURE OF THE MODERN SUPREME COURT at 475-76 (1999); Edward Lazarus, *The Judgment on Justice Souter*, N.Y. TIMES ROOM FOR DEBATE BLOG, May 1, 2009.

14. 551 U.S. 701 (2007).

15. Greenhouse, *supra* note 8. Greenhouse observed that Justice Souter viewed the majority's opinion, which held that the "once-segregated city lacked any 'compelling interest' in preserving its progress toward integration as profoundly ahistorical and as a troubling signal for the court's future approach to government actions that touched on race." *Id.*

16. 129 S. Ct. 2504 (2009).

17. Sherrilyn Ifill, The Root.com.

18. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

19. 550 U.S. 124 (2007).

20. Huq, *supra* note 12.

21. Lazarus, *The Judgment on Justice Souter*, *supra* note 13.

icant facts differently” or they “discover some relevance to a constitutional rule where earlier judges saw none.”²² As an example, he cited *Plessy v. Ferguson*,²³ which in 1896 permitted states to provide “separate but equal” educational opportunities to students, and *Brown v. Board of Education*,²⁴ decided fifty-eight years later, which deplored them.

With Justice Souter’s resignation, the Court will no longer have a sitting justice with experience as a state court judge. Because many of the Court’s cases come from the state courts, it is important that the Court have a justice who knows how the record is shaped in the state courts, which have different civil and criminal practice rules. Perhaps more important, there will no longer be a justice on the Court who understands the interplay between the state courts and the legislature and the pressures on state court judges, who are often elected and struggle to maintain their impartiality and independence.²⁵

On the other hand, while some of the Court’s areas of expertise will disappear with the resignation of Justice Souter, it will be replaced by other new areas of expertise with the appointment of Justice Sotomayor.

B. *Appointment of Justice Sonia Sotomayor*

When the Senate confirmed the appointment of Justice Sonia Sotomayor to the Supreme Court on August 6, 2009, she became the first justice nominated by a president of the Democratic Party in fifteen years.²⁶ But her appointment can be seen as groundbreaking for many other reasons, including the fact that she is the first justice of Hispanic descent. Indeed, her background combines a number of unique features that include living with a chronic illness, being a native Spanish speaker, and having parents who hailed from a U.S. territory.

Justice Sotomayor was born in the Bronx, New York, in 1954, to parents who emigrated from Puerto Rico. After her father died in 1965, she was raised by her mother.²⁷ She graduated from Princeton, summa cum laude, and from Yale Law School, where she was an editor of the *Yale Law Journal*. Before her appointment to the bench, she worked as an assistant district attorney and was in private practice. She then served on the U.S. District Court for the Southern District of New York. From the district

22. Greenhouse, *supra* note 8.

23. 163 U.S. 537 (1896).

24. 347 U.S. 483 (1954).

25. Sherrilyn A. Ifill, *After Souter*, BALT. SUN, May 4, 2009.

26. Charlie Savage, *Sotomayor Confirmed by Senate*, 68–31, N.Y. TIMES, Aug. 6, 2009. See, e.g., *Caperton v. Massey Coal Co.*, 129 S. Ct. 2252 (2009).

27. Office of the Press Secretary, White House, *Background on Sotomayor*, May 26, 2009, available at http://www.whitehouse.gov/the_press_office/Background-on-Judge-Sonia-Sotomayor/.

court, she was appointed to the Second Circuit, where she served for over ten years.²⁸

During her term on the district court and appellate bench, Justice Sotomayor issued a number of important rulings. In *Silverman v. Major League Baseball Player Relations Committee, Inc.*,²⁹ Justice Sotomayor held that baseball club owners had engaged in unfair labor practices and enjoined them from unilaterally eliminating salary arbitration for certain reserve players, competitive bargaining for certain free agents, and the anticollusion provision of their collective bargaining agreement. In doing so, she recognized that professional sports provides a unique context for collective bargaining: "On the one hand, the talent of an individual athlete can provide him with extraordinary bargaining power, but on the other hand, a player may sell his talent only to a circumscribed group of owners, who have something akin to monopoly power in the sport at issue."³⁰ She also demonstrated that she was conscious of the unique public interest created by the baseball player's strike:

This strike has captivated the public's attention, given the popularity of the sport as well as the protracted nature and well-documented bitterness of the strike. Thus, this strike is about more than just whether the Players and Owners will resolve their differences. It is also about how the principles embodied by federal labor law operate. In a very real and immediate way, this strike has placed the entire concept of collective bargaining on trial. It is critical, therefore, that the Board ensure that the spirit and letter of federal labor law be scrupulously followed. If the Board is unable to enforce the NLRA, public confidence in the collective bargaining process will be permanently and severely undermined. Issuing the injunction before Opening Day is important to ensure that the symbolic value of that day is not tainted by an unfair labor practice and the NLRB's inability to take effective steps against its perpetuation.³¹

Justice Sotomayor also issued several significant rulings pertaining to the media. In *Dow Jones v. Department of Justice*,³² she ruled that former White House counsel Vincent Foster's suicide note must be disclosed due to the public interest in viewing the actual document. In *Tasini v. New York Times Co.*,³³ she held that publishers do not violate the Copyright Act when they place the contents of their magazines on CDs without securing the consent of the individual authors of the stories and articles in the magazine.

28. Federal Judicial Center, <http://www.fjc.gov/servlet/tGetInfo?jid=2243>.

29. 880 F. Supp. 246 (S.D.N.Y. 1995).

30. *Id.* at 255.

31. *Id.* at 259.

32. 880 F. Supp. 145 (S.D.N.Y. 1995).

33. 972 F. Supp. 804 (S.D.N.Y. 1997).

Her work on the Second Circuit has been similarly noteworthy and has led to her being labeled a political centrist.³⁴ In *Center for Reproductive Law & Policy v. Bush*,³⁵ Justice Sotomayor authored the court's opinion, in which it held that the government could constitutionally limit the distribution of federal funds to organizations that did not promote abortions. The court based its decision primarily on *Rust v. Sullivan*,³⁶ which held that "the government is free to favor the anti-abortion position or the pro-choice position, and can do so with public funds."³⁷

In several decisions, she championed individual constitutional rights. For example, she wrote a strong dissent in *N.G. & S.G. v. Connecticut*.³⁸ In that case, the court held that the initial strip searches of two juvenile girls did not violate their Fourth Amendment rights. Justice Sotomayor found that the strip searches of "emotionally troubled" children, who had never been charged with a crime, were illegal. She observed that children are not only more susceptible to influence and psychological damage than adults, but that officials are frequently dealing with children who may themselves have been subject to sexual abuse or who may be otherwise more vulnerable mentally and emotionally than other youths their age.³⁹ The dissent rejected the government's argument that these very intrusive strip searches were necessary to discover contraband.

Justice Sotomayor filed another dissenting opinion in a case filed by a police officer who claimed that he was terminated in violation of his First Amendment rights. In *Pappas v. Giuliani*,⁴⁰ the Second Circuit held that the officer's rights were not violated when he was terminated for anonymously disseminating racist antiblack and anti-Semitic materials. Justice Sotomayor's dissent relied on the fact that the officer sent the materials from home anonymously on his own time, thereby severing any connection between the speech and the police department. Justice Sotomayor thought it important that the officer did not exercise policymaking authority or engage in public contact, and that there was no evidence that the officer's acts disrupted the workplace. She concluded that the decision "lays down too broad a rule regarding the government's ability to disqualify an indi-

34. See, e.g., Terry Carter & Stephanie Francis Ward, *The Lawyers Who May Run America*, ABA J., Nov. 1, 2008; Edward Adams, *Who Will Replace Justice Souter?* ABA J., Apr. 30, 2009; Joan Biskupic, *The Next President Could Tip High Court*, USA TODAY, July 19, 2009; Mark Sherman, *Sotomayor: A Liberal Record—But Not Entirely So*, ASSOC. PRESS, May 26, 2009.

35. 304 F.3d 183 (2d Cir. 2002).

36. 500 U.S. 173 (1991).

37. *Center for Reproductive Law & Policy*, 304 F.3d at 198.

38. 382 F.3d 225 (2d Cir. 2004).

39. *Id.* at 225.

40. 290 F.3d 143 (2d Cir. 2002).

vidual from public employment based on the expression of an unpopular viewpoint.”⁴¹

C. *Debate Surrounding Justice Sotomayor’s Confirmation Focused Attention on the Lack of Judicial Diversity on the Federal Bench*

The appointment of Justice Sotomayor brought into focus the fact that the Supreme Court, like the federal judiciary generally, lacks sufficient diversity. Although most state courts have made tremendous strides over the last two decades in providing opportunities for women and minorities to serve on the bench, the same cannot be said of the federal courts. Some contend that the lack of diversity should not be a concern because judges are engaged in a neutral application of legal rules. This view ignores the history of the Court as well as the way the Court actually decides cases. As Jeffrey Toobin points out, early in the Court’s history, when regional disputes were foremost, there was an acknowledged need for geographic diversity.⁴² Later came a time when a need for religious diversity was recognized. It is now time, Toobin observes, to increase the ethnic, racial, and gender diversity on the bench.⁴³ By 2050, Hispanics will comprise a third of the American people and, Toobin concludes, “it is a sign of a mature and healthy society when the best of formerly excluded groups have the opportunity to earn their way to the top.”⁴⁴ Justice Sotomayor is “a fitting representative of a changed and changing nation.”⁴⁵

The lack of diversity on the federal bench has important implications because a diverse bench is beneficial in a number of important ways. First, the judgments of a diverse judiciary command greater acceptance in a diverse society. The judiciary depends entirely on the confidence of the American people to give its decisions authoritative effect.⁴⁶ The public will have more confidence in judicial decisions when those decisions are rendered, not by a body of isolated elites, but by judges who reflect and understand the multicultural society we live in today. As Justice Ginsburg observed about her status as the only female Supreme Court justice: “My basic concern about being all alone was the public got the wrong perception of the Court. It

41. *Id.* at 159.

42. Jeffrey Toobin, Comment, *Diverse Opinions*, *NEW YORKER*, June 8, 2009, at 37.

43. *Id.*

44. *Id.*

45. *Id.*

46. Justice Stephen G. Breyer has observed: “Although we on the Supreme Court do not face the problems associated with judicial elections, we are, of course, judges. And so the dangers attendant to attacking the legitimacy of courts and judges affect us much as they affect other judges. Courts and judges must have public support if they are to receive the resources they need to fulfill their responsibilities.” Stephen G. Breyer, *Reflections on the Role of Appellate Courts*, 8 *J. APP. PRAC. & PROCESS* 91, 95 (2006) (from an address given at the 2005 National Conference on Appellate Justice on Nov. 5, 2005).

just doesn't look right in the year 2009."⁴⁷ Professor Anita Hill spoke to the same point: "The face of judging, in an emblematic way, matters as a reflection of access to justice; the diversity of the bench affects public perception of fairness."⁴⁸

Second, a deliberative process enhanced by collegiality and a broad range of perspectives necessarily results in opinions that are both true to the rule of law and over time allow for a fuller and richer evolution of the law.⁴⁹ The more variety among the panel members in terms of race, gender, ethnicity, and socio-economic background, the more likely it is that the panel will probe deeply into the facts of the case. With a deeper understanding of the facts, the panel can apply the law more fairly. This is particularly true when an appellate panel reviews a summary judgment order. In such cases, the outcome depends on the judges' view of the facts because the question the court must answer is whether a jury might decide the case differently on the facts presented.⁵⁰ And each judge's view of the facts depends upon his or her unique experiences.⁵¹ This is also often the case in criminal prosecutions. For example, in determining whether a defendant was subject to a custodial interrogation, the judge must decide whether a person in the defendant's situation would have felt free to walk away. An understanding

47. Danielle Sollars, Note, *Gender Balance in the Judiciary: Why Does It Matter?*, 36 WM. MITCHELL L. REV. (forthcoming 2010) at 15 (quoting Emily Bazelon, *The Place of Women on the Court*, N.Y. TIMES, July 12, 2009)).

48. *Id.* at 18 (quoting Anita F. Hill, *The Embodiment of Equal Justice Under the Law*, 31 NOVA L. REV. 237, 250 (2007)).

49. At least one study has found that there is no substantive difference between the decisions of male and female judges. That is, sex is not a factor in determining who would make a "better" judge. Stephen J. Choi, Mitu Gulati, Mirya Holman, Eric A. Posner, *Judging Women*, University of Chicago Law School, Law & Economics Research Paper Series, Paper No. 09-38 and 09-54 (Sept. 29, 2009), available at <http://ssrn.com/abstract=1479724>. But see *infra* note 51.

50. Professor Ifill has observed that we tend to operate from the perspective that whiteness is the transparent neutral position and thus, accept the false premise that a white person can judge all cases neutrally, but a person of color must view cases through a color barrier. In fact, it is the case that all of us, whether we are white, black, Hispanic or something else, view cases through our own unique backgrounds. *Diversifying Our Courts*, American Constitution Society panel discussion, Aug. 4, 2009, available at <http://www.acslaw.org/node/13869>. See Sollars, *supra* note 47 (observing the irony that Justice Sotomayor was asked in the confirmation process whether she could set aside her personal biases when Justices Alito and Roberts were not: "The would-be first Latina justice faced a committee with only two women members in order to get confirmed by a Senate with only 17 women for a seat on a court with only one woman. And yet Sotomayor had to prove that *she* wasn't biased.") (Amanda Hess quoting Ellen Goodman in *Sotomayor Confirmation Quote of the Day* (July 16, 2009)).

51. An example of the role a justice's background plays in the decision making process was given by Justice Samuel Alito, who observed, "[W]hen I get a case about discrimination, I have to think about people in my own family who suffered discrimination because of their ethnic background or because of religion or because of gender." Sollars, *supra* note 47, at 25 (quoted in Carolina A. Miranda, *Just What is a 'Wise Latina' Anyway?*, TIME MAG. (July 14, 2009)).

of a defendant's social milieu will aid in this determination. In short, judges must have a broader perspective than the dominant view to engage in a rich discussion: if all have the same view, the result is a superficial discussion and the law does not evolve.⁵²

Certainly, the more perspectives there are at the table, the more confidence we can have that the court considered all important aspects of the decision. The public should not be left with the suspicion that a fact was omitted from consideration because a point of view was absent from the room. Moreover, it is particularly important that these other perspectives be delivered not by a party, or the party's counsel, but by a colleague in a professional, respectful collegial setting. The justices do consider the views of their colleagues: as Justice Souter wrote in a dissent, "Anyone who has ever sat on a bench with other judges knows that judges are supposed to influence each other, and they do. One may see something the others did not see, and then they all take another look."⁵³

Justice Ginsburg has given a vivid example of this phenomenon. She observed that Justice Thurgood Marshall often helped the rest of the Court understand the facts from a different perspective. He would, for example, describe his experience growing up in segregated Maryland and as a civil rights lawyer traveling through the South.⁵⁴ These are experiences that were entirely foreign to the experience of the other members of the Court. Justice Scalia has said that Justice Marshall's very presence on the bench exerted a "gravitational pull" more powerful than his single vote.⁵⁵ Adam Liptak quotes Justice Scalia as saying in an interview for a biography of Justice Marshall by Juan Williams that "Marshall could be a persuasive force just by sitting there. . . . [In conferences,] [h]e wouldn't have to open his mouth to affect the nature of the conference and how seriously the conference would take matters of race."⁵⁶

Similarly, Justice Ginsburg has observed that the presence of women on the bench "made it possible for the courts to appreciate earlier than they might otherwise that sexual harassment belongs under Title VII [as a violation of civil rights law]."⁵⁷ Thus, whether or not diverse perspectives affect the outcome in a particular case, the presence of diverse viewpoints assures us that the decision will have been tested by individuals with a broad va-

52. An interesting example of this is the incident involving Harvard law professor Henry Louis Gates, Jr. From the point of view of the police, their actions were justified based on their experience. From the point of view of a black individual, the police's actions were another example of racial profiling, resulting in violation of Professor Gates' rights.

53. Adam Liptak, *The Waves Minority Lawyers Always Make*, N.Y. TIMES, May 31, 2009, at 4.

54. Sherrilyn Ifill, *The Root.com* (May 4, 2009).

55. Liptak, *supra* note 53.

56. *Id.*

57. Emily Bazelon, *The Place of Women on the Court*, N.Y. TIMES MAG., July 12, 2009.

riety of views thinking deeply and critically and that it was as informed as possible.

Third, diversity is important because it promotes the selection of the best judges by broadening the base of highly qualified candidates. Women have made up approximately 50 percent of law school graduates for many years.⁵⁸ Their achievements in law school have equaled those of male graduates. It is then obvious that 50 percent of the top 10 percent of lawyers are women. To exclude this group in the selection process would lead to the selection of a less qualified judiciary.

D. *How Justice Sotomayor's Selection Might Impact the Court's Decisions*

Although it may be true that Justice Sotomayor is a moderate liberal replacing a moderate liberal, her appointment has an obvious impact simply because there will be more than two members of the Court appointed by a Democratic president for the first time in thirty-four years.

Her background as a trial lawyer and a trial judge will bring an entirely new perspective to the Court. Friends of Justice Sotomayor say her experiences as a trial court judge shaped her view of the law and judging, giving her a close look at how the criminal justice system works.⁵⁹ By contrast, most of the justices have spent their careers as law professors, government lawyers, and appellate judges, all at least one step removed from trials. Unlike the other justices, Justice Sotomayor will know how to read a trial court record and how important that record is. She will not only focus her colleagues on the importance of the record, she is likely to be more exacting in terms of excluding evidence that is not in the record.

Justice Sotomayor's appointment may also impact decisions in a number of substantive areas. As noted above, having another woman on the Court may make a difference in discrimination cases. In these cases, studies have found a demonstrable difference in outcomes based on the sex of the judge.⁶⁰ Another study found that the race of a judge is a factor in

58. Jonathan Glater, *Women Are Close to Being Majority of Law Students*, N.Y. TIMES, Mar. 26, 2001, at 46 ("Women, who made up about 10 percent of first-year law students in 1970, accounted for 49.4 percent of the 43,518 students who began law school last fall, according to data to be released soon by the American Bar Association, and that rate of growth is expected to continue. As of March 9, more women than men had applied for admission to law schools this fall.")

59. David G. Savage & James G. Oliphant, *Senate Set to Debate Sotomayor*, L.A. TIMES, Aug. 7, 2009.

60. One study found a difference in outcomes in sex discrimination cases as a result of a woman serving on the panel that decided the case. Jennifer Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759 (2005); Christina Boyd, Lee Epstein & Andrew Martin, *Untangling the Causal Effects of Gender on*

voting rights decisions.⁶¹ This suggests that the fact that Justice Sotomayor is a Spanish speaker whose parents came from Puerto Rico may affect outcomes in cases involving language rights, language education in the schools, immigration, and affirmative action. Regarding affirmative action, University of Maryland Professor Sherrilyn Ifill has observed that she will definitely “change the conversation on affirmative action” within the Court.⁶² The only other minority on the Court, Justice Clarence Thomas, is a staunch foe of affirmative action; he maintains that such policies taint the accomplishments of all minorities. “Her story of how hard she worked to graduate first in her class from Princeton makes her really the poster child for the benefits of affirmative action,” Ifill has said.⁶³

Moreover, Justice Sotomayor has a chronic illness: diabetes. With this background, her presence on the panel might have an impact in cases involving disabilities and access to health care. Finally, the fact that she hails from Puerto Rico suggests that she may view cases involving territories from a different perspective. The fact that Justice Sotomayor has a background and perspective in these areas will make a constructive and rich discussion possible.

Although the appointment of Justice Sotomayor to replace Justice Souter may seem a small step in terms of the Court’s jurisprudence, it represents a “giant leap forward” toward a more diverse federal judiciary.

Judging, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1001748; see also Sollars, *supra* note 47, at n.48 (citing NANCY E. CROWE, *THE EFFECTS OF JUDGES’ SEX AND RACE ON JUDICIAL DECISION MAKING ON THE U.S. COURTS OF APPEALS, 1981–1996* (1999)). Note, however, that in an interview Peresie cautioned against extrapolating the results of an appellate court study to the Supreme Court: “Maybe one out of nine is different from one out of three.” Liptak, *supra* note 53. It should also be noted that Justice Ginsburg dissented from the Court’s decision in *AT&T v. Hulteen*, 129 S. Ct. 1962 (2009), in which a woman was denied equal pension benefits because she had taken a mandatory pregnancy leave before passage of the Pregnancy Discrimination Act (PDA), which required employers to treat pregnancy leave the same as temporary disability for all purposes, including as credit toward retirement. Similarly, she dissented in *Ledbetter v. Goodyear Tire & Rubber*, 550 U.S. 618 (2009), in which the court ruled that Ms. Ledbetter could not sue over unequal pay because she had failed to file her complaint in a timely manner. Justice Ginsburg pointed out that this ruling failed to consider that an employee cannot sue when the pay decision is made, because it is unlikely that she would discover that she was receiving less pay than her contemporaries. These dissents suggest a gender difference in the way women view issues involving the financial security of women.

61. Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. LAW REV. 1 (2008) (when a white judge sits on a panel with at least one African American judge, she becomes roughly 20 percentage points more likely to find a voting rights violation).

62. David G. Savage, *Sotomayor’s Background Will Shape Her Service*, L.A. TIMES Aug. 7, 2009.

63. *Id.*

III. RECENT U.S. SUPREME COURT DECISIONS

A. *Due Process and Judicial Impartiality*

The Supreme Court's recent five-to-four decision in *Caperton v. A.T. Massey Coal Co., Inc.*⁶⁴ has roiled the murky backwater of judicial recusal and invited litigants to follow. The dissent fears that no clear course has been charted and expects the primary casualty to be public perception of the judiciary—the very cause that the majority sought to invigorate.

The Court held that federal due process requires judges to recuse themselves when significant campaign fundraising by an interested party creates a constitutionally intolerable probability of actual bias. It was drawn into this constitutional fray by a near perfect storm of inculcation. At issue was whether a West Virginia Supreme Court justice was required to disqualify himself from an appeal involving his top campaign contributor.⁶⁵ When it appeared his company's appeal would come before that court, the litigant helped elect the justice by contributing \$3 million to his campaign and its proxies. This exceeded the total of all other contributors and was triple the amount spent by the justice's own committee.⁶⁶ The justice then cast the deciding vote to reverse the \$50 million verdict.⁶⁷ He thereafter denied a motion to disqualify himself, twice refused to recuse himself in the appeal, and issued a belated concurring opinion.⁶⁸

Finding that due process mandated recusal, Justice Kennedy wrote that “objective standards . . . require recusal when ‘the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable.’”⁶⁹ The Court determined that

there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent.⁷⁰

The inquiry is objective and “asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is ‘likely’ to be neutral, or whether there is an unconstitutional ‘potential for bias.’”⁷¹ In other words, due process asks “whether the contributor's influence on

64. 129 S. Ct. 2252 (2009).

65. *Id.* at 2256–57.

66. *Id.* at 2257.

67. *Id.* at 2257–58.

68. *Id.*

69. *Id.* at 2256; *see also id.* at 2257 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

70. *Id.* at 2263–64.

71. *Id.* at 2262.

the election under all the circumstances ‘would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.’⁷²

Factors relevant to the inquiry are “the contribution’s relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.”⁷³ While a contribution’s effect on the election outcome is relevant, the contribution need not be a “necessary and sufficient cause” of a judge’s victory to require recusal.⁷⁴

The Court emphasized its historic insistence on objective standards to implement due process because it is not feasible to “superintend” or review a judge’s often private inquiry into actual bias.⁷⁵ It recognized the limited reach of its precedents concerning recusal, which had turned on either direct financial interest in the outcome of a case⁷⁶ or the conflict inherent in adjudication of criminal contempt charges by an accusing judge.⁷⁷ However, the *Caperton* majority has generalized the remedy in order to bolster the “constitutional floor”⁷⁸ supporting judicial independence.

The dissent attacked the holding as overreaching. It cited the presumption of honesty and integrity by adjudicators and a long-standing requirement of pecuniary interest to mandate recusal.⁷⁹ More persuasively, Chief Justice Roberts argued that the issue of recusal should be declared unjusticiable.⁸⁰ In his view, the considerations bearing on the appearance of bias and its extent, even in the context of judicial elections, are too numerous—and the calculus too complex—to admit a rule as “amorphous”⁸¹ as that now established. He posited forty plausible and diverse factors that “[w]ith little help from the majority, courts will now have to determine”⁸² as they simultaneously play the roles of political scientist, economist, and psychologist.⁸³

Writing separately, Justice Scalia underscored the dissent’s concerns that the decision will precipitate a flood of expensive and judicially exhausting litigation and that it will have the unintended effect of diminishing, not

72. *Id.* at 2264 (citing *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)).

73. *Id.*

74. *Id.*

75. *Id.* at 2263.

76. *Id.* at 2259–61 (discussing *Tumey*, 273 U.S. 510; *Ward v. Monroeville*, 409 U.S. 57 (1972); *Aetna Life Ins. Co. v. Lavoie*; 475 U.S. 813 (1986); and other decisions).

77. *Id.* at 2261–62 (discussing *In re Murchison*, 349 U.S. 133 (1955); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971)).

78. *Id.* at 2267 (quoting *Bracy v. Gramley*, 520 U.S. 899, 904 (1997)).

79. *Id.* at 2267–68 (Roberts, C.J., dissenting).

80. *Id.* at 2272.

81. *Id.* at 2274.

82. *Id.* at 2269; *see generally id.* at 2269–72.

83. *Id.* at 2272.

enhancing, public confidence in the fairness and integrity of the courts.⁸⁴ The Court sought to allay the litigation concern. Justice Kennedy noted the “extreme”⁸⁵ and “exceptional”⁸⁶ nature of the facts at bar and litigators’ likely greater reliance on state ethical standards, which often are more rigorous than federal due process requires.⁸⁷

Though incisive, the dissents also were ironic. The jurisprudential “imperfection”⁸⁸ that Justice Scalia insists is beyond constitutional repair is literal judge shopping, a stratagem that unfairly favors more affluent litigants. Yet, a significant objection to the constitutional remedy is that it will create incentives for litigants to play the recusal card too freely. Both sides thus invoke the need for regularity of judicial process, not only to maintain a level playing field but also to maximize the public’s respect for the courts. Despite the rhetoric, *Caperton* is not a case where “the cure is worse than the disease.”⁸⁹

Even so, Justice Roberts’ forty theses shed useful light on the decision’s practical implications. Among these is whether litigants may conduct discovery into election campaign information that otherwise is not publicly available. Should the constitutional status of a recusal claim, or the imprecise new standard, entitle an offended litigant to discover disqualifying information? Would the promise of a remedy for such fundamental unfairness be illusory if there is no access to material evidence of the impropriety? Some states explicitly preclude discovery of disqualifying information.⁹⁰ Whether and to what extent litigants may inquire, or muckrake as the dissent would have it, undoubtedly will impact both the utility of the new claim and perceptions of the judicial system.

Caperton also begs the question of a proper remedy where a failure to recuse is found to have been improvident. The Chief Justice questioned whether this will turn on the level of adjudication.⁹¹ Must an appeal be argued anew in the case of a recalcitrant appellate judge? Must the case be relitigated in full where a trial court judge is the culprit? A related issue is

84. *Id.* at 2274–75.

85. *Id.* at 2265.

86. *Id.* at 2263.

87. *Id.* at 2267.

88. *Id.* at 2275.

89. *Id.* at 2274.

90. *See, e.g., Hogan v. Warden*, 916 P.2d 805, 809 (1996) (“Nevada law makes no provision for the discovery of potentially disqualifying facts from judicial sources.”); *State v. Austin*, 87 S.W.3d 447, 471 (Tenn. 2002) (there is no authority for the issuance of subpoenas, or any other discovery procedures, in support of one’s motion to disqualify a judge). Interestingly, the rationale in *Hogan* was that allowing parties to request disclosure of disqualifying facts indirectly suggests an appearance of partiality and erodes public confidence in the judiciary. *Hogan*, 916 P.2d at 808–09.

91. *Caperton*, 129 S. Ct. at 2269, 2271.

whether “the judge’s vote [must] be outcome determinative in order for his non-recusal to constitute a due process violation.”⁹² Answering this question affirmatively may draw a salutary bright line in the tangle, both limiting the scope of the new right and helping to answer questions about the appropriate remedy.

A further significant concern is the proper standard of review. Is the higher court to consider whether a nonrecusal, though improper, was harmless error?⁹³ It would seem so. The fundamental right at stake in recusal is a fair and impartial tribunal, but primarily for the sake of the outcome. Authorizing reviewing courts to remedy ostensibly harmless failures would add “traffic cop” to the list of roles which the dissent envisions for reviewing courts under the majority’s decision. Also significant is that review under the constitutional standard is likely to be *de novo*, rather than for abuse of discretion. As the Court notes, an objective standard of “probability of bias” will obviate “exclusive reliance on [a] personal inquiry, or on appellate review of the judge’s determination [that he is not biased in fact].”⁹⁴ *De novo* review is likely to embolden offended litigants to pursue an appeal, not merely because it facilitates technical argument but also because it objectifies the underlying issue of misconduct, thereby lightening the emotional load for the appellate panel.

These issues undoubtedly will receive much more attention as litigants, the courts, and the public negotiate the deepening waters of judicial recusal.

B. *Subject Matter and Supplemental Jurisdiction*

In addition to impartiality, this Term the Court rendered significant decisions concerning jurisdiction. It unanimously held that a district court’s remand of pure state law claims after declining to exercise supplemental jurisdiction is not a remand for “lack of subject matter jurisdiction” that is barred from appellate review under 28 U.S.C. §§ 1447(c) and (d). It reached that conclusion in *Carlsbad Technology, Inc. v. HIF Bio, Inc.*⁹⁵ by adhering to its decisions limiting the remands barred from review by § 1447(d) to those based on a ground specified in § 1447(c).⁹⁶ This result left Justice Stevens gratified by the Court’s self-discipline, Justice Scalia disgusted by inconsistent results, and Justices Breyer and Souter concerned about misplaced priorities.

After dismissing plaintiff’s only federal claim (RICO) under under Rule 12(b)(6), the district court declined to exercise supplemental jurisdiction

92. *Id.* at 2270.

93. *Id.* at 2272.

94. *Id.* at 2263.

95. 129 S. Ct. 1862 (2009).

96. *Id.* at 1865–66 (citing *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 345–46 (1976), and its progeny).

over the remaining state law claims under 28 U.S.C. § 1367(c)(3) and remanded.⁹⁷ Defendant appealed, arguing that the state law claims implicated federal patent law rights. The Federal Circuit dismissed the appeal on the basis that the remand order could be “colorably characterized” as one based on lack of subject matter jurisdiction, and that § 1447(c) and (d) provide that remands for “lack of subject matter jurisdiction” (§ 1447(c)) are “not reviewable on appeal or otherwise” (§ 1447(d)).⁹⁸ Reversing, the Court invoked the fundamental distinction between a decision to decline the exercise of supplemental jurisdiction and the question of whether a court has jurisdiction to begin with. The former is “not based on a jurisdictional defect,” but rather, is a “discretionary choice.”⁹⁹

Without apology, Justice Stevens noted that, “[t]oday, as in *Thermtron*,^[100] the Court holds that § 1447(d) does not mean what it says.”¹⁰¹ Respect for stare decisis had prevailed over the Court’s “sometimes single-minded focus on literal text.”¹⁰² In another of the kaleidoscopic opinions, Justice Scalia bemoaned the “hodgepodge” of jurisdictional rules spawned by *Thermtron*—no review for most remands for lack of subject matter jurisdiction, but review for remands of supplemental jurisdiction claims, those based on abstention, and some involving subject jurisdiction—and urged that *Thermtron* be reconsidered.¹⁰³ Justices Breyer and Souter instead urged statutory revision to cure the anomalous implications of § 1447, which has rendered nonreviewable decisions that significantly impact federal rights and rendered reviewable others that, in jurisprudential terms, are relatively inconsequential.¹⁰⁴

The availability of a federal forum can be a considerable tactical advantage or disadvantage in a case involving state law claims and nondiverse parties. As compared with state court, federal court may offer more experienced docketing and courtroom clerks, stricter adherence to procedural deadlines, more law clerks to evaluate complex claims, appointed judges, and a higher public profile. However, the decision concerning whether to appeal a district court’s refusal to exercise supplemental jurisdiction will turn not simply on those collateral, if pragmatic, considerations, but also on the strength of facts to support a finding that discretion to decline jurisdiction was abused.¹⁰⁵ Moreover, the appeal decision must acknowledge

97. *Id.* at 1865.

98. *Id.*

99. *Id.* at 1866 (citing 28 U.S.C. § 1367(c)).

100. *Thermtron Prods.*, 423 U.S. at 336.

101. *Carlsbad Tech.*, 129 S. Ct. at 1868 (Stevens, J., dissenting).

102. *Id.*

103. *Id.* at 1868.

104. *Id.* at 1869–70 (citing *Powerex Corp. v. Reliant Energy Serv., Inc.*, 551 U.S. 224 (2007)).

105. *Id.* at 1866 (noting abuse of discretion standard for nonjurisdictional ruling).

that reversal would confront the appellant with a district court judge who is even less eager than before to adjudicate the state law claims. In short, the Court has preserved an opportunity to force on judges the trial of claims on which they initially have deferred. Litigants who appeal must be equipped with strong facts and a strong stomach.

On the same day that it decided *Carlsbad*, the Court held that a non-party to an arbitration agreement may invoke the Federal Arbitration Act (FAA)¹⁰⁶ to obtain a stay of litigation and to appeal an order denying such a stay. Resolving a mature circuit split, a six-justice majority in *Arthur Anderson LLP v. Carlisle*¹⁰⁷ reversed the Sixth Circuit's dismissal of an appeal of noncontracting litigants' request for a stay. The Court held that § 16(a)(1) (A) of the FAA confers on courts of appeal jurisdiction to review all denials of stays under § 3, "regardless of whether the litigant is in fact eligible for a stay."¹⁰⁸ Citing *Bebrens v. Pelletier*,¹⁰⁹ Justice Scalia insisted that jurisdiction depends on the category of the order being challenged, rather than the strength of the grounds to reverse.¹¹⁰

Substantially extending the impact of its decision, the Court further held that a noncontracting litigant is entitled to a stay if applicable state law permits the underlying agreement to be enforced by or against that litigant.¹¹¹ Section 3 of the FAA requires a court, on application, to stay a case if it involves an "issue referable to arbitration under an agreement in writing."¹¹² The majority concluded that the statute thus maintains the natural order that "background principles of state contract law"—including assumption, piercing the corporate veil, alter ego, incorporation by reference, third party beneficiary theories, waiver and estoppel—determine whether contracts are binding and against whom they are enforceable.¹¹³

Dissenting, Justice Souter favored a strained and more relational reading of §§ 3 and 16 in order to limit interlocutory appeals. In his view, those "extraordinary interruptions to the normal process of litigation" are "a matter of limited grace" that should not be extended unnecessarily to "anyone as peripheral to the core agreement as a nonsignatory."¹¹⁴ However, the majority's more natural reading of the FAA comports with a frank acknowledgment of litigation imperatives. As every law student can appre-

106. 9 U.S.C. §§ 3, 16(a)(2)(A).

107. 129 S. Ct. 1896 (2009).

108. *Id.* at 1900.

109. 516 U.S. 299, 311 (1996).

110. *Id.*

111. *Arthur Anderson*, 129 S. Ct. at 1902.

112. 9 U.S.C. § 3.

113. *Arthur Anderson*, 129 S. Ct. at 1902.

114. *Id.* at 1904.

ciate and every court's docket will attest, contractual rights and obligations do not stop at the four corners of a document.

With the path now cleared by *Carlisle*, litigants that are not contracting parties but may be related to them and that have a stake in the dispute may step in to secure (or oppose) arbitration rights not actively addressed by the signatories. Among such stakeholders will be co-defendants' employers, business partners, innocent spouses, insurers, principals, indemnitors, beneficiaries, and lenders. Resort to stay motions, and appeals from their denial, may be especially valuable for these stakeholders in an economy that is leaving many contracting parties financially or emotionally unable or unwilling to take up their own cause. Indeed, in the present commercial environment, a contrary holding would have been perceived widely as a gratuitous hardship.

The majority addressed the dissent's concern that its decision will invite dilatory or otherwise abusive appeals¹¹⁵ by noting that courts have power to streamline the disposition of meritless appeals and sanction those that are frivolous.¹¹⁶ That some far-fetched appeals nonetheless may be filed with impunity¹¹⁷ does not justify restricting judicial access where it is invited by statute. Congress wisely has recognized that the occasional far-fetched appeal is a tolerable concomitant of our adversarial system.

C. *Product Liability and Preemption*

Two appeals in this field merit particular attention. Rejecting diverse preemption arguments, the Court twice held wide open the door to state law remedies in health-related product liability cases. In each instance, Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer steered a determined, but controversial, course by construing narrowly both the basis and objective of the plaintiff's tort claim and the reach of federal regulations. Together, these decisions, *Altria Group, Inc. v. Good*¹¹⁸ and *Wyeth v. Levine*,¹¹⁹ compound the burden on manufacturers of heavily regulated products, which now must devise warnings that heed not only declared regulatory imperatives but also the inchoate expectations of health care conscious and antagonistic juries in the several states.

Whereas the plaintiff in *Wyeth* asserted common law claims, the *Altria* claim was statutory. There, smokers alleged that cigarette manufacturers violated Maine's Unfair Trade Practices Act (MUTPA)¹²⁰ by fraudulently

115. *Id.*

116. *Id.* at 1901.

117. *Id.* at 1904.

118. 129 S. Ct. 538 (2009).

119. 129 S. Ct. 1187 (2009).

120. ME. REV. STAT. ANN. tit. 5, § 207 (Supp. 2008).

advertising that their light cigarettes delivered less tar and nicotine than regular brands. The defendants knew that smokers engaged in compensatory behaviors that are not registered by FTC-approved testing protocols but that, by boosting smoke inhalation, negate the tar-and-nicotine reducing features of their products.¹²¹ The majority rejected both express and (weak) implied preemption arguments to affirm the First Circuit's reversal of summary judgment for the manufacturers.

In *Altria*, the Court held that a state's facially neutral prohibition of fraudulent practices does not run afoul of the Federal Cigarette Labeling and Advertising Act's express proscription of state law requirements "based upon smoking and health" with regard to cigarette advertising or promotion.¹²² The majority adopted a predicate duty analysis, which the dissent characterized as "atextual" and myopic.¹²³ The Court insisted that the MUTPA duty is unrelated to "smoking and health." It distinguished that duty from the health based failure-to-warn claim in a case previously decided, *Cipollone v. Liggett Group, Inc.*,¹²⁴ and analogized to the common law fraud claim upheld by that decision.¹²⁵

The majority rejected arguments that state fraud rules would denigrate the Act's purpose of preventing nonuniform regulations. It noted a longstanding dependence of the FTC on "[s]tates' historic regulation of deceptive advertising practices"¹²⁶ and, quoting from *Cipollone*, reiterated that "fraud claims 'rely only on a simple, uniform standard: falsity.'"¹²⁷ This reasoning provoked insinuations of intellectual dishonesty from the dissent, which attacked the "shifting level of generality" being required of state laws in order to avoid preemption.¹²⁸

The majority and dissent diverged crucially on the materiality of federally mandated package warnings to tort liability and manufacturers' practices. Although it acknowledged that those warnings may bear on the materiality of the products' allegedly fraudulent lowered tar statements, the majority insisted that the case concerned those statements and not the mandated warnings.¹²⁹ Focusing instead on the practical impact of a ruling, Justice Thomas argued that the materiality of warnings is decisive, and dispositive of preemption, because a successful fraud claim necessarily indicates that the mandated warnings are inadequate and compels new

121. *Altria Group*, 129 S.Ct. at 541-42.

122. *Id.* at 547; see also 15 U.S.C. § 1334(b).

123. *Altria Group*, 129 S.Ct. at 552.

124. 505 U.S. 504 (1992).

125. *Id.* at 545-46.

126. *Id.* at 544, n.6.

127. *Id.* at 546 (citation omitted).

128. *Id.* at 560 (Thomas, J., dissenting).

129. *Id.* at 546.

warnings or behavior of a sort that the Act does not allow states to require directly.¹³⁰

It remains to be seen whether the industry will confront a flood of ad hoc and inconsistent jury determinations regarding the fraudulent character of unregulated cigarette descriptors. In the meantime, plaintiff's counsel in cigarette cases will benefit from this pass to invoke consumer fraud laws. Counsel contemplating suit or appeal involving other types of products will need to scrutinize the language of express preemption provisions to evaluate the strength of a consumer fraud claim. In any event, statute-based claims may fare better than common law fraud claims because a preemption defense is less likely to be fueled by inartful or suggestive pleading where the cause of action is prescribed.

The same justices extended their support of state law product remedies just months later. In *Wyeth*,¹³¹ the Court held that a failure-to-warn claim involving an intravenously administered pharmaceutical was not impliedly preempted, even though the label underlying the jury's \$7.4 million verdict had complied with FDA requirements. The Court held that it was not impossible for Wyeth to comply with both the federal requirements and a heightened state law duty. It reasoned that primary responsibility for safe labeling lies with manufacturers,¹³² that the FDA's "changes being effected" (CBE) rules permit interim augmentation of warnings pending supplemental agency approval (even on the basis of accumulating data concerning known risks),¹³³ and that the FDA would not have rejected an enhanced warning of the type that the jury found lacking.¹³⁴

The majority found no congressional intent to preempt failure-to-warn litigation, notwithstanding a recent contrary statement in the preamble to FDA rules.¹³⁵ The Court cited the absence of express preemption language in pharmaceutical regulations, in contrast to the express language in medical device regulations that underlay the Court's holding in *Riegel v. Medtronic, Inc.*¹³⁶ The Court also stressed that the agency had not considered and rejected a prohibition on the IV-push, or intravenous injection, method of administering the anti-nausea drug in question.¹³⁷ The use of that method had caused gangrene and required amputation of the plain-

130. *Id.* at 552, 554 (citing *Cipollone*, 505 U.S. at 555 (Scalia, J., concurring in part)).

131. 129 S.Ct. 1187 (2009).

132. *Id.* at 1195, 1198 (citing regulations).

133. *Id.* at 1196–97.

134. *Id.* at 1198–99.

135. *Id.* at 1201–03 (finding the preamble inconsistent with FDA's long-standing affinity for state law tort suits as a "catalyst" to improve drug regulation).

136. 128 S. Ct. 999 (2008) (holding that the preemption clause in the Medical Device Amendments of 1976 to the Food Drug and Cosmetic Act bars state common-law claims challenging the safety or efficacy of a device that was given pre-market approval by the FDA).

137. *Id.* at 1199–1200.

tiff musician's forearm. The majority contrasted this lack of scrutiny of alternative methods of administering the drug with the Department of Transportation's treatment of air bags as a permitted alternative to other vehicle restraints, which had defeated the product claims in *Geier v. American Honda Motor Co.*¹³⁸

There are echoes of the Court's *Altria* opinion in its insistence that the Vermont jury award against Wyeth mandated no particular warning. Again, to the great consternation of the dissent, the majority focused narrowly on matters of form. Justice Alito decried a "frontal assault" on an established regulatory scheme and the resulting endorsement of "drug labeling by jury verdict."¹³⁹ He defended Wyeth, whose proposed enhanced warning the FDA had ignored,¹⁴⁰ and paradoxically emphasized the stringency of that agency's process for approval of new drugs and the adequacy of its evaluation of IV-push administration of the medication.¹⁴¹

Concurring in the judgment, Justice Thomas wrote separately to challenge unnecessary resort to a presumption against preemption and the use of nontextual resources to divine legislative purpose.¹⁴² However, he usefully restated the Court's conclusion that compliance with FDA requirements, while necessary to market a drug, does not define sound business practice. "In sum, the relevant federal law did not give Wyeth a right that the state court judgment took away. . . ."¹⁴³

The dissent was motivated by a concern that juries deciding claims of horribly injured patients are ill-equipped to balance a drug's risks and benefits.¹⁴⁴ Whether their role and sophistication, and the evidence before them, equips juries for that task, pharmaceutical manufacturers now will be more subject to community judgments. At a time of huge and highly publicized penalties and qui tam settlements for off-label uses, marketing indiscretions, and other improprieties,¹⁴⁵ manufacturers cannot rely safely on

138. *Id.* at 1203 (citing *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 881 (2000)). The dissent challenged the factual accuracy and soundness of this argument, however. *Id.* at 1222 (Alito, J. dissenting).

139. *Id.* at 1218, 1222.

140. *Id.* at 1192.

141. *Id.* at 1222–26.

142. *Id.* at 1207, 1208 n.2. In the process, he wisely observed that congressional prerogatives and pronouncements do not necessarily coincide with, or find full expression in, statutory text due to inevitable legislative compromises. *Id.* at 1215–16.

143. *Id.* at 1211.

144. *Id.* at 1229–30 (citing *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008)).

145. For example, near the close of the Term, Pfizer, Inc. paid a record-setting \$2.3 billion to settle criminal charges and whistleblower claims arising from its illegal promotion of painkillers, antibiotics, and other medications. Jonathan D. Rockoff, *Pfizer to Plead Guilty to Improper Marketing*, WALL ST. J., Sept. 3, 2009, available at <http://online.wsj.com/article/SB125190160702979723.html>. For a survey of recent whistleblower judgments and settlements in general, see <http://www.taf.org/top20.htm>.

the FDA's labeling standards or declarations that it has exclusive authority to regulate. In some circumstances, manufacturers may resort to repeated CBE filings in order to create a record of proactive interim conduct and forestall failure-to-warn litigation. Where financial considerations do not motivate them to undertake such action, plaintiffs' attorneys will sue and appeal to boost that incentive. Moreover, when sued, health care providers, who already are stressed by administrative, regulatory, financial and litigation concerns, now may be more inclined to implead drug manufacturers. The hospital staff sued in *Wyeth* settled with the plaintiff and then testified passionately on her behalf at trial.¹⁴⁶

IV. RECENT DEVELOPMENTS IN FEDERAL APPELLATE PROCEDURE

This year the U.S. Supreme Court approved various amendments to the Federal Rules of Appellate Procedure and submitted them to Congress.¹⁴⁷ The amendments took effect December 1, 2009.¹⁴⁸ The amended rules will govern in all appeals commenced after that date, as well as appeals then pending "insofar as just and practicable."¹⁴⁹

The amendments adopt a new method for counting "days" and alter important appellate deadlines to take account of the time computation change.¹⁵⁰ A new Appellate Rule 12.1 is added, which standardizes the procedure for obtaining a remand after a so-called indicative ruling by a district court.¹⁵¹ Finally, the amendments change language in Appellate Rule 4 to correspond to deadline changes in the Civil Rules and to clarify the circumstances in which a litigant must file an amended notice of appeal.¹⁵²

Although a comprehensive review of the rule amendments is beyond the scope of this article, the most significant changes are summarized below.

146. *Id.* at 1218, n.3.

147. See Letter from Chief Justice John G. Roberts, Jr. to the Honorable Nancy Pelosi (March 26, 2009) and Letter from Chief Justice John G. Roberts, Jr. to the Honorable Joseph R. Biden, Jr. (Mar. 26, 2009) submitting Order of the U.S. Supreme Court Amending Federal Rules of Appellate Procedure (Mar. 26, 2009) (Appellate Rules Order), available at <http://www.supremecourtus.gov/orders/courtorders/frap09.pdf>. The Supreme Court also approved amendments to the Federal Rules of Civil Procedure (Civil Rules) that dovetail with the new Appellate Rules. See Order of the U.S. Supreme Court Amending Federal Rules of Civil Procedure (Mar. 26, 2009) (Civil Rules Order), available at <http://www.supremecourtus.gov/orders/courtorders/frcv09.pdf>.

148. See 28 U.S.C. § 2074.

149. Appellate Rules Order 1, *supra* note 147, at 1.

150. These include FED. R. APP. P. 4, 5, 6, 10, 12, 15, 19, 25, 26, 27, 28.1, 30, 31, 39, and 41. Appellate Rules Order, *supra* note 147.

151. FED. R. APP. P. 12.1 (2009).

152. FED. R. APP. P. 4 (2009).

A. *Changes in Time Computation Rules*

The Appellate Rules Advisory Committee proposed the amendments to counting days as part of a time computation project designed to make time computation “consistent, simpler, and clearer.”¹⁵³ The project was “launched in response to frequent complaints about the time, energy, and anxiety expended in calculating time periods, the potential for error, and the anomalous results of the current computation provisions.”¹⁵⁴ Most appellate practitioners will no doubt appreciate the more uniform approach to time computation in the new rules. The changes may be confusing, however, to those who are accustomed to the current methods. Practitioners need to familiarize themselves and their staffs with the new rules to avoid errors in calculating deadlines.

The amendments to Appellate Rule 26(a) simplify the method for computing time periods by adopting what has been dubbed a “days are days” approach.¹⁵⁵ Under the current rule, intermediate weekends and holidays are excluded from a time period when it is less than eleven days (unless stated in calendar days), and intermediate weekends and holidays *are* currently included in computing longer periods of time.¹⁵⁶ Under the new rule, periods stated in days or a longer unit will include every day, including intermediate weekends and holidays, regardless of the length of the specified period.¹⁵⁷ These time computation rules will “apply in computing any time period specified in [the Federal Rules of Appellate Procedure], in any local or court order, or in any statute that does not specify a method for computing time.”¹⁵⁸ The Advisory Committee Note clarifies that the rules do not apply when a fixed time to act is set.¹⁵⁹

The amendments to Appellate Rule 26 also clarify the method for counting forward and backward when the deadline falls on a weekend or holiday. The new Appellate Rule 26(a)(1)(c) provides that when stated in days or a longer unit, the time period includes the last day of the period unless the

153. Report of the Judicial Conference of the United States at 1, *available at* http://www.uscourts.gov/rules/Supreme%20Court%202008/Excerpt_ST_AP.pdf.

154. *Id.*

155. *Id.* The proposed amendments also specify the method for computing hourly time periods. *See* FED. R. APP. P. 26(a)(2) (2009). This is in response to legislation affecting court proceedings in which deadlines are expressed in hours rather than days or longer periods. Report of the Judicial Conference of the United States, *supra* note 153, at 2.

156. FED. R. APP. P. 26(a)(2) (2007) (repealed 2009).

157. FED. R. APP. P. 26(a)(1)(B) (2009).

158. FED. R. APP. P. 26(a)(1)(B) (2009).

159. Appendix B to Memorandum from Judge Carl E. Stewart, Chair, Advisory Committee on Appellate Rules to Judge Lee H. Rosenthal, Chair, Standing Committee on Rules of Practice and Procedure (May 13, 2008 (rev. June 20, 2008)) (2008 Appellate Advisory Committee Report) at 7, *available at* <http://www.uscourts.gov/rules/jc09-2008/2008-09-Appendix-B.pdf>.

last day falls on a weekend or legal holiday, in which case “the period continues to run until the end of the next day” that is not a weekend or legal holiday.¹⁶⁰ Under Appellate Rule 26(a)(5), “[t]he ‘next day’ is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.”¹⁶¹

The amendments address time calculation considerations implicated by electronic filing by defining the “last day” for such filings. Under new Appellate Rule 26(a)(4)(B), the last day for electronic filing in the circuit courts of appeals ends “at midnight in the time zone of the circuit clerk’s principal office.”¹⁶² Thus, attorneys who practice in circuits spanning more than one time zone will need to take time differences into account when calculating deadlines.¹⁶³ During Daylight Savings Time, electronic filing deadlines will shift backward by an hour in the states and territories that do not observe the time change.¹⁶⁴

The rule is different in the district courts. Under Appellate Rule 26(a)(4)(A), the “last day” of a time period for purposes of electronic filing in the district court “ends . . . at midnight in the [district] court’s time zone,” unless a statute, local rule, or court order provides otherwise.¹⁶⁵ Thus, a notice of appeal is timely if filed in the district court by midnight in the time zone where the district court is located, even if the circuit court clerk’s office is in a different time zone. The Advisory Committee adopted this distinction because lawyers would not “intuitively expect” that the deadline for filing a notice of appeal in the district court would need to conform to the time zone of the circuit court clerk’s office.¹⁶⁶

B. *Changes in Appellate Rule Deadlines*

The amendments extend various short deadlines by two or more days to offset the effect of including intermediate weekend days and holidays in

160. FED. R. APP. P. 26(a)(1)(c) (2009).

161. *Id.*

162. FED. R. APP. P. 26(a)(1)(c) (2009).

163. To cite an extreme example, the San Francisco-based Ninth Circuit encompasses nine states and two territories in five different time zones: Alaska, Arizona, California, Guam, Hawai’i, Idaho, Montana, Nevada, the Northern Mariana Islands, Oregon, and Washington. See http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000135. A document due to be electronically filed on a particular day by midnight PST will be timely if filed by 1 a.m. the next day in Montana, 12:00 midnight the same day in Nevada, 11 p.m. the same day in Alaska, 10 p.m. the same day in Hawai’i, and 6 a.m. the previous day in Guam.

164. These include Arizona (except for the Navajo Nation), Hawai’i, Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands. <http://tf.nist.gov/general/history.htm#Anchor-16126>.

165. FED. R. APP. P. 26(a)(4)(A) (2009).

166. Memorandum from Judge Carl E. Stewart, Chair, Advisory Committee on Appellate Rules to Judge David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure (May 25, 2007 (revised June 22, 2007)) (2007 Appellate Advisory Committee Report) at 2, available at http://www.uscourts.gov/rules/proposed0807/AP_Memo_5_25_07.pdf.

computing deadlines.¹⁶⁷ The amendments change most time periods of less than thirty days to multiples of seven days (*i.e.*, seven, fourteen, twenty-one, or twenty-eight days).¹⁶⁸ This simplifies counting and ensures that deadlines will fall on a weekday. References to “calendar days” in Appellate Rules 25, 26, and 41 become references simply to “days.”¹⁶⁹

Noteworthy deadline changes include the following:

- **Appellate Rule 5(b)(2):** Extends the deadline for filing an answer in opposition to a petition for permission to appeal (or a cross-petition) from seven to ten days after the petition is served.¹⁷⁰
- **Appellate Rule 10(b)(1) & (3):** Extends deadlines relating to the ordering and designation of transcripts for the record on appeal from ten to fourteen days, including the deadline for the appellant to order the transcript of proceedings or file a certificate that no transcript will be ordered.¹⁷¹
- **Appellate Rule 12(b):** Extends the deadline for filing a representation statement from ten to fourteen days after filing the notice of appeal.¹⁷²
- **Appellate Rule 27(a)(3)(A):** Extends the default deadline for filing a response to a motion from eight to ten days after service of the motion.¹⁷³
- **Appellate Rule 30(b)(1):** Extends deadlines relating to the parties’ responsibilities to determine the contents of the appendix from ten to fourteen days.¹⁷⁴
- **Appellate Rule 39(d):** Extends the deadline for filing an objection to a bill of costs from ten to fourteen days after service of the bill of costs.¹⁷⁵

This list is not comprehensive, and practitioners are urged to review the amendments to ensure timely compliance with all new deadlines.

C. New Appellate Rule 12.1 Providing Procedure for Remand After Indicative Rulings

New Appellate Rule 12.1 and Civil Rule 62.1 together set forth the procedure for obtaining a remand after a so-called indicative ruling by a district court on a motion filed during an appeal.¹⁷⁶ These rules codify and standardize a practice already used with some variations by the appellate courts.¹⁷⁷ Indicative rulings often arise in the context of Civil Rule 60(b)

167. 2008 Appellate Advisory Committee Report, *supra* note 159, at 2.

168. *Id.*

169. Appellate Rules Order, *supra* note 147, at 17, 22 and 27.

170. FED. R. APP. P. 5(b)(2) (2009).

171. FED. R. APP. P. 10(b)(1) & (3) (2009).

172. FED. R. APP. P. 12(b) (2009).

173. FED. R. APP. P. 27(a)(3)(A) (2009).

174. FED. R. APP. P. 30(b)(1) (2009).

175. FED. R. APP. P. 39(d) (2009).

176. Appellate Rules Order, *supra* note 147, at 12–13; Civil Rules Order, *supra* note 147, at 26–27.

177. See *Pickens v. Howes*, 549 F.3d 377, 383 (6th Cir. 2008); *Ameritech Corp. v. Int’l Bhd. of Elec. Workers*, 543 P.3d 414, 418–19 (7th Cir. 2008); *Davis v. Yageo Corp.*, 481 F.3d 661,

motions for relief from a final judgment or order, which must be filed in the district court.¹⁷⁸ Civil Rule 60(b) motions have presented a “jurisdictional quandary” for district courts and litigants when filed after the district court has been divested of jurisdiction by an appeal.¹⁷⁹ Inexperienced practitioners may be unaware that the procedure is even available.

Under the new rules, if a litigant timely moves for relief while an appeal is pending, the district court may “(1) defer considering the motion; (2) deny the motion; or (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.”¹⁸⁰ The movant must “promptly notify” the circuit court clerk if the district court selects the third, “indicative ruling,” option.¹⁸¹ Neither of the rules defines the term “promptly,” but one commentator has suggested that it would be prudent for the movant to notify the circuit court clerk within ten calendar days after receiving the district court’s indicative ruling.¹⁸²

Upon notification, the appellate court may (but is not required to) remand to the district court for “further proceedings” on the indicative ruling.¹⁸³ The district court may then decide the motion.¹⁸⁴ The appellate court otherwise retains jurisdiction unless it dismisses the appeal outright.¹⁸⁵ After the district court has ruled on the motion, the parties must “promptly notify” the circuit court clerk of the district court’s decision.¹⁸⁶ Again, “promptly” is not defined, so practitioners are advised to act as expeditiously as possible.¹⁸⁷ Practitioners should also note that while the movant is required to notify the circuit court of an indicative ruling,¹⁸⁸ *all*

685 (9th Cir. 2007); *Shepherd v. Int’l Paper Co.*, 372 F.3d 326, 329 (5th Cir. 2004); *Mahone v. Ray*, 326 F.3d 1176, 1180 (11th Cir. 2003); *King v. First Am. Investigations, Inc.*, 287 F.3d 91, 94 (2d Cir. 2002); *Fobian v. Storage Tech. Corp.*, 164 F.3d 887, 891–92 (4th Cir. 1999); *Hoai v. Vo*, 935 F.2d 308, 312 (D.C. Cir. 1991); *Aldrich Enters., Inc. v. U.S.*, 938 F.2d 1134, 1143 (10th Cir. 1991); *Venen v. Sweet*, 758 F.2d 117, 123 (3d Cir. 1985); *Pioneer Ins. Co. v. Gelt*, 558 F.2d 1303, 1312 (8th Cir. 1977); *Commonwealth of Puerto Rico v. SS Zoe Colocotroni*, 601 F.2d 39, 42 (1st Cir. 1979).

178. See FED. R. CIV. P. 60(b), (c); see also *Pickens*, 549 F.3d at 383.

179. See Josh Jacobson, *New Federal Rules Will Govern Indicative Rulings*, 28-3 ABA APP. PRAC. J. 14 (2009), available at http://www.abanet.org/litigation/litigationnews/trial_skills/appellate-federal-rules-indicative-rulings.html; see also Mark I. Levy, *Indicative Rulings*, NAT’L L.J. 14 (Feb. 16, 2009) (noting problem created by district court’s lack of jurisdiction to grant Civil Rule 60(b) motion while judgment is on appeal).

180. FED. R. CIV. P. 62.1(a) (2009).

181. See FED. R. APP. P. 12.1 (a) (2009); FED. R. CIV. P. 62.1(b) (2009).

182. See Jacobson, *supra* note 179.

183. FED. R. APP. P. 12.1(b) (2009).

184. FED. R. CIV. P. 62.1(c) (2009).

185. FED. R. APP. P. 12.1(b) (2009).

186. *Id.*

187. See Jacobson, *supra* note 179.

188. FED. R. APP. P. 12.1(a) (2009).

parties share responsibility to alert the circuit court clerk when the district court has decided the motion after remand.¹⁸⁹ Courts may by local rule establish the format for the litigant's notifications and for the district court's statement.¹⁹⁰

The Advisory Committee Note to Appellate Rule 12.1 provides useful guidance in interpreting and implementing the rule.¹⁹¹ First, the Note makes clear that Appellate Rule 12.1 "does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in the face of a pending appeal."¹⁹² The district court's jurisdiction will continue to be governed by existing case law and statutes.¹⁹³

Second, the Note cautions that a full remand terminating the appeal is generally disfavored in the context of postjudgment motions, unless the appellant has clearly expressed an intent to abandon the appeal.¹⁹⁴ The concern is that an unlimited remand may deprive the appellant of full review: "if the initial appeal is terminated and the district court then denies the requested relief, the time for appealing the initial judgment will have run out and a court might rule that the appellant is limited to appealing the denial of the postjudgment motion."¹⁹⁵ A limited remand for the sole purpose of ruling on the motion is generally the "preferred course."¹⁹⁶

Third, practitioners should be mindful that a new or amended notice of appeal will likely be necessary to challenge the district court's disposition of the motion on remand.¹⁹⁷

D. Amendments to Appellate Rule 4 Relating to Appeals Taken as of Right

The amendments make minor changes to provisions for taking an appeal as of right under Appellate Rule 4. Appellate Rule (a)(4)(A)(vi) defines which motions under Civil Rule 60 extend the time to file a notice of appeal. The amendment to this rule extends the deadline by which Rule 60 motions must be filed to toll the notice of appeal deadline, from ten to twenty-eight days after entry of judgment.¹⁹⁸ This amendment matches revisions to the time limits for postjudgment motions under amended Civil

189. FED. R. APP. P. 12.1(b) (2009); see also Appendix B to 2008 Appellate Advisory Committee Report, *supra* note 159, at 48.

190. Appendix B to 2008 Appellate Advisory Committee Report, *supra* note 159, at 47; see FED. R. APP. P. 47 (a)(1) (2009).

191. See Appendix B to 2008 Appellate Advisory Committee Report, *supra* note 159.

192. *Id.* at 46–47.

193. See *id.*; see also Levy, *supra* note 179.

194. Appendix B to 2008 Appellate Advisory Committee Report, *supra* note 159, at 47.

195. *Id.*

196. *Id.* at 48.

197. *Id.*

198. Appellate Rules Order, *supra* note 147, at 2.

Rules 50, 52, and 59, which extend deadlines relating to these motions from ten to twenty-eight days.¹⁹⁹

The amendment to Appellate Rule 4(a)(4)(B)(ii) eliminates an ambiguity in the current rule, which might be construed to require an appellant to amend a prior notice of appeal whenever the district court amends the judgment, even if the amendment is favorable to the appellant. The amended rule clarifies that the appellant need only file an amended notice of appeal when the appellant challenges the amendment to the judgment.²⁰⁰

199. Civil Rules Order, *supra* note 147, at 18–19, 24–25.

200. Appellate Rules Order, *supra* note 147, at 3.

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