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Appellate Outlook: Circuit Splits & Hot Topics To Track In 2024

By **Jeff Overley**

Law360 (January 1, 2024, 8:02 AM EST) -- The 2024 appellate almanac is looking lively after eye-popping opinions and arguments in 2023's homestretch. As the new year begins, several circuit splits seem more serious, ideological imbalances are in the spotlight, and luminaries of the U.S. Supreme Court bar are locked in a burgeoning battle over alleged corporate complicity in terrorism.

Before the current 366-day leap year even started, circuit courts in the last weeks of 2023 handed down remarkable rulings involving voting rights, securities fraud and healthcare kickbacks. Those rulings threaten the linchpins of statutory safeguards for democracy, investments and patients, and it's likely that the Supreme Court will eventually intervene.

On another front, liberals in late 2023 found themselves poised to occupy every active seat on one of the nation's 13 circuits; that's an exceedingly rare feat and an illustration of President Joe Biden's energetic efforts to counter former President Donald Trump's strikingly successful reshaping of appeals courts nationwide.

Meanwhile, a conservative circuit that's been frequently dropping bombshell opinions is approaching moments of truth in 2024, when the Supreme Court will embrace or erase controversial opinions curtailing abortion medication, defanging powerful regulators and letting suspected domestic abusers retain firearms.

And as 2024 ramps up, the U.S. solicitor general is expected to pick sides in an extraordinary saga at the Supreme Court. The justices are facing calls from the who's who of BigLaw oral advocacy to torpedo a D.C. Circuit decision against prominent drug and device manufacturers accused of pay-to-play corruption that fueled terrorism in the Middle East.

Here, Law360 summarizes hot appellate topics to track in the year ahead.

Disgorgement Divide Threatens 'Essential' Enforcement, SEC Says

In mid-December, the U.S. Securities and Exchange Commission sounded an alarm amid a new split between the Second and Fifth circuits regarding the Supreme Court's 2020 ruling in Liu v. SEC, which erected guardrails around disgorgement in financial fraud cases.

The commission's warning appeared in a Dec. 15 petition asking the full Second Circuit to revisit a panel's conclusion that defrauded investors must suffer "pecuniary harm" to qualify as victims eligible

for disgorgement awards under Liu. The conclusion in SEC v. Govil "contravenes Congress' intent by hindering courts' ability to force wrongdoers to disgorge ill-gotten gains," the SEC wrote.

Unregistered securities offerings and investment advice tainted by conflicts of interest are just two examples of schemes that could produce unlawful profits without inflicting pecuniary harm, according to the SEC's petition.

In an interview with Law360, Bradley Arant Boult Cummings LLP partner Elisha J. Kobre, a former federal prosecutor who defends securities fraud matters, cited insider trading as another illegal activity where "there's very rarely an identifiable victim who suffered pecuniary harm."

Prior to its ruling on pecuniary harm, the Second Circuit also ruled against the commission in SEC v. Ahmed, finding that Liu's limitations on disgorgement had survived subsequent congressional authorization of disgorgement. In its Ahmed decision, the Second Circuit explicitly snubbed the Fifth Circuit's 2022 ruling in SEC v. Hallam.

In Hallam, the Fifth Circuit examined the post-Liu congressional authorization and held that "such swift, expansive action is more consistent with a desire to curtail the [Supreme] Court's decision."

The Second Circuit's rulings could be especially consequential because the appeals court encompasses the Southern District of New York, where prosecutors and judges are deeply familiar with Wall Street shenanigans.

"It certainly is going to create a very, very different posture for the SEC and its enforcement actions in the Second Circuit than in the Fifth Circuit," Kobre said.

The SEC's petition predicted similar fallout, fretting that "the commission may be left unable to obtain disgorgement where there is no dispute that defendants profited from victimizing investors," even though "enforcement in such cases is essential to Congress' securities law regime."

The Second Circuit setbacks are especially meaningful because the SEC has been besieged on multiple other fronts in recent years; in addition to the Supreme Court's 2020 decision in Liu, the Supreme Court's 2018 decision in Lucia v. SEC restricted the SEC's hiring of administrative law judges, and a pending Supreme Court case, SEC v. Jarkesy, is threatening to upend the commission's in-house courts.

Kickback Question is Among 'Most Well-Developed Circuit Splits'

As 2024 gets going, the False Claims Act bar is intently watching the First Circuit. The appeals court is set to scrutinize a crucial question for healthcare fraud enforcement and to pick sides in a circuit split with sweeping significance for doctors, hospitals, drugmakers and medical device manufacturers.

"It really is critical to how my practice would operate, but also how players in the healthcare space operate," Crowell & Moring LLP partner Michael Shaheen said of the contested FCA question.

That question centers on the Anti-Kickback Statute, which fuels much of the nation's FCA litigation and broadly prohibits financial conflicts of interest in Medicare and Medicaid. At issue is an Affordable Care Act section that says healthcare billing "resulting from" kickbacks is actionable under the FCA.

After analyzing that section, the Sixth and Eighth circuits demanded proof that billing only occurred

because of kickbacks, while the Third Circuit merely required "some connection" between billing and kickbacks. Within the First Circuit, an intra-circuit split recently opened up, and interlocutory appeals recently commenced, after one Massachusetts federal judge embraced the government-friendly standard and another Massachusetts federal judge accepted the industry-friendly approach.

Ropes & Gray LLP partner John P. Bueker, who has represented Regeneron Pharmaceuticals Inc. in one of the Massachusetts kickback cases, told Law360 in an interview that kickback allegations are "the theory of the day in the False Claims Act space at the moment," and that the dispute "really is a big deal for both the defense bar, for the government and for [whistleblowing] relators."

Douglas Hallward-Driemeier, a Ropes & Gray partner who specializes in both the AKS and appellate matters, added in a separate interview that the dispute is "actually one of the most well-developed circuit splits," and that it is "hugely important." Led by Hallward-Driemeier, Ropes & Gray has helped Pfizer Inc. wage a tenacious offensive against government views of the AKS, which the U.S. Attorney's Office in Massachusetts has utilized to secure numerous eight-figure and nine-figure settlements from drugmakers.

Before the First Circuit assented to pretrial appeals, the U.S. Department of Justice assailed demands for evidence that billing wouldn't have happened "but for" kickbacks. Those demands would debilitate the AKS because its intent is "to ensure, on a prophylactic basis, that payments to providers or patients would not impact medical decision-making," the DOJ wrote in Regeneron's case.

But Shaheen, a former DOJ fraud litigator, told Law360 that the DOJ's stance is "nonsensical" and could, in theory, equate small gifts with graft. "You could have a hypothetical where a sales rep ... gives a provider a $200 Starbucks gift card, and that $200 gift card results in tens of millions of dollars in AKS exposure," the Crowell & Moring attorney said.

"Having the government have to establish the [direct] causal link there is crucial," Shaheen said. "It's the only way to have a regime that both accepts the problems that come with kickbacks and the tainted medical judgment that arises, but that also allows for some common sense."

After Long Consensus, Division Appears on Voting Rights

In voting rights litigation, one case generated a Supreme Court opinion in June, another case generated Supreme Court arguments in October, and multiple cases are carrying that momentum into 2024 after controversial circuit rulings in late 2023.

An Eighth Circuit panel in November delivered the most controversial of those rulings when it held that private litigants can't sue under the Voting Rights Act's Section 2 prohibition on racially discriminatory voting practices. Since the VRA's creation in 1965, few if any other appellate courts have adopted that view.

"The panel's decision has created a circuit split on a vitally important issue regarding VRA enforcement. In doing so, it contravenes the hundreds of Section 2 cases brought by private plaintiffs that federal appeals courts have decided for almost six decades," the Arkansas State Conference NAACP wrote in a December petition for rehearing.

U.S. Circuit Judge David R. Stras authored the 2-1 ruling and was joined by U.S. Circuit Judge Raymond W. Gruender. The ruling noted that Section 2 lacks an explicit mechanism for private enforcement, and

it observed that "for much of the last half-century, courts have assumed that Section 2 is privately enforceable."

"A deeper look has revealed that this assumption rests on flimsy footing," the majority wrote in its 20-page opinion.

A dissent by Chief U.S. Circuit Judge Lavenski R. Smith declared that "rights so foundational to self-government and citizenship should not depend solely on the discretion or availability of the government's agents for protection," and that the issue would be "best left to the Supreme Court in the first instance."

The matter may be headed that way, and it may have company: Mere days after the Eighth Circuit's decision, the Eleventh Circuit jettisoned a challenge to statewide elections for Georgia's Public Service Commission in another Section 2 case. Black residents had contended that the format unlawfully diluted their votes, but the circuit balked, finding that a proposed remedy — single-member election districts — wasn't appropriate.

"Because it is clear to us that plaintiffs' proposed remedy is a unique application of Section 2 that would upset Georgia's policy interests that are afforded protection by federalism and our precedents, we hold that plaintiffs have not proposed a viable remedy," the circuit wrote in Rose v. Georgia Secretary of State.

Elliot H. Scherker, co-chair of Greenberg Traurig LLP's national appeals group, told Law360 in a recent interview that "the most significant recent cases that are wending their way to the Supreme Court … have been the Section 2 Voting Rights Act cases," specifically citing the "uniquely notable decisions" of the Eighth and Eleventh circuits.

Those decisions "caused quite a stir in the national consciousness," and "there's very little doubt" that one or both decisions will end up before the justices, Scherker said.

Liberals See 'Very Friendly' 1st Circuit Grow Even Friendlier

President Joe Biden has added roughly 40 circuit judges, and those nominees have broadly diversified the judiciary, tilted the Second Circuit leftward, and fortified liberal blocs on almost every circuit. In 2024, the president's picks are set for a memorable milestone at the First Circuit, where all six active judges are expected to be selections of Biden or former President Barack Obama.

That's not to say ideological imbalances are uncommon among federal appeals courts; the Eighth Circuit, for example, has 11 active judges, and only one is a Democratic appointee. But it's rare to see 100% control by nominees from presidents of the same party.

Even before Biden's election, the First Circuit leaned strongly left, so an all-liberal line-up is less about changing the status quo than cementing it for another generation. Judges electing senior status during Biden's presidency have been in their 70s, and their successors have been in their late 40s to mid-50s.

"The First Circuit, for a long time, has been considered very friendly to progressive causes. And I'm not sure the difference between zero and one Republicans on the bench will make that much of a difference," Elliot Mincberg, senior fellow at left-leaning advocacy group People For the American Way, told Law360. "But it could. It's hard to tell."

In addition to ideological consistency, the First Circuit is the smallest federal appeals court, further simplifying considerations for litigants.

"When you have a bench that's as small as that, sometimes you might think of it as a favorable venue, [and] sometimes you might think of it as an unfavorable venue," Ropes & Gray's Bueker, whose Boston office is two miles from the First Circuit courthouse, told Law360. "But at the very least … it's easier to think about venue."

The First Circuit does, however, have two senior judges who were appointed by GOP presidents and still sit on panels, so the ideological climate remains slightly unpredictable.

Bueker specifically noted that Senior First Circuit Judge Bruce M. Selya — who is 89 years old and joined the bench in 1986 — is apparently "still continuing to take a pretty full docket and almost as many sittings as the active judges."

And so, despite the dominance of Democratic appointees, there's still "room for variance" from panel to panel, Bueker said.

Do The 5th & 9th Circuits Suddenly Have Something in Common?

As the months went by in 2023, appellate aficionados increasingly used blog posts, podcasts and small talk to pose a burning question: Is the Fifth Circuit the new Ninth Circuit?

In layman's terms, the question is asking if the New Orleans-based Fifth Circuit has supplanted the San Francisco-based Ninth Circuit as the most reliable supplier of borderline-radical rulings that the Supreme Court feels obliged to scrutinize and inclined to pulverize.

"As the Supreme Court's docket is shrinking, it is considering an increasing number [of cases from] the Fifth Circuit, and the Fifth Circuit's decisions do not appear to be faring well," Jonathan H. Adler, a right-leaning professor at the Case Western Reserve University School of Law, wrote recently on the Volokh Conspiracy blog. "This invites comparisons to the Ninth Circuit, which was notorious for issuing decisions out of step with the current [Supreme] Court."

Speculation about a role reversal has coincided with extreme makeovers on each court: Trump beefed up the Fifth Circuit's conservative majority by adding six judges, and he drastically eroded the Ninth Circuit's liberal majority by adding 10 judges.

It's too soon to confidently know if the Fifth Circuit has overstepped. But it's clear that the revamped circuit is eager to propel the law rightward. Examples include allowing suspected domestic abusers to retain firearms, rejecting the U.S. Food and Drug Administration's streamlined access to abortion medication, and balking at federal efforts to equate bump stocks and machine guns. The Supreme Court has agreed to examine each of those rulings.

Additional Fifth Circuit rulings have dealt body blows to administrative agencies, calling into question years of work at the Consumer Financial Protection Bureau, and invalidating long-standing enforcement procedures at the SEC. The justices are also examining those rulings, which are in the vanguard of efforts to tame an "administrative state" that conservatives call bloated and unaccountable.

Early in 2023, two administrative law cases — Axon Enterprise v. Federal Trade Commission and SEC v. Cochran — wound up at the Supreme Court and offered a tidy test of whether the Ninth Circuit is truly passing its torch to the Fifth Circuit. The two cases were consolidated, and they presented the same question about challenges to agency structures, but they had been decided differently in the lower courts.

"The Ninth and the Fifth themselves created the very important split that led to the Axon and [Cochran] consolidated case," Greenberg Traurig shareholder Dominic E. Draye, who clerked on the Fifth Circuit and litigated in the Ninth Circuit as Arizona's solicitor general, told Law360 in an interview.

In April, a unanimous Supreme Court opinion essentially fast-tracked constitutional challenges to the FTC and the SEC — reversing the Ninth Circuit and affirming the Fifth Circuit.

Similar face-offs between the two circuits probably won't happen often. And Sarah M. Harris, an appellate specialist at Williams & Connolly LLP, suggested that comparisons of the two circuits are somewhat superficial, overlooking distinct reasons that each circuit's ideology entered the spotlight in the first place.

"The venue provisions for a lot of these administrative challenges let you essentially figure out a way to get into the Fifth Circuit," Harris told Law360 near the start of the Supreme Court's current term. "The Ninth Circuit — in the old days, when it was the liberal circuit — it had cases that were coming to it because it was populous, on criminal law issues, or habeas issues, or death penalty issues. People weren't choosing to be there, necessarily. People are choosing to be in the Fifth Circuit."

Draye, however, noted that the hot-button topic of immigration is constantly igniting legal challenges in each circuit and fiery fights at the Supreme Court. In June 2022, for instance, the justices capped off their term by reversing a Fifth Circuit decision against the Biden administration's asylum policies.

Although the U.S.-Mexico border has a short stretch within the Tenth Circuit, it mostly runs through the Fifth and Ninth circuits. And on Jan. 8, in the Supreme Court's first arguments of 2024, the justices will review consolidated cases out of the Fifth and Ninth circuits concerning noncitizen removal proceedings.

"For all intents and purposes, it's only two circuits that are border circuits now: the Fifth and the Ninth," Draye said. "And they will necessarily be two of the most important circuits going forward, because they will be the venue in which immigration-related lawsuits arise."

Top Oral Advocates Abound In High Court Terrorism Case

Some of America's best-known appellate advocates are gliding into 2024 with a burst of adrenaline, courtesy of Supreme Court justices. Three months ago, the justices subtly signaled interest in reviewing — or perhaps even unceremoniously vacating — the D.C. Circuit's 61-page pummeling of drug and device companies accused of war profiteering schemes that funded deadly attacks on U.S. service members in Iraq.

The expression of interest consisted of a single boilerplate sentence: "The Solicitor General is invited to file a brief in this case expressing the views of the United States." The high court rarely extends such invitations — only four others have gone out this term — and it did so in the Anti-Terrorism Act case as part of its first order list of the current term.

That's good news for the companies — AstraZeneca Pharmaceuticals LP, GE Healthcare, Johnson & Johnson, Pfizer Inc., F. Hoffmann-La Roche Ltd. and various affiliates — and their assertion that the D.C. Circuit's opinion should be vacated under the high court's May ruling in Twitter Inc. v. Taamneh, which required ATA cases to demonstrate "conscious and culpable" conduct. The high court's invitation is also good news for the healthcare companies' lawyers, many of whom are seasoned orators at One First Street.

Those orators include Lisa S. Blatt and Harris of Williams & Connolly; Kannon K. Shanmugam of Paul Weiss Rifkind Wharton & Garrison LLP; and Catherine M.A. Carroll and David W. Bowker of WilmerHale. There's also Andrew J. Pincus of Mayer Brown LLP, lead counsel on a supportive amicus brief from the U.S. Chamber of Commerce and trade group Pharmaceutical Research and Manufacturers of America.

On the other side is David C. Frederick of Kellogg Hansen Todd Figel & Frederick PLLC. Frederick is lead counsel for service members and families who are suing over deaths and injuries that the companies facilitated, according to a 588-page complaint, "by making corrupt payments to the terrorists" who ran the Iraqi health ministry that doled out lucrative medical contracts.

All together, those attorneys have delivered more than 175 arguments at the high court. They're all awaiting the response from Solicitor General Elizabeth B. Prelogar, who has argued roughly two-dozen times at the Supreme Court; if Prelogar sticks to her typical timeline for Supreme Court requests to weigh in on cases, she'll share the government's views within the next few months.

--Editing by Emily Kokoll.
