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Ross School of Business Working Paper

Working Paper No. 1134

September 2009

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Justice Sotomayor on the Supreme Court: A Boon for Business?

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*"I generally structure my opinions by setting out what the law requires and then by explaining why a contrary position, sympathetic or not, is accepted or rejected."<sup>1</sup>*

The recent confirmation hearings of now Justice Sonia Sotomayor<sup>2</sup> followed the pattern of most of the other confirmation hearings for the Justices currently sitting on the U.S. Supreme Court. There was political grandstanding by members of both parties.<sup>3</sup> Justice Sotomayor declined to say how she might vote on a number of issues and gave ambiguous answers to some other questions.<sup>4</sup> In the end, of course, she was confirmed. But, the hearings offered only limited insights into the record Justice

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<sup>1</sup> *Nomination Hearing of Sonia Sotomayor: Hearing Before the S. Comm. on the Judiciary*, 111 Cong. (July 13, 2009) [hereinafter *Nomination Hearing*](opening statement of Judge Sonia Sotomayor, nominee U.S. Supreme Court), [http://judiciary.senate.gov/hearings/testimony.cfm?id=3959&wit\\_id=8102](http://judiciary.senate.gov/hearings/testimony.cfm?id=3959&wit_id=8102).

<sup>2</sup> Because she was confirmed prior to the writing of this essay, we refer to Justice Sotomayor as "Justice" or as "Sotomayor" throughout the essay regardless of the time period being discussed.

<sup>3</sup> *See, e.g.*, "I agree with Senator Feingold and Senator Whitehouse that we hear a lot about judicial activism when politicians talk about what kind of judge they want in the Supreme Court. But it seems that their definition of an activist judge is one who votes differently than they would like." *Nomination Hearing, supra* at note 1 (July 13, 2009) (statement of Sen. Al Franken, Member, Senate Committee on the Judiciary); "Down the other path lies a Brave New World where words have no true meaning and judges are free to decide what facts they choose to see. In this world, a judge is free to push his or her own political and social agenda. I reject this view." *Id.* (statement of Sen. Jeff Sessions, Member, Senate Committee on the Judiciary).

<sup>4</sup> *See, e.g.*, Jonathan Turley, *Retire the 'Ginsburg rule': Supreme Court nominee hearings are most noteworthy for what they don't reveal*, USA TODAY, July 16, 2009, at A9.

Sotomayor established during her time as a district court judge and while on the Second Circuit Court of Appeals.

In this essay we, as business law professors with different areas of doctrinal expertise, offer our views on Justice Sotomayor's decisions across five areas of law of interest to business. We focus primarily on her appellate decisions. In Parts I through V we separately discuss each of those doctrinal areas and the extent to which the themes are found, or not found, in those areas. Not surprisingly, and to the benefit of this essay, we each bring our individual perspective, language, and predispositions to the separate doctrinal discussions. In Part VI we sketch the themes that we drew from those decisions across the doctrinal areas and discuss how Justice Sotomayor may contribute to the development of business-related jurisprudence during her tenure on the Supreme Court.

## **I. JUSTICE SONIA SOTOMAYOR: HER INTELLECTUAL PROPERTY OPINIONS**

### *A. General Observations*

Justice Sonia Sotomayor brings much intellectual property experience with her to the Supreme Court. This Part's discussion is limited to her patent and copyright opinions. Patents and copyrights are explicitly authorized in the Constitution.<sup>5</sup> As such, these intellectual property rights are the only two devoted solely to promoting innovation and creativity. Therefore, this discussion provides a good overview of how Justice Sotomayor addresses the delicate balance between promoting creative activities through the grant of exclusive rights and public access to innovative and creative works.

It is difficult to assign liberal/conservative or pro/anti-business labels to Justice Sotomayor's intellectual property decisions. With certain exceptions, such as music piracy, copyright length and limits to public access of creative works, there are few intellectual property issues that capture the public imagination. Moreover, business entities, especially in patent cases, tend to be on both sides of intellectual property cases, thereby making a search for a pro or anti-business bias superfluous.

Justice Sotomayor proved to be a very competent intellectual property jurist. Her intellectual property decisions exhibit a workmanlike attention to detail. Her opinions rely heavily on precedent. Rather than take intuitive leaps when ambiguity is present, she tends to resort to first principles and move the law in a cautious and incremental direction. Accordingly, she does not employ a creative approach to intellectual property cases. Nonetheless, her grasp of the highly technical subject matter is notable. She does not shy away from dealing directly with such arcane claims and defenses as prosecution history estoppel, doctrine of equivalence and copyright compilation disaggregation. Sotomayor's comfort in and confidence regarding intellectual property matters may partially be attributable to her private law firm experience representing trademark holders against infringers and counterfeiters.<sup>6</sup>

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<sup>5</sup> U.S. Const. art. I, § 8, cl. 8.

<sup>6</sup> Ed Shanahan, *IP a Key Part of Sotomayor Package*, IP LAW & Bus. (May 27, 2009), <http://www.law.com/jsp/iplawandbusiness/PubArticleIPLB.jsp?id=1202431010683>.

In addition to caution and careful analysis, Sotomayor's work exhibits constraint and a strong adherence to rules and established law. Given the opportunity to severely punish an infringer, she has repeatedly scaled back awards in an effort to align her judgment with the plaintiff's actual losses. In several of her copyright decisions, plaintiffs were entitled to receive statutory damages in amounts of up to \$100,000 per infringement. She never awarded the maximum amount, typically granting awards of \$20,000-\$30,000 per infringement and sometimes less.<sup>7</sup> Analogously, she refused to award injunctive relief in situations where she believed justice would not be served by such a grant.<sup>8</sup> In situations where plaintiffs have taken their time filing complaints, Sotomayor has not hesitated to evoke the statute of limitations to bar or limit recovery. Finally, when parties act in bad faith, she has also evoked equitable principles to bar their recovery.

### *B. Intellectual Property Cases by the Numbers*

As a Second Circuit court judge, Justice Sotomayor heard seven cases involving copyright issues and, as a district court judge, five patent and ten copyright cases. It is difficult to draw inferences when dealing with small numbers of cases. Nonetheless, there are some trends present in Justice Sotomayor's intellectual property decisions. She has a tendency to rule against the intellectual property rights holder in patent cases. In four of the five patent law cases, Sotomayor either ruled against the plaintiff or significantly scaled back the plaintiff's award. In her copyright decisions, Sotomayor ruled against plaintiffs seven times, in their favor seven times and in the three cases for which liability was not an issue, she significantly reduced or limited the requested award. This pattern could indicate bias against patent holders. However, it may also indicate that Sotomayor strictly construes patent law requirements. Failure to assiduously meet identified standards leads her to reject patent holder claims.

### *C. Themes in Intellectual Property Cases*

The analytical foundations for patent and copyright protection – innovation versus creativity – differ enough that separating the discussion of Justice Sotomayor's patent and copyright law decisions produces significant insights.

#### 1. Patent Law Cases

Justice Sotomayor's patent law decisions have generally not favored patent holders. In *Intellectual Property Dev. v. UA-Columbia*,<sup>9</sup> Sotomayor dismissed a patent infringement claim with prejudice ruling

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<sup>7</sup> See, e.g., *Top Rank, Inc. v. Allerton Lounge, Inc.*, 96 Civ. 7864 (1998) (reducing request for \$100,000 per instance to amounts in the \$20,000-\$30,000 range); *Peer Int'l Corp. v. Luna Records*, 887 F. Supp. 560 (S.D.N.Y. 1995) (stressing that statutory damages are not supposed to provide a windfall while substantially reducing damage request).

<sup>8</sup> See *Krueger Int'l v. Nightingale Inc.*, 915 F. Supp. 595 (S.D.N.Y. 1996) (refusing to award a preliminary injunction because the plaintiff's delay in filing its complaint repudiated a finding of likely irreparable harm).

<sup>9</sup> No. 94 Civ. 6296, 1998 U.S. Dist. LEXIS 3901 (S.D.N.Y. March 24, 1998), *aff'd*, 336 F.3d 1308 (Fed. Cir. 2003).

that the subject patent was invalid and no infringement had occurred. This ruling was based in part on a narrow interpretation of the meaning of “high frequency” when used in the claim description. On appeal, the CAFC affirmed the ruling of non-infringement but reversed Sotomayor’s ruling of invalidity.<sup>10</sup> The two courts differed on the plain meaning of “high frequency” with the CAFC assigning a meaning that would allow a court to find the patent valid.

*Refac Int'l v. Lotus Dev. Corp.*<sup>11</sup> was, perhaps, Sotomayor’s most interesting patent case. It provides an illustration of her keen sense of justice. In an infringement action, Lotus Corp. asserted that the patent should be invalidated due to the patentee’s inequitable conduct before the patent examiner. In providing evidence that the patent claim met the enablement standard for patentability,<sup>12</sup> the patent applicant provided three affidavits from purportedly independent experts. However, neither the applicant nor the affidavits revealed that the affiants had a prior affiliation with the applicant. Sotomayor found such omissions unacceptable and, therefore, invalidated the patent on the basis of inequitable conduct. On appeal, the CAFC affirmed Sotomayor’s decision but provided interesting commentary.<sup>13</sup> The CAFC suggested that finding inequitable conduct based on the omission of employment history may seem severe but was not an abuse of discretion.<sup>14</sup> Thus, the CAFC seemed to imply that while many judges would not have treated this behavior so harshly, it was not unacceptable and was within her discretion.

In the one clear victory for a patent holder, Sotomayor displayed her strong grasp of one of the more difficult concepts in patent law.<sup>15</sup> Under the doctrine of prosecutorial history estoppel, a patent holder who amends his patent application in order to obtain a patent is estopped from subsequently claiming that products that are not exactly described by the patented claim nonetheless infringe the patent because they are equivalent to the patent.<sup>16</sup> The logic is that it is unfair for a patent holder who concedes claim coverage in order to initially obtain a patent to regain that coverage by asserting that another creator has created an equivalent technology. In *Dow Corning v. Biomet, Inc.*,<sup>17</sup> Sotomayor rejected the estoppel argument after reviewing the claim record. She concluded that there was no evidence that the plaintiff had conceded coverage in the disputed area, therefore, Dow’s argument that the defendant’s product was an infringing equivalent could be considered.<sup>18</sup>

What is impressive about Sotomayor’s ruling in *Dow Corning* was her ability to adhere to the rule dictated by precedent even though that application was controversial. The CAFC subsequently

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<sup>10</sup> Intellectual Prop. Dev. v. UA-Columbia Cablevision, 336 F.3d 1308 (Fed. Cir. 2003).

<sup>11</sup> 887 F. Supp. 539 (S.D.N.Y. 1995), *aff’d*, 81 F.3d 1576 (Fed. Cir. 1996).

<sup>12</sup> 35 U.S.C. § 112 (2008).

<sup>13</sup> *Refac Int'l v. Lotus Dev. Corp.*, 81 F.3d 1576 (Fed. Cir. 1996).

<sup>14</sup> *Id.* at 1584.

<sup>15</sup> *Dow Corning v. Biomet, Inc.*, No. 91 Civ. 5341, 1993 U.S. Dist. LEXIS 2261 (S.D.N.Y. March 2, 1993).

<sup>16</sup> See Robert E. Thomas, *Debugging Software Patents: Increasing Innovation and Reducing Uncertainty in the Judicial Reform of Software Patent Law*, 25 SANTA CLARA COMPUTER & HIGH TECH L.J. 191, 229 (2008).

<sup>17</sup> 1993 U.S. Dist. LEXIS 2261, at \*7-\*9.

<sup>18</sup> *Id.* at \*9.

rejected this interpretation of prosecution history estoppel, ruling that any amendment of a patent claim serves as a subsequent bar to use of a doctrine of equivalents argument.<sup>19</sup> However, the Supreme Court quickly reversed the CAFC decision, ruling that despite the efficiency gains from changing the rule, overturning established precedent would be harmful to settled expectations.<sup>20</sup> Thus, whereas the CAFC was willing to “improve” the law, Sotomayor’s workmanlike approach and allegiance to precedent resulted in an outcome in line with the Supreme Court’s interpretation.

## 2. Copyright Decisions

Unlike her patent law cases, Justice Sotomayor’s copyright cases provide a balance between copyright holders and defendants. Most indicative of her treatment of copyright cases are her district court decisions in two famous copyright cases. In the first, *Castle Rock Entertainment v. Carol Publishing Group*,<sup>21</sup> Sotomayor displayed her facility with the fact/expression dichotomy used to distinguish between protected and unprotected content. In this case, the producers of the Seinfeld television show sued the publishers of a book titled *The Seinfeld Aptitude Test* (“SAT”) for copyright infringement. The SAT provided a variety of questions on the characters and events from the show. The defendant asserted that the book was factual and, therefore, was not a derivative work. In ruling for the copyright holder, Sotomayor rejected the defendant’s claim because the facts that the SAT tested were part of the fictional Seinfeld world. Sotomayor explained that non-infringing facts included the identity of actors playing specific roles, who produced the show, or the number of years the show had run.<sup>22</sup>

Justice Sotomayor’s most significant intellectual property case was *Tasini v. New York Times*.<sup>23</sup> This case of first impression concerned the definition of revision of a collective work. The contracts between the freelance author plaintiffs and newspaper and magazine defendants allowed publication of revised compilations without additional compensation to authors. Thus, journals could publish reprints of entire magazines or distribute magazines and articles on microfilm and microfiche without additional royalty payments. The ambiguity arose when the New York Times and other defendants began making their articles available on electronic databases such as Lexis Nexis. Authors argued that such reproductions were not revised collective works but were, instead, disaggregated reproductions of their copyright protected articles that required additional compensation.<sup>24</sup>

With very little guidance from authorities, Sotomayor ruled that it was a revision because the entire magazine was reproduced on Lexis Nexis. Relying on precedent drawn from infringement of collective works, Sotomayor applied a substantial similarity standard. To prove infringement of a collective work, the plaintiff must show that the alleged offending work is substantially similar to the protected work. It must contain creative aspects of the original. Copying of unprotected component

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<sup>19</sup> *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 234 F.3d 558 (Fed. Cir. 2000), *rev’d*, 535 U.S. 722 (2002).

<sup>20</sup> 535 U.S. 722.

<sup>21</sup> 955 F. Supp. 260 (1997).

<sup>22</sup> *Id.* at 266.

<sup>23</sup> 972 F. Supp. 804 (1997), *rev’d*, 206 F.3d 161 (2d Cir. 1999), *aff’d*, 533 U.S. 483 (2001).

<sup>24</sup> 972 F. Supp. at 807-09.

parts of the collective work is not infringement. Using this framework, Sotomayor concluded that placing entire periodicals online is a substantially similar work and, therefore, a revision. Moreover, the treatment of microfilm and microfiche mandated this conclusion since little distinction can be drawn between the electronic and film-based media.<sup>25</sup> Despite Sotomayor's well reasoned opinion, The Supreme Court reversed, in a 7-2 ruling, concluding that publishing periodicals on electronic databases effectively disaggregates collective works.<sup>26</sup> The justices analogized that an electronic database is akin to a large file room with an excellent indexing and search system containing a myriad of articles that had little relation to the original publication.<sup>27</sup>

Although the Supreme Court reversed Sotomayor's district court decision, her decision displayed a higher adherence to established precedent than did the Supreme Court decision. With no direct precedent, Sotomayor relied on the closest analogs: infringement actions for collective works and the treatment of microfilm. By contrast, the Supreme Court used a non-legal analogy on which to base its decisions. In essence, the Supreme Court engaged in an act of "policy making," whereas Sotomayor attempted to use established law to guide her.

#### *D. The Supreme Court, Intellectual Property Law and Justice Sotomayor*

Justice Sotomayor's experience as both a district and circuit court judge will provide valuable experience to the Supreme Court. The Supreme Court operates with few constraints. Without constraints, the allure of shaping law to accommodate each justice's personal preferences can be overwhelming. I believe Sotomayor's years of experience in subordinate courts will help provide an anchor or reality check for the Court. She has, and I believe, will continue to have a strong adherence to precedent in intellectual property cases. Thus, she will provide discipline forcing the court to evaluate whether existing law should govern or whether there is no alternative other than to blaze a new path.

Her one possible bias may be that she will be no friend of patent holders. At a time when patent law is the subject of severe criticism and reform efforts, her views may push the Court to render decisions that raise standards for patent review and ease the ability of defendants to defend against patent infringement claims. However, I am confident that Sotomayor will not be an ideologue in intellectual property matters. Her sense of fairness and balance will provide a moderating influence in intellectual property cases.

## **II. JUSTICE SONIA SOTOMAYOR: HER ANTITRUST OPINIONS**

### *A. General Observations*

Overall, the antitrust opinions and decisions of Justice Sotomayor as a Second Circuit Court Judge are cogent and balanced. It is possible to contend that from the time she was appointed to the Second

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<sup>25</sup> *Id.* at 822.

<sup>26</sup> *N.Y. Times Co. v. Tasini*, 533 U.S. 483 (2001).

<sup>27</sup> *Id.* at 503.

Circuit, Justice Sotomayor's antitrust opinions have become increasingly confident, and even truculent, ending in 2008 with the "lecturing" of her Second Circuit colleagues in a concurring opinion on the real foundations for a ruling. Justice Sotomayor competently relies on economic concepts frequently used by market-oriented economists. Although Justice Sotomayor is comfortable justifying her opinions based on precedent, she is not afraid to chart her own path where precedents are ambiguous.

### B. *Antitrust Opinions By the Numbers*

Justice Sotomayor has written six antitrust opinions as a circuit court judge, three of which were dismissals of the plaintiffs' claims. In one case the Second Circuit reversed a district court decision to grant a motion to dismiss some of the plaintiff's claims because granting that motion did not resolve the case. The opinions authored by Justice Sotomayor sided with plaintiffs in two cases. In the first, the Second Circuit affirmed the district court's determination that a group of retailers could be certified as a class. In the second, the opinion she authored stated that the claims of a plaintiff/employee were credible in a wage suppression, information exchange case involving major oil companies.

### C. *Themes in Antitrust Cases*

I provide a chronological and thematic discussion of Justice Sotomayor's antitrust opinions as a circuit court judge. In each case, Justice Sotomayor begins with precedent; however, in antitrust, precedent often does not yield an unambiguous signal because many of the cases are fact intensive. In most of her antitrust opinions, Sotomayor moves on to provide a very careful analysis, often making use of sophisticated economic concepts. Fairness and due process are less significant factors in most of Justice Sotomayor's opinions, but they are discussed in two cases. There are no regulatory agencies for antitrust, so Sotomayor's deference to government officials is not a factor, but she is very attuned to federal policy and justifies her most significant antitrust opinion, *Clarett v. Nat'l Football League*,<sup>28</sup> on deference to federal labor policy. Justice Sotomayor appears to relish economic exchanges with her colleagues and appears to be increasingly bold in her opinions.

In 2001, Justice Sotomayor's first antitrust opinion as a circuit court judge involved the major oil companies, where the plaintiff alleged that by exchanging wage information about non-union (managerial, professional, and technical (MPT)) employees, the major oil companies were colluding to keep wages lower in a buying oligopsony.<sup>29</sup> In *Todd v. Exxon Corp.*, the district court had granted the defendants' motion to dismiss for failure to state a claim, but Justice Sotomayor reversed, stating that the actions alleged in the complaint by the plaintiff could violate Section 1 of the Sherman Act.<sup>30</sup> As with many antitrust cases, in *Todd* there were significant disputes as to whether the plaintiff had alleged a plausible product market.<sup>31</sup> Justice Sotomayor opined that the district court had erred: (1) by requiring

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<sup>28</sup> 369 F.3d 124 (2d Cir. 2004), *cert. denied*, 544 U.S. 961 (2005).

<sup>29</sup> *Todd v. Exxon Corp.*, 275 F.3d 191 (2d Cir. 2001), *related proceeding*, In re Comp. of Mang'l, Prof'l & Tech'l Employees, No. 1471, 2008 U.S. Dist. LEXIS 63633 (D.N.J., Aug 19, 2008).

<sup>30</sup> In the language of Section 1 of the Sherman Act, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (2000).

<sup>31</sup> 275 F.3d at 200.



the plaintiff to show that different MPT jobs were interchangeable and had rejected product market information based on (2) industry-specific experience and (3) industry recognition. Other market information that Justice Sotomayor deemed relevant included evidence that in the oil industry, the market was sufficiently concentrated to be deemed an oligopsony, oil companies had manufactured job fungibility through sophisticated job comparison techniques, and the supply of labor had an “inherently inelastic” quality.

Justice Sotomayor cited precedents established by the U.S. Supreme Court in price exchange antitrust cases that were decided in the 1960s and earlier.<sup>32</sup> Justice Sotomayor went through a careful, logical analysis that led to the conclusion that price or wage information exchanges may be illegal under the rule of reason if the defendants comprise a large share of the relevant market. The plaintiff’s market was hypothesized to be “the services of experienced, salaried, non-union, managerial, professional and technical employees in the oil and petrochemical industry, in the continental United States and submarkets thereof.”<sup>33</sup> This market definition meant that the defendants had an 80-90% market share, clearly a market where wage or price exchanges could restrain competition. Justice Sotomayor pointed out that market definition is “a deeply fact-intensive inquiry” which mitigates against trial courts granting motions to dismiss before discovery has taken place.

In *Wal-Mart Stores, Inc. v. Visa USA, Inc.*,<sup>34</sup> Justice Sotomayor dealt with a complex antitrust case that involved assessing opposing economic reports as to whether defendant credit card companies illegally tied their credit cards to a requirement that large retailers also honor their debit cards issued by the credit card companies. The “honor all cards” policy promoted by the defendant credit card companies allegedly created an illegal tie-in, a possible violation of Section 1 of the Sherman Act. The main dispute was whether the plaintiff/retailers constituted a coherent class for litigation purposes. In making this determination, Justice Sotomayor had to wade through competing economic reports from prominent academics.

In this, her second antitrust opinion as a circuit court judge, there was a dissent by Judge Jacob, who opined that the class in this case would become unmanageable.<sup>35</sup> The dissent also contended that Justice Sotomayor misread the requirements of Rule 23(a) and (c). Responding to the dissent, Justice Sotomayor began by saying, “[T]he dissent discusses an issue not raised by the parties regarding adequacy of representation. Rule 23(a)(4) provides that, in order to certify a class, its proponents must show that ‘the representative parties will fairly and adequately protect the interests of the class.’”<sup>36</sup> Several more pages of the majority opinion, similarly and confidently dismisses the dissent’s arguments.

In *Information Resources, Inc. v. The Dun and Bradstreet Corp.*,<sup>37</sup> both the plaintiff and defendant supplied retail tracking services on the sale of packaged goods. The plaintiff alleged that co-

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<sup>32</sup> U.S. v. Container Corp. of Am., 393 U.S. 333 (1969); *Sugar Inst., Inc. v. U.S.*, 297 U.S. 553 (1936).

<sup>33</sup> 275 F.3d at 199.

<sup>34</sup> 280 F.3d 124 (2d Cir. 2001), *cert. denied*, 536 U.S. 917 (2002).

<sup>35</sup> 280 F.3d at 147.

<sup>36</sup> *Id.* at 142.

<sup>37</sup> 294 F.3d 447 (2d Cir. 2002).

defendant Nielsen engaged in anticompetitive conduct in the form of bundling and tie-in contracts to buyers of retail tracking in violation of Sections 1 and 2 of the Sherman Act. The tie took the form of lower prices if defendants' other services were purchased. Defendants filed a motion to dismiss contending that (1) the plaintiff lacks standing to sue for actions that took place outside of the U.S. because the harm was felt only by plaintiff's subsidiaries and affiliates and (2) district court lacks subject matter jurisdiction under the Foreign Trade Antitrust Improvement Act of 1982. The district court granted a motion to dismiss largely based on its belief that the plaintiff lacked standing to sue for actions that took place in foreign countries.

Ultimately, Justice Sotomayor vacated the grant of the motion to dismiss because that motion would not end the litigation. According to Sotomayor, "We find that the district court's grant of partial summary judgment is not final, . . . ." <sup>38</sup> Later in the opinion, Justice Sotomayor writes, "There is still work to be done by the district court with respect to the claims included in the Rule 54(b) certification."<sup>39</sup> There is no doubt that this is a complex issue of law, but Justice Sotomayor reversed the district court because her careful analysis of the partial motion to dismiss led her to conclude that the decision of the district court did not resolve anything.

In *Innomed Labs, LLC, v. Alza Corp.*,<sup>40</sup> Justice Sotomayor again displayed her intellectual rigor in ruling that even though the district court made two errors in its charge to the jury, these errors were not fundamental and therefore not sufficient to require a new trial. The scenario in this case is familiar to experienced antitrust participants: a pharmaceutical manufacturer allegedly gave price breaks to one distributor, but not the other, who sued claiming a violation of the Robinson-Patman Act based on price discrimination.<sup>41</sup> The case went to trial and the jury found for the defendant on the Robinson-Patman claim.

Justice Sotomayor authored this Second Circuit opinion, which held that the district court erred in its analysis of the Robinson-Patman Act, but that this error was not material. Justice Sotomayor then discussed the basic purpose or policy associated with the Robinson-Patman Act and the protection the Act provides for wholesale distributors. According to Sotomayor, "A commodities contract's transfer of the exclusive right to distribute does not create an issue as to whether the contract is a commodities contract within the meaning of the Robinson-Patman Act. . . . The district court therefore erred instructing the jury that if the dominant nature of the contract involved the 'right to distribute a patented product,' the Robinson-Patman Act would not apply."<sup>42</sup> The court ruled that even though the district court wrongly instructed the jury about applying the dominant nature test, the plaintiff still could not prevail because the plaintiff did not object in a timely manner.

Perhaps the most important of the antitrust cases written by Justice Sotomayor's is *Clarett v. National Football League (NFL)*,<sup>43</sup> where the Second Circuit decided that the antitrust laws did not apply. The

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<sup>38</sup> *Id.* at 453.

<sup>39</sup> *Id.*

<sup>40</sup> 368 F.3d 148 (2d Cir. 2004).

<sup>41</sup> 15 U.S.C. § 13 (2000).

<sup>42</sup> 368 F.3d at 163.

<sup>43</sup> 369 F.3d 124 (2d Cir. 2004), *cert. denied*, 544 U.S. 961 (2005).

Sotomayer opinion in *Clarett* was significant for a number of reasons and has been the subject of several law review commentaries.<sup>44</sup> The panel reversed the district court in a case where the plaintiff, a potential NFL player, challenged the NFL's eligibility rule that prohibited teams from drafting players within three years of high school graduation. Clarett contended that the NFL's refusal to allow him to enter the NFL draft was an illegal trade restraint that violated Section I of the Sherman Act. Justice Sotomayer ruled that the antitrust laws did not apply because the NFL teams were protected by a non-statutory exemption under federal labor law. In this case, Justice Sotomayer admits that the line between antitrust and labor law in sports is especially murky, but she came down on the side of labor law and ruled that the NFL qualified for an exemption from antitrust law. In effect, she justified her decision based on the strong federal policy favoring collective bargaining.

I believe that the Second Circuit's ruling in the *Clarett* case was path-breaking, Bork-like, and correct. The opinion authored by Justice Sotomayer rejected the Eighth Circuit test, developed in *Mackey* as to when antitrust laws can be used by plaintiffs challenging rules promulgated by professional sports leagues.<sup>45</sup> In *Mackey*, the infamous Roselle rule, which allowed NFL franchises to demand ransom from other teams for players teams cut from the lineup, was toppled. The criteria elucidated in *Mackey* as to when concerted action by a professional league is exempt from the antitrust laws under the non-statutory labor law exemption is very limited. Thus, most challenges to league rules, such as the one launched by Clarett, would be evaluated under antitrust standards, which favor the plaintiff.

Although some law review commentators have criticized Sotomayer's opinion in *Clarett*, most conclude her opinion is correct, especially given the health and safety risks to young players competing against older men in the NFL.<sup>46</sup> Some commentators note that there are no minimum age limits for golfers, tennis players, and entertainers that prohibit them from plying their money-making skills, but the health risks seem especially applicable to young players in professional football. In addition, Justice Sotomayer's opinion can be justified based on precedent in the Second Circuit and respect for federal labor law, which necessarily entails concerted action that would be illegal without a non-statutory exemption from antitrust liability.

In *Major League Baseball Properties (MLBP), Inc. v. Salvino, Inc.*,<sup>47</sup> the defendant was distributing trademarked materials owned by the MLBP without authorization. The majority opinion of the Second Circuit affirmed the district court's dismissal of the defendant's counterclaim. The defendant had alleged that MLBP committed a per se violation of Section 1 of the Sherman Act by jointly licensing its intellectual property, mainly team logos on toys and wearing apparel protected by trademarks. The defendant was a licensee of the MLBP, but violated the terms of the agreement. Essentially the appeal is based on the defendant's claim that MLBP violated Section 1 of the Sherman Act by establishing uniform licensing rates and acting together in terminating the licensing agreement with the defendant. The defendant asserted that the dismissal of the case by the district court was wrong based on defendant's view that the case should be resolved under the *per se* rule of Section 1 of

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<sup>44</sup> See, e.g., Michael A. McCann & Joseph S. Rose, *Law, Technology and the Arts Symposium: Sports and Eligibility—Who is Eligible to Play?: Legality of Age Restrictions in the NBA and the NFL*, 56 CASE W. RES. REV. 731 (2006).

<sup>45</sup> See *Mackey v. Nat'l Football League*, 543 F.2d 606 (8th Cir. 1976).

<sup>46</sup> Michael R. Lombardo, *Losing Collegiate Eligibility: How Mike Williams & Maurice Clarett Lost Their Chance to Perform on College Athletics' Biggest Stage*, 3 DEPAUL J. SPORTS L. CONTEMP. PROBS. 19, 40 (2005). But see Symposium: Panel II: *Maurice Clarett's Challenge*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 391 (2005).

<sup>47</sup> 542 F.3d 290 (2d Cir. 2008).

the Sherman Act.

The majority opinion runs 35 pages, discussing the market for MLBP and other familiar bricks in antitrust analyses. Justice Sotomayor discusses her views in a concurring opinion of five pages, writing that “the majority endorses an overly formalistic view of price fixing and in doing so avoids addressing directly the central contention of appellant/Salvino, Inc. . . .”<sup>48</sup> Making sure there can be no doubt that she substantially disagrees with the analysis put forward in the majority opinion, Justice Sotomayor states, “Before applying this framework, however, I address the majority’s flawed view that the Clubs have made no agreement on price.”<sup>49</sup> The framework that Sotomayor refers to is something called the “doctrine of ancillary restraints,” which she believes “is a superior method for analyzing the challenged restraints here...”<sup>50</sup> It is difficult to escape the conclusion that Justice Sotomayor is increasingly confident in her antitrust opinions, and by 2008 is perhaps a little disdainful of others jurists who are not at her level.

In Justice Sotomayor’s view, “the MLBP joint venture offers substantial efficiency-enhancing benefits that the individual Clubs could not offer on their own, including decreased transactions costs on the sale of licenses, lower enforcement and monitoring costs, and the ability to one-stop shop (i.e., to purchase licenses from more than one Club in a central location).”<sup>51</sup> Again these are the factors that free market economists cite in assessing costs and benefits of various property right configurations. Sotomayor notes that the MLBP claims that these pro-competitive benefits could not be achieved without exclusivity and profit-sharing, “the two provisions challenged by Salvino as price fixing.”<sup>52</sup> Ultimately, the differences between the majority and Sotomayor’s opinion are not that great as both hold that the price fixing of the MLBP should be evaluated under the rule of reason. Sotomayor cited *NCAA v. Board Of Regents*,<sup>53</sup> which prominently made use of the writings of Judge Robert Bork, a former federal circuit court judge known for his free market, conservative views.

#### *D. The Supreme Court, Antitrust Law and Justice Sotomayor*

Nominated to the U.S. Supreme Court by a progressive Democrat, Justice Sotomayor’s opinions often rely on conservative and free market-oriented economists and jurists. I believe that many may be surprised, some pleasantly, when Justice Sotomayor assumes her position in the U.S. Supreme Court. She is well-versed in modern economic concepts and seems miles away from the “big is bad” mentality of some of the Supreme Court decisions in the 1950s and 1960s.<sup>54</sup> With her impressive understanding of economic concepts, there is little doubt that Justice Sotomayor will significantly contribute to the continuing evolution of modern U.S. antitrust law.

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<sup>48</sup> *Id.* at 334.

<sup>49</sup> *Id.* at 334-35.

<sup>50</sup> *Id.* at 341.

<sup>51</sup> *Id.* at 337.

<sup>52</sup> *Id.*

<sup>53</sup> 468 U.S. 85 (1984).

<sup>54</sup> See e.g., *U.S. v. Philadelphia National Bank*, 374 U.S. 321 (1963); *Brown Shoe Co. v. U.S.*, 370 U.S. 294 (1962).

### III. JUSTICE SONIA SOTOMAYOR: HER SECURITIES OPINIONS

#### A. General Observations

Some general observations may be made about the opinions issued by Justice Sotomayor in the securities field during her tenure as a lower federal court judge. Her securities opinions are technical, restrained, and often exemplify a very methodical approach to statutory interpretation. As both a district court judge and an appellate judge, Sotomayor tended to carefully and often narrowly apply the relevant law to the facts at hand, with no particular ideology on display. There is no evidence in her opinions that she is a judicial activist with regard to securities fraud, or that she has any particular empathy for shareholder plaintiffs.<sup>55</sup> Indeed, the statistics set forth below concerning her reported decisions in securities cases belie any notion that she is pro-plaintiff or anti-business. Sotomayor's failure to exhibit any particular ideology in securities cases is consistent with her overall track record as an appellate judge.<sup>56</sup>

Sotomayor, a former prosecutor,<sup>57</sup> also seems to be somewhat deferential to government regulators and their roles as enforcers.<sup>58</sup> Sotomayor's somewhat deferential view of the enforcement role played by government regulators is underscored in part by her approach to white collar criminal cases. During the period encompassing fiscal years 1993 to 1998, when Sotomayor served as a district court judge, she handled 47 white collar criminal prosecutions, of the total of 1,570 such cases handled by the federal district judges serving in the Southern District of New York. Sotomayor sentenced to prison terms 52 percent of the white collar criminal defendants appearing in her court. By contrast, only 43 percent of the white collar criminal defendants in the courtrooms of her 51 fellow Southern District judges were sentenced to prison. Likewise, whereas Sotomayor sentenced 48 percent of white collar criminal defendants to prison terms of six months or longer, her fellow judges in the Southern District imposed such sentences on only 34 percent of similar defendants.<sup>59</sup>

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<sup>55</sup> See, e.g., Anna C. Henning & Kenneth R. Thomas, Cong. Res. Serv., *Judge Sonia Sotomayor: Analysis of Selected Opinions* 47 (June 19, 2009) ("As a group, Judge Sotomayor's opinions in the securities context appear to favor neither corporations nor investors.").

<sup>56</sup> See *infra* text accompanying note 158.

<sup>57</sup> After graduating from Yale Law School, Justice Sotomayor served as an Assistant District Attorney in Manhattan from 1979 until she entered private practice in 1984. Justice Sotomayor remained in private practice in New York City until she joined the federal bench, following nomination by President George H.W. Bush in 1991 and confirmation by the Senate in 1992.

<sup>58</sup> See *infra* text accompanying notes 85-89.

<sup>59</sup> See Transactional Records Access Clearinghouse, *Supreme Court Nominee Judge Sonia Sotomayor: Tough on White-Collar Crime*, July 8, 2009, <http://trac.syr.edu/tracreports/judge/213/>.

B. *Securities Cases by the Numbers*

There are 26 cases dating back to 1994 involving Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act)<sup>60</sup> and companion Rule 10b-5<sup>61</sup> in which at least one issue in which the decision was issued by Sotomayor as trial judge or reviewed by her as an appellate judge. Of the 26 cases, three were actions brought by the SEC and two were criminal actions brought by the United States. The SEC or United States prevailed in all five cases. In 16 of the remaining 21 cases, the defendant was granted relief, usually on a motion to dismiss that was affirmed. In four cases the defendant was granted some, but not all, of the relief requested or only one defendant was granted relief. In one case the plaintiff won outright.<sup>62</sup>

Further, during the eight years in which Sotomayor served as a district court judge in the Southern District of New York (1992 to 1998), there were eight cases she decided in which defendants sought dismissal of private securities fraud claims before trial, either on a motion to dismiss or for summary judgment, on the basis that plaintiffs failed to plead or prove the essential elements of their claims. In all but one case Sotomayor ruled in favor of defendants on the securities law issues, and the claims were dismissed for failure to show loss causation, reliance, or scienter, and/or failure to plead fraud with the requisite specificity. Of the eight decisions, only two were appealed and both were affirmed. Since her elevation to the Second Circuit in 1998, there have been 14 cases where Sotomayor was part of a panel required to decide whether the trial court's pre-trial dismissal of private federal securities law claims was proper. In each case, the panel unanimously affirmed the dismissal.<sup>63</sup> If, as some scholars suggest, judicial activism by appellate judges can be measured, at least in part, by the rates with which they reverse district court judges, then Sotomayor's failure to reverse in any of these cases once again suggests an absence of activism in the securities field. This suggestion is consistent

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<sup>60</sup> 15 U.S.C. §§ 78a, *et seq.* (2006). Section 10(b) prohibits the "use or employ[ment], in connection with the purchase or sale of any security . . . , [of] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange Commission (SEC)] may prescribe. . . ." 15 U.S.C. § 78j(b) (2006).

<sup>61</sup> Rule 10b-5, promulgated by the SEC under the authority of the Exchange Act is the "catch-all" anti-fraud provision. See 17 C.F.R. § 240.10b-5.

<sup>62</sup> Christine Hurt, *More on Sotomayor's Securities Law Record*, June 5, 2009, <http://www.theconglomerate.org/2009/06/more-on-sotomayors-securities-law-record.html> (concluding that Justice Sotomayor's record in securities cases shows "no evidence of runaway shareholder empathy"). Of the 21 cases, one (discussed *infra*) was reversed by the Supreme Court, one Second Circuit case requested rehearing but was denied, and *certiorari* to the Supreme Court in four other Second Circuit cases was requested but denied. One district court opinion was reversed in part and affirmed in part. *Id.*

<sup>63</sup> Mary Eaton & Roger Netzer, *Securities Docket, Guest Column: Sonia Sotomayor's Securities Law Opinions—What President Obama's Supreme Court Nominee Might Mean for Private Securities Litigation*, June 10, 2009, <http://www.securitiesdocket.com/2009/06/10/guest-column-sonia-sotomayors-securities-law-opinions-%E2%80%93-what-president-obamas-supreme-court-nominee-might-mean-for-private-securities-litigation/> (concluding, on the basis of her track record in securities cases, that "Sotomayor has demonstrated herself to be a thoughtful jurist who has carefully hewn to federal law and congressional policy"). Indeed, in light of the foregoing statistics, it is very difficult to understand the basis for conclusions that Justice Sotomayor is anti-business. See, e.g., John Schwartz, *Sotomayor's Appellate Opinions Are Unpredictable, Lawyers and Scholars Say*, N.Y. TIMES, May 28, 2009 (quoting American Enterprise Institute Senior Fellow Michael Greve, who placed Justice Sotomayor "among the most aggressively pro-plaintiff, anti-business appellate judges in the country").

with at least one study which ranked Sotomayor as less activist across a range of cases than both her peers on the Second Circuit and judges in other Circuits.<sup>64</sup>

Overall, Sotomayor has authored eleven Second Circuit opinions dealing with securities issues. Four of them are discussed *infra*,<sup>65</sup> as examples of general themes to be drawn from these cases.

### C. Themes in Securities Cases

Some general themes or common threads emerge from a review of Justice Sotomayor's opinions in the securities field. First, Sotomayor endeavors to adhere to precedent. A prime example of this proposition is *Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,<sup>66</sup> which is the most well-known opinion authored by Justice Sotomayor in the securities field. This case concerns preemption by the Securities Litigation Uniform Standards Act of 1998 (SLUSA),<sup>67</sup> which was enacted in response to the perceived failure of the Private Securities Litigation Reform Act of 1995 (PSLRA)<sup>68</sup> to curb perceived abuses by plaintiffs' lawyers in securities fraud litigation.<sup>69</sup> The PSLRA, inter alia, established strict pleading requirements for filing securities fraud cases in federal court. Following its enactment, a perception arose that plaintiffs were circumventing these strict requirements by litigating cases in state courts on the basis of common law fraud or other non-federal claims.<sup>70</sup> SLUSA was enacted to resolve the problem, by federalizing class action securities litigation.<sup>71</sup> SLUSA amended the Securities Act of

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<sup>64</sup> See Marcia Coyle, *Defining Activism on the Bench: New Studies Rank Current and Former Justices, As Well As Sotomayor*, NAT'L L.J., June 8, 2009, at 1 (citing studies by Profs. Corey Yung, Frank Cross, and Stephanie Lindquist).

<sup>65</sup> Seven other Second Circuit opinions authored by Justice Sotomayor concern securities issues: *Gerber v. MTC Elec. Tech. Co.*, 329 F.3d 297 (2d Cir. 2003); *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113 (2d Cir. 2003); *LNC Inv., Inc. v. Nat'l Westminster Bank, N.J.*, 308 F.3d 169 (2d Cir. 2002); *Moore v. PaineWebber, Inc.*, 306 F.3d 1247 (2d Cir. 2002); *United States v. Falcone*, 257 F.3d 226 (2d Cir. 2001); *Securities Investor Protection Corp. v. BDO Seidman, LLP*, 222 F.3d 63 (2d Cir. 2000); and *LNC Inv., Inc. v. First Fidelity Bank, N.A. N.J.*, 173 F.3d 454 (2d Cir. 1999).

<sup>66</sup> 395 F.3d 25 (2d Cir. 2005).

<sup>67</sup> Pub. L. No. 105-353, 112 Stat. 3227 (1998) (codified in various sections of 15 U.S.C.).

<sup>68</sup> Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 and 18 U.S.C.).

<sup>69</sup> See Ann Morales Olazabal & Patricia Sanchez Abril, *The Ubiquity of Greed: A Contextual Model for Analysis of Scierter*, 60 FLA. L. REV. 401, 406 (2008) (noting perception of abuse).

<sup>70</sup> See 144 Cong. Rec. 16,425, 16,437 (1998) (noting a 6000 percent increase in state securities class action filings post-PSLRA). This perception persists, in the courts and elsewhere. See, e.g., *Anderson v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 521 F.3d 1278, 1280 (10th Cir. 2008) ("[T]his shift to state court re-introduced many of the abuses that the PSLRA had attempted to mitigate. . . ."). But the accuracy of the perception is subject to considerable dispute. See William B. Snyder, Jr., Comment, *The Securities Act of 1933 After SLUSA: Federal Class Actions Belong in Federal Court*, 85 N.C. L. REV. 669, 696 n.183 (2007) (noting debate about existence of so-called "federal flight").

<sup>71</sup> See generally Kenneth I. Schachter & Mary Gail Gearns, *Removing '33 Act Class Actions Under SLUSA and CAFA*, N.Y.L.J., Dec. 1, 2008, at S7.

1933 (Securities Act)<sup>72</sup> and the Exchange Act in substantially identical ways, by requiring suits to be brought in federal court, if certain conditions are met.

The issue on appeal in *Dabit* was whether, as the district court held, the claims, which were based only on state law, were preempted. Sotomayor, writing for the Second Circuit, found no preemption, because plaintiff was a holder and not a buyer or seller of securities. The Supreme Court previously held in *Blue Chip Stamps v. Manor Drug Stores*,<sup>73</sup> that a private litigant may bring an antifraud action only if he is an actual purchaser or seller of securities. According to the Second Circuit, by enacting SLUSA, “Congress sought only to ensure that class actions brought by plaintiffs who satisfy the *Blue Chip* purchaser-seller rule are subject to the federal securities laws.”<sup>74</sup> Four months later the Seventh Circuit took a contrary approach,<sup>75</sup> and the Supreme Court granted *certiorari* in *Dabit*, presumably to resolve the circuit split. In an 8-0 decision the Supreme Court vacated the judgment of the Second Circuit, rejecting its holding that SLUSA preempts only those actions in which the purchaser-seller requirement of *Blue Chip* has been met.<sup>76</sup>

An 8-0 decision may appear to be a definitive rejection of Justice Sotomayor’s analysis,<sup>77</sup> but such a perception must be tempered. First, two other judges on the Second Circuit panel, both of them Republican appointees, agreed with Sotomayor.<sup>78</sup> Second, the Supreme Court’s opinion has been the subject of much critical commentary.<sup>79</sup> Whereas the Supreme Court decided *Dabit* mainly on the policy grounds of a perceived need to constrain abusive securities litigation, a persuasive argument can be made that other equally important policy considerations were given too little attention – such as, the need to constrain securities fraud. Third, three other circuits had reached the same conclusion before Sotomayor wrote the *Dabit* opinion.<sup>80</sup> Sotomayor referred to this precedent in her opinion: “We note that this holding aligns us with every circuit court that has considered the question thus far.”<sup>81</sup>

Indeed, as an appellate judge, Sotomayor sometimes avoided resolving issues for which there was little or no precedent. An example of this approach is *Official Committee of Unsecured Creditors of*

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<sup>72</sup> 15 U.S.C. §§ 77a, *et seq.*

<sup>73</sup> 421 U.S. 723 (1975).

<sup>74</sup> 395 F.3d 25, 43 (2d Cir. 2005).

<sup>75</sup> *Kircher v. Putnam Funds Trust*, 403 F.3d 478 (7th Cir. 2005), *vacated and remanded on other grounds*, 547 U.S. 633 (2006).

<sup>76</sup> 547 U.S. 71 (2006) (Justice Alito took no part in the consideration of the case).

<sup>77</sup> *The Washington Times* characterized the Supreme Court’s opinion as a judicial “smackdown.” See Editorial: *Sotomayor’s Smackdown*, THE WASH. TIMES, June 3, 2009 (asserting also that in *Dabit*, Sotomayor “was trying to make policy in favor of plaintiffs rather than dutifully follow precedent”).

<sup>78</sup> Judges Oakes and Wesley were the other members of the Second Circuit panel that decided *Dabit*.

<sup>79</sup> See, e.g., Larry E. Ribstein, *Dabit, Preemption, and Choice of Law*, 2006 CATO SUP. CT. REV. 141 (2006).

<sup>80</sup> *Dabit*, 395 F.3d at 35.

<sup>81</sup> *Id.* at 43.



*WorldCom, Inc. v. SEC.*<sup>82</sup> In this case, the Second Circuit, in another opinion written by Sotomayor, rejected a challenge by WorldCom, Inc.'s Committee of Unsecured Creditors and affirmed the district court's approval of the SEC's distribution plan for settlement funds. This distribution was based on the Fair Funds for Investors provision of the Sarbanes-Oxley Act of 2002,<sup>83</sup> under which the SEC would distribute to investors the money it collected through the settlement of its civil enforcement action against WorldCom. The Committee argued that the distribution plan wrongfully excluded certain categories of creditors and that the district court, had it applied the correct standard of review, would have rejected those exclusions. The Second Circuit concluded that the Committee had nonparty standing to appeal the district court's order, but it held that the district court correctly reviewed the SEC's plan for reasonableness and fairness and did not abuse its discretion in approving the SEC's plan. One of the other issues raised on appeal concerned the scope of creditors' committees' statutory authority. Sotomayor, noting that this is "a question for which there is very little guiding precedent," decided that the Bankruptcy Court was best-equipped to provide an answer.<sup>84</sup>

A second theme that emerges from a review of Justice Sotomayor's opinions in the securities field is that she has a very methodical approach to statutory interpretation and legislative history. Examples include *Dabit*, which involved a careful analysis of SLUSA and its history in Congress, and *WorldCom*, in which Sotomayor was required to apply the Fair Funds for Investors provision of Sarbanes-Oxley.

A third theme is that Sotomayor exhibited a fair amount of deference to government regulators when they fulfilled roles assigned to them by statute. *In re NYSE Specialists Sec. Litig.* and *WorldCom* illustrate this point. In the former case Justice Sotomayor emphasized that the SEC has substantial oversight power to supervise, investigate, and discipline the NYSE. In the latter case, Sotomayor again noted the Court's deference to the SEC: "We therefore reject the Committee's contention that the SEC acts outside the scope of its expertise and deserves less deference when it prepares a plan to distribute civil penalties along with disgorged profits."<sup>85</sup> Similarly, in *Press v. Quick & Reilly, Inc.*,<sup>86</sup> the Second Circuit, in another opinion by Sotomayor, affirmed the dismissal of investors' claims under Section 10(b), Rule 10b-5, and Rule 10b-10<sup>87</sup> that broker-dealer defendants defrauded them by failing to disclose the receipt of fees from poor-performing money market funds the broker-dealers selected to automatically sweep plaintiffs' uninvested funds into. Sotomayor's opinion relied heavily on amicus briefs submitted by the SEC at the request of the Court. The opinion noted that the Court is "bound by the SEC's interpretation of its regulations in its *amicus* brief, unless they are 'plainly erroneous or inconsistent

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<sup>82</sup> 467 F.3d 73 (2d Cir. 2006).

<sup>83</sup> Pub. L. No. 107-204, § 308(a), 116 Stat. 745, 784 (2002) (codified at 15 U.S.C. § 7246 (a) (Supp. III 2004)).

<sup>84</sup> 467 F.3d at 80. Justice Sotomayor also noted that the issue was not argued before the district court. *Id.* at 79.

<sup>85</sup> 467 F.3d at 84.

<sup>86</sup> 218 F.3d 121 (2d Cir. 2000).

<sup>87</sup> 17 C.F.R. § 10b-10 requires a broker-dealer to disclose to its customers any remuneration that it receives from third parties in connection with a customer transaction.

with the regulation[s],”<sup>88</sup> and then “adopt[ed] the SEC’s determination that no Rule 10b-10 violation occurred in this case.”<sup>89</sup>

Fourth, Sotomayor exhibited no pro-investor, anti-business bias at all. The overall statistics concerning securities cases decided by her provide the best evidence of this point. Finally, there is little or no evidence that Sotomayor, during her tenure as lower court judge, was an activist, policy-making judge in the area of securities. Again, the best evidence is the overall statistics. For example, as mentioned, since her elevation to the Second Circuit in 1998, there have been 14 cases where Sotomayor was part of a panel required to decide whether the trial court’s pre-trial dismissal of private federal securities law claims was proper. In each case, the panel unanimously affirmed the dismissal.

#### *D. The Supreme Court, Securities Law and Justice Sotomayor*

If the Roberts Court has a pro-business tilt, and this issue is subject to some dispute,<sup>90</sup> Sotomayor, based on her track record as a federal judge in securities cases and her role as Justice Souter’s replacement, is unlikely to tilt the Court in a different direction. Of course, it is always a tricky proposition to make accurate predictions about a Supreme Court Justice based upon his or her track record as a lower court judge. But if Sotomayor’s record is any indication, she is not likely to be particularly receptive to shareholder arguments in the few securities cases that the Court agrees to hear. Her more significant contribution may lie in the approximately 17 years of experience that she has accumulated as a federal judge handling sophisticated securities and other types of business cases. Sotomayor is the only current Justice with experience serving both as a federal judge in the Southern District of New York and on the Second Circuit, the dockets of which are the most securities-intensive in the country.<sup>91</sup> Accordingly, Sotomayor’s judicial background, among her other attributes, may serve to enhance and inform the Court’s approach to securities cases.

### **III. JUSTICE SONIA SOTOMAYOR: HER ERISA OPINIONS**

#### *A. General Observations*

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<sup>88</sup> 218 F.3d at 128.

<sup>89</sup> 218 F.3d at 129. In *Dabit*, Sotomayor declined to apply *Chevron* deference to the SEC’s views concerning SLUSA, which, following oral argument, had been invited by the Second Circuit. Where Congress has impliedly delegated authority to an agency to elucidate an ambiguous provision of a statute, the agency’s interpretation will be given controlling weight so long as it is reasonable. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 834-44 (1984).

<sup>90</sup> See, e.g., Robin S. Conrad, *The Roberts Court and the Myth of a Pro-Business Bias*, 49 SANTA CLARA L. REV. 997 (2009).

<sup>91</sup> The Second and Ninth Circuits ranked in the top two for securities class action filings every year between 1997 and 2008, and in 2008, a typical year, the Second had more than three times as many such filings as the Ninth. Cornerstone Research, *Securities Class Action Filings, 2008: A Year in Review* 20 (2009), <http://securities.cornerstone.com/pdfs/YIR2008.pdf>; Stanford Securities Class Action Clearinghouse, <http://securities.stanford.edu/>.

All employee benefit plans sponsored by private-sector employers in the United States are subject to the Employee Retirement Income Security Act of 1974<sup>92</sup> (ERISA). ERISA provides for exclusive federal court jurisdiction for some types of employee benefits-related claims and concurrent jurisdiction for other claims. ERISA cases now make up a significant part of the labor and employment dockets of the federal courts.<sup>93</sup> The five ERISA decisions authored by Justice Sonia Sotomayor while on the Second Circuit share some common themes in their use of agency authority, reference to congressional intent, standards for disclosure, limited remedies, and detailed analysis.

### B. ERISA Cases by the Numbers

Justice Sotomayor participated in twenty-two ERISA decisions during her tenure on the Second Circuit Court of Appeals. She did not dissent in any of these cases. All five of the decisions Justice Sotomayor authored were on behalf of unanimous panels. Four of the five ERISA decisions authored by Justice Sotomayor vacated or reversed and remanded the lower court decision.<sup>94</sup> In one decision, the Second Circuit affirmed.<sup>95</sup>

### C. Themes in ERISA Cases

In the ERISA decisions she has authored, Justice Sotomayor consistently shows respect for and adherence to precedent. In the most recent ERISA decision, *Strom v. Siegel Fenchel & Peddy P.C. Profit Sharing Plan*,<sup>96</sup> authored by Justice Sotomayor, the Second Circuit confronted the question of what stand of review the district court should have applied to the plan administrator's actions regarding one of the plaintiff's benefit claims. In reversing the district court's use of an arbitrary and capricious standard, the Second Circuit relied on an earlier decision in the circuit where the court had found it incorrect to apply a deferential standard where the plan administrator had not actually exercised discretion. The *Strom* court found the situation analogous because the plan administrator had refused to decide plaintiff's claim and, thus, had not exercised any discretion.<sup>97</sup>

Careful, step-by-step analysis is another hallmark of the ERISA decisions authored by Justice Sotomayor. In *Layaou v. Xerox Corp.*,<sup>98</sup> the Second Circuit addressed a claim that a plan's statutorily required brief description, a Summary Plan Description (SPD), failed to adequately disclose plan provisions that resulted in plaintiff receiving a significantly lower retirement benefit than he had

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<sup>92</sup> Employee Retirement Income Security Act of 1974 (ERISA) §§ 1-4402, 29 U.S.C. §§ 1001-1461 (2000).

<sup>93</sup> See United States District Courts, *Civil Cases Filed, by Nature of Suit*, available at <http://www.uscourts.gov/judicialfactsfigures/2007/Table404.pdf>.

<sup>94</sup> *Strom v. Siegel Fenchel & Peddy P.C. Profit Sharing Plan*, 497 F.3d 234 (2d Cir. 2007); *Henry v. Champlain Enter. Inc.*, 445 F.3d 610 (2d Cir. 2006); *Marcella v. Capital Dist. Physicians' Health Plan*, 293 F.3d 42 (2d Cir. 2002); *Layaou v. Xerox Corp.*, 238 F.3d 205 (2d Cir. 2001).

<sup>95</sup> *In re Bethlehem Steel Corp.*, 479 F.3d 167 (2d Cir. 2007).

<sup>96</sup> 497 F.3d at 243.

<sup>97</sup> *Id.* at 243-44.

<sup>98</sup> 238 F.3d 205.

expected based on his understanding of the plan terms and earlier plan estimates. The decision carefully walked through the complex benefit formula, which consisted of six steps that the plan administrator used to calculate the benefit. It then carefully analyzed the language in the SPD and concluded that the SPD did not contain sufficient detail to enable the plaintiff to understand the full import of his individual benefits situation.<sup>99</sup> Similarly, in two cases, *In re Bethlehem Steel Corp.*<sup>100</sup> and *Henry*,<sup>101</sup> Second Circuit opinions authored by Justice Sotomayor rejected simplistic arguments based on form and required the use of substantive analysis.

In the ERISA decisions she authored, Justice Sotomayor's interest in fairness and attention to process are apparent in two disclosure cases. In each instance, the Second Circuit reversed the district court and found the disclosure to be inadequate. Both decisions focus on the obligation of plans and plan decision makers to give participants reasonable information about the participants' individual situations. In one of the cases, *Layaou*,<sup>102</sup> also discussed above, the Second Circuit held that the SPD failed to give adequate notice to the plaintiff of the complex formula that would be used to calculate his benefits given his unusual employment history with the employer sponsoring the plan. In *Strom*,<sup>103</sup> also discussed above, the court found that whether the plaintiff had actual knowledge of the plan review procedures was irrelevant where the plan administrator intentionally refused to comply with regulations requiring disclosure of claims procedures.

One of the most striking threads in the ERISA decisions Justice Sotomayor authored while sitting on the Second Circuit was the extent to which those decisions defer to government actors and rely on congressional intent as a guide in statutory interpretation. On the first point, deference to government actors, Justice Sotomayor's ERISA decisions cite a variety of Department of Labor (DOL) authority as being consistent with the court's analyses. None of her ERISA opinions took issue with a DOL position.

Specifically, the ERISA opinions authored by Justice Sotomayor relied on a variety of DOL authority, which ranged from final regulations to opinion letters. *Layaou* and *Strom*, already discussed in some detail above, relied on final regulations regarding the content of SPDs and notification requirements owed by a plan to benefit plan participants who file benefit claims. In the *Henry* opinion, the Second Circuit went further, looking to proposed regulations regarding the definition of "adequate consideration" in an Employee Stock Ownership Plan (ESOP) transaction. The court noted that, although the proposed regulations "have no legal effect," other circuits had accepted the proposed definition.

The most interesting citation of agency authority occurs in *Marcella v. Capital District Physicians' Health Plan*,<sup>104</sup> where the court quotes from three DOL Opinion Letters while at the same time stating that the Opinion Letters did not have the status of regulation. The district court had concluded that

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<sup>99</sup> 238 F.3d at 207-11.

<sup>100</sup> 479 F.3d at 173-75 (rejecting the argument that the label "severance payment" in an earlier case was talismanic and holding that an administrative expense in bankruptcy is not determined by its label but by when it is earned).

<sup>101</sup> 445 F.3d at 621 (rejecting the argument that the fiduciaries breached their obligations to plaintiffs by failing to keep written notes of an investigation and stating that the fiduciary prudence standard requires careful analysis of all of the relevant facts).

<sup>102</sup> See *Layaou*, 238 F.3d at 211.

<sup>103</sup> See *Strom*, 497 F.3d at 246.

<sup>104</sup> 293 F.3d at 48.

ERISA preempted the plaintiff's state law claims related to her health care plan's refusal to pay for surgery to remove a brain tumor. The Second Circuit concluded that plaintiff's health coverage was not provided through an ERISA plan because she had purchased the coverage as an individual and not as an employee. Justice Sotomayor, consistent with her pattern of careful statutory analysis, first found that the statutory language supported the view that the health coverage had not been provided as part of an employer plan. Still, the decision went further and discussed the three Opinion Letters, each of which articulated a somewhat narrow definition of what type of organization constituted an employer for ERISA purposes. Finally, Justice Sotomayor wrote that the letters reflect "the views of the agency charged with implementing ERISA [and as such constituting] 'a body of experience and informed judgment to which courts and litigants may properly resort for guidance' . . . ." <sup>105</sup>

In addition to her deference to the DOL, three of Justice Sotomayor's ERISA opinions refer to congressional intent. Especially interesting are her statements that Congress enacted ERISA to protect benefit plan participants. These statements are in contrast to multiple cases where the Court has said that ERISA represents a balancing of interests between the employers who sponsor benefit plans and the employees who receive benefits through those plans. <sup>106</sup> Specifically, Justice Sotomayor wrote in *Layaou* that the court was "mindful that Congress intended that ERISA function as a comprehensive remedial statute designed to safeguard pension benefits." <sup>107</sup> Somewhat similarly, Justice Sotomayor wrote in *Henry* that "[t]he aim of ERISA is 'to make the plaintiffs whole, but not to give them a windfall.'" <sup>108</sup> In a third opinion, which more tangentially addressed an ERISA claim, the Second Circuit referred to congressional intent regarding the removal of claims to federal court. <sup>109</sup>

Finally, the ERISA opinions authored by Justice Sotomayor's indicate a view of appropriate damages that reinforces the sense of fairness that she brings to her decisions. In addition, her approach to damages relies on her view of the goals underlying ERISA. In *Henry*, an ESOP case where the value of the ESOP stock was in question, the Second Circuit stated that a 'complete remedy' would be restoration of "the ESOP to the position it would have occupied absent the overpayment." <sup>110</sup> This approach relied on the view of ERISA's purpose just quoted above that making plaintiffs whole is appropriate but windfalls are not. <sup>111</sup> Similarly, in *Layaou*, the Second Circuit gave guidance on damages when remanding a case where the plaintiff argued that a pension plan had misled him about the amount of benefits he was entitled to. The Second Circuit directed the court on remand to consider an

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<sup>105</sup> *Id.* (quotation omitted).

<sup>106</sup> See, e.g., *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004) ("As the Court said in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 95 L. Ed. 2d 39, 107 S. Ct. 1549 (1987): "[T]he detailed provisions of [ERISA] § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans.").

<sup>107</sup> 238 F.3d at 210.

<sup>108</sup> 445 F.3d at 624 (quotation omitted).

<sup>109</sup> *Marcella*, 293 F.3d at 45.

<sup>110</sup> 445 F.3d at 624.

<sup>111</sup> 445 F.3d at 624.

array of factors including the damages Layaou incurred, how he would have acted differently if he had received accurate information, and whether the plan should be required to pay benefits according to the plan formula it had represented to the plaintiff rather than the actual plan formula. In both of these cases, the court's focus is on establishing a remedy that would make the participant whole. This approach contrasts with the Supreme Court decisions referred to earlier, which have discussed the statutory remedial framework as representing a balance between the interests of plan participants and plan sponsors.

*D. The Supreme Court, ERISA and Justice Sotomayor*

Justice Sotomayor's practice of engaging in detailed analysis of highly technical issues will make a positive contribution to the Court's analysis of the often intricate questions involved in ERISA cases. In addition, ERISA cases often require importation of principles from basic fiduciary law. Justice Sotomayor's attention to precedent and tendency to reason by analogy may help ensure that employee benefit jurisprudence continues to incorporate well-established fiduciary principles.

Perhaps the most important implications for employee benefits law of Justice Sotomayor's past decisions is the extent to which she deferred to the expertise of government authorities, particularly the DOL. Also, her reliance on congressional intent has synergies in the ERISA area with her belief that fairness has a role to play in decisions. One opinion authored by Justice Sotomayor indicated her belief that Congress enacted ERISA as a "comprehensive remedial statute."<sup>112</sup> When read in conjunction with the disclosure cases she has authored, it appears that she will expect benefit plan participants to be treated fairly and with appropriate process.

**V. JUSTICE SONIA SOTOMAYOR: HER EMPLOYMENT LAW OPINIONS**

*A. General Observations*

Decisions by Justice Sotomayor in the area of employment law reflect her self-described "fidelity to the law," including "commitment to interpreting the Constitution according to its terms; interpreting statutes according to their terms and Congress's intent; and hewing faithfully to precedents established by the Supreme Court and [the Second] Circuit Court."<sup>113</sup> The employment law decisions she has authored address Title VII issues such as race discrimination, gender discrimination, and sexual harassment, as well as discrimination under the Americans with Disabilities Act (ADA) and the Age Discrimination in Employment Act (ADEA). Justice Sotomayor has also considered a number of cases involving labor issues. In addressing all of these cases, Justice Sotomayor pays careful attention to facts and applies the law methodically, considering all relevant precedent. She interprets antidiscrimination statutes fairly, mindful of Congress's intent in passing the law. Her record on employment and labor law cases is balanced, showing no evident bias for or against business. While cases indicate that she holds

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<sup>112</sup> *Layaou*, 238 F.3d at 210.

<sup>113</sup> Sotomayor's Opening Statement, WALL ST. J. (July 13, 2009).

for employers as often as for employees, the opinions she has authored regarding the ADA suggest that she may be willing to construe that statute more liberally in favor of employees.

### B. Employment Law Cases by the Numbers

Justice Sotomayor has participated in some nineteen employment law cases while sitting on the United States Court of Appeals for the Second Circuit. She authored fourteen decisions. In seven of those decisions, the Court of Appeals affirmed the lower court decision; in seven it reversed. Justice Sotomayor dissented in two cases, and wrote separately concurring in the judgment, but advocating for a different test, in another. During the six years she served as a district court judge, Sotomayor wrote numerous opinions in the area of employment law. She is clearly comfortable and well-versed in this area of the law.

### C. Themes in Employment Law Cases

As in other areas of the law, Justice Sotomayor looks to precedent to guide her decisions. Her involvement in the controversial decision, *Ricci v. DeStefano*,<sup>114</sup> regarding testing procedures for firefighters in New Haven is no exception. Although Sotomayor did not author the Second Circuit's brief per curiam opinion, the case is worth mentioning because the Supreme Court's reversal of the Second Circuit decision and the brevity of the Second Circuit's opinion featured prominently in Sotomayor's confirmation process. In *Ricci*, the Second Circuit issued a one paragraph per curiam opinion which stated simply that the court affirmed the "thorough, thoughtful, and well-reasoned opinion of the court below."<sup>115</sup> The lower court had held that the City of New Haven's decision to discard the results of a promotional exam for firefighters did not constitute discriminatory intent under Title VII.<sup>116</sup> In reaching its decision, the district court relied on *Hayden v. County of Nassau*,<sup>117</sup> a Second Circuit decision which held that a race-conscious configuration of an entry-level police department exam did not violate Title VII.<sup>118</sup> A majority of the judges for the Second Circuit, including Sotomayor, voted not to rehear the case en banc.<sup>119</sup> The opinion emphasized that the lower court had relied on precedent which "clearly establish[ed] for the circuit that a public employer, faced with a *prima facie* case of disparate-impact liability under Title VII, does not violate Title VII or the Equal Protection Clause by taking facially neutral, albeit race-conscious, actions to avoid such liability."<sup>120</sup> The facts of the *Ricci* case sharply divided both

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<sup>114</sup> 530 F.3d 87 (2d Cir. 2008) (per curiam), *rev'd*, 129 S. Ct. 2658 (2009).

<sup>115</sup> *Ricci v. DeStefano*, 430 F.3d 87, 87 (2d Cir. 2008) (per curiam), *rev'd*, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009).

<sup>116</sup> *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 160 (D. Conn. 2006).

<sup>117</sup> 180 F.3d 42 (2d Cir. 1999).

<sup>118</sup> 180 F.3d at 50.

<sup>119</sup> See *Ricci v. DeStefano*, 530 F.3d 88 (2008). Seven judges, including Justice Sotomayor, concurred in the denial of rehearing en banc; six judges dissented from the denial of rehearing en banc.

<sup>120</sup> *Ricci v. DeStefano*, 530 F.3d 88, 89 (2d Cir. 2008) (citing *Hayden v. County of Nassau*, 180 F.3d 42 (2d Cir. 1999) and *Bushey v. N.Y. State Civil Serv. Comm'n*, 733 F.2d 220 (2d Cir. 1984), *cert. denied*, 469 U.S. 1117 (1985)). In a

the Second Circuit and the United States Supreme Court. Justice Sotomayor's position in the case confirms her propensity to opt for following precedent in difficult cases.

Justice Sotomayor's employment law decisions are methodical, providing detailed review of the facts, aligning facts with the necessary elements for a successful claim, and applying precedent. The detailed opinion authored by Sotomayor in *Raniola v. Bratton*,<sup>121</sup> illustrates her methodical approach to reviewing cases. In reversing the trial judge's dismissal of a female police officer's claims of discrimination, retaliation, and hostile work environment, Sotomayor reviewed all of the facts in detail, disagreeing pointedly with the district courts' conclusions regarding the sufficiency of evidence on each of the plaintiff's claims. Throughout the opinion, Sotomayor relied on precedent from the U.S. Supreme Court and the Court of Appeals for the Second Circuit. She also cited authority from other circuit courts of appeal where the facts are substantially similar to the case under review.

Sotomayor's attention to details in the record has sometimes led her to conclude that due process has been violated or that fairness requires further opportunity to be heard. For example, in *Brown v. Parkchester South Condominiums*,<sup>122</sup> Justice Sotomayor authored the opinion that reversed the district court's dismissal of an employment discrimination claim. The opinion maintained that an evidentiary hearing was appropriate to determine to what extent, if any, the employee's condition inhibited his understanding or otherwise impaired his ability to comply with the requirement that he file his complaint within ninety days of receipt of a right to sue letter from the Equal Employment Opportunity Commission (EEOC).<sup>123</sup> Relying on Second Circuit precedent, she wrote that the "issue of whether a mental disability warrants equitable tolling of a filing deadline requires a 'highly case-specific' inquiry."<sup>124</sup>

Justice Sotomayor's concern for due process is also evident in her vigorous dissent in *Neilson v. Colgate-Palmolive Company*.<sup>125</sup> In *Neilson*, the Court of Appeals for the Second Circuit upheld the district court's conclusion that the appointment of a guardian ad litem for the employee was fair, reasonable, and adequate. Although the majority recognized that the Due Process Clause of the Fifth Amendment limits a court's discretion with respect to the procedures in appointing a guardian ad litem, the court concluded that given the circumstances of the case "there would be little probable value to a formal, adversary hearing."<sup>126</sup> Sotomayor dissented, maintaining that the district court failed to give the plaintiff even the most basic notice before appointing a guardian ad litem who assumed full control over her case. According to Justice Sotomayor, the majority misinterpreted Supreme Court precedent which, according to Sotomayor, stands for the proposition that when a party exhibits a limited ability to

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dissenting opinion, Justice Ginsburg references the district court's reliance on Hayden as precedent. See *Ricci*, 129 S. Ct. at 2696.

<sup>121</sup> 243 F.3d 610 (2d Cir. 2001).

<sup>122</sup> 287 F.3d 58 (2d Cir. 2002).

<sup>123</sup> *Id.* at 60-61.

<sup>124</sup> *Id.* at 60 (citing *Boos v. Runyon*, 201 F.3d 178, 184 (2d Cir. 2000)).

<sup>125</sup> 199 F.3d 642 (2d Cir. 1999).

<sup>126</sup> *Id.* at 651-52.



understand a proceeding affecting her rights, the court must undertake even more strenuous efforts to explain the process and give the party a meaningful opportunity to respond.<sup>127</sup>

Sotomayor is not, however, always convinced by a due process argument. In *Leventhal v. Knapek*,<sup>128</sup> Sotomayor wrote the opinion for a unanimous panel, concluding that an employee's constitutional rights to due process were not violated when he did not receive a discretionary salary increase and when he lost a provisional job appointment following disciplinary proceedings. According to Sotomayor, neither liberty nor property interests protected by the Fourteenth Amendment were at issue.<sup>129</sup>

Sotomayor also demonstrates some flexibility in the interest of fairness. In *Cruz v. Coach Stores*,<sup>130</sup> for example, the Second Circuit reversed the lower court's dismissal of the employee's claim of hostile work environment harassment.<sup>131</sup> Justice Sotomayor wrote that although the "hostile work environment harassment claim might have been stated 'more artfully,' the essential elements of the claim appeared in the complaint and the defendants had adequate notice of the claim."<sup>132</sup> Although Sotomayor found that the plaintiff did not establish a prima facie case of discrimination based on race, she concluded that the evidence of racial harassment, together with other evidence, was pertinent to establishing a hostile work environment claim. In *Cruz*, Sotomayor suggests that, in the interest of fairness, form should not prevail over substance.

Consistent with the restraint Justice Sotomayor shows in awarding damages in intellectual property cases, at least one employment law case indicates that she might be in favor of limiting damage awards. In *Norville v. Staten-Island University Hospital*,<sup>133</sup> Justice Sotomayor, writing for a unanimous panel, vacated the jury's punitive damage award of five million dollars, and reduced the compensatory damages from \$575,000 to \$30,000.<sup>134</sup> The panel agreed with the district court's judgment that the "plaintiff did not present sufficient evidence to support her contention that [the employer] discriminated against her 'with malice or with reckless indifference' as required to sustain an

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<sup>127</sup> *Id.* (referring to *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970) and *Covey v. Town of Somers*, 351 U.S. 141, 145-47 (1956)).

<sup>128</sup> 266 F.3d 64 (2d Cir. 2001).

<sup>129</sup> *Id.* at 77-78. Justice Sotomayor held that the discretionary salary increase was not a form of property protected by the Constitution against deprivation without due process of law. *Id.* at 77. The employee claimed that his constitutional liberty interest was harmed because his demotion "imposed on him a stigma or other disability that forecloses his freedom to take advantage of other employment opportunities or that might seriously damage his standing and associations in his community." *Id.* at 78. But Justice Sotomayor noted that "[t]o constitute deprivation of a liberty interest, the stigmatizing information must be both false and made public by the offending governmental entity." *Id.* (citing *Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 446 (2d Cir. 1980)).

<sup>130</sup> 202 F.3d 560 (2d Cir. 2000).

<sup>131</sup> Justice Sotomayor did, however, uphold the lower court's dismissal of the employee's claims for failure to promote, for retaliation, and for discrimination based on race. *Id.* at 568.

<sup>132</sup> *Id.* at 569.

<sup>133</sup> 112 Fed. Appx. 92 (2d Cir. 2004).

<sup>134</sup> *Id.* at 93.

award of punitive damages.”<sup>135</sup> Moreover, the appellate court found that the facts and circumstances of the case did not warrant the compensatory damages awarded by the jury and that the amount of the plaintiff’s award should be limited to back pay, front pay, benefits pay, and prejudgment interest.<sup>136</sup>

Justice Sotomayor’s employment law decisions are balanced, revealing no bias towards employers or employees. She has issued as many cases in favor of employers as employees.<sup>137</sup> In several cases, opinions she authored are partially in favor of the employer and partially in favor of the employee.<sup>138</sup>

Sotomayor indicates that she appreciates the practicalities of business. In *Singh et al. v. City of New York*,<sup>139</sup> the opinion concluded that employers do not have to compensate fire alarm inspectors for the time or additional time spent carrying inspection documents during their commute to and from work.<sup>140</sup> Relying on the Portal-to-Portal Act, Sotomayor wrote that the statute excludes traveling to and from the actual place of performance of the principal activity of employment. Sotomayor professed that the Portal-to-Portal Act had not recognized claims seeking compensation for commuting time during its

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<sup>135</sup> *Id.* at 94 (quoting *Farris v. Instructional Sys., Inc.*, 259 F.3d 91, 101 (2d Cir. 2001)).

<sup>136</sup> *Id.* at 95.

<sup>137</sup> Cases in which Justice Sotomayor favored employees include: *EEOC v. J.B. Hunt Transport, Inc.*, 331 F.3d 69 (2d Cir. 2003) (dissenting to the court’s holding that employees were not perceived as disabled); *Brown v. Parkchester South Condominiums*, 287 F.3d 58 (2d Cir. 2002) (remanding case for an evidentiary hearing on whether or not the filing deadline should be equitably tolled); *Raniola v. Bratton*, 243 F.3d 610 (2d Cir. 2001) (holding that female police officer presented sufficient evidence of a hostile work environment under the totality of the circumstances test to avoid judgment as a matter of law); *Parker v. Columbia Pictures Industries*, 204 F.3d 326 (2d Cir. 2000) (reversing summary judgment for employer in ADA case, finding that employee had made a prima facie case that he was discriminated against because of his disability); *Neilson v. Colgate-Palmolive Co.*, 199 F.3d 642 (2d Cir. 1999) (dissenting from decision that appointment of a guardian ad litem was appropriate from a due process perspective).

Cases in which Justice Sotomayor favored the employer include: *Ricci v. DeStefano* (holding that City’s decision to discard the results of a promotional exam was not intentional race-based discrimination); *Singh v. City of New York*, 424 F.3d 361, 364 (2d Cir. 2008) (holding that employees are not entitled to compensation for carrying inspection documents during their commute under the FLSA); *Washington v. County of Rockland*, 373 F.3d 310 (2d Cir. 2004) (rejecting claims of retaliatory discrimination by black employees on the grounds the adverse consequences were not severe enough to constitute discrimination); *Williams v. R.H. Donnelly Corp.*, 368 F.3d 123 (2d Cir. 2004) (finding that an employee alleging race and sex discrimination failed to establish a prima facie case because she was not qualified or available for the positions she sought); *Leventhal v. Knapek*, 266 F.3d 64 (2d Cir. 2001) (holding that government employee’s privacy rights were not violated during a search of his work place computer); *White v. White Rose Food*, 237 F.3d 174 (2d Cir. 2001) (reversing trial court’s ruling against an employer after a bench trial in a section 301 case).

<sup>138</sup> *See, e.g.*, *Cruz v. Coach Stores*, 202 F.3d 560 (2d Cir. 2000) (dismissing claims for race and gender discrimination but finding that employee had properly stated a case for hostile work environment); *Norville v. Staten Island University Hospital*, 196 F.3d 89 (2d Cir. 1999) (affirming summary judgment for employer on race and age claims because employee could not prove she was similarly situated to other employees but reversing jury verdict in favor of ADA claim because the jury charge was improper on that issue).

<sup>139</sup> 524 F.3d 361 (2d Cir. 2008).

<sup>140</sup> *Id.* at 364.

sixty years of history and that this case did not “warrant such groundbreaking law.”<sup>141</sup> Although interpretation of the Portal-to-Portal Act and the FLSA guided her decision, Sotomayor also noted “the practical consequences” of the employees’ case. She stated that “ruling in [the employees’] favor could have a wide-ranging impact, suddenly imposing upon businesses across the country a liability to compensate employees anytime those employees must commute to work with important documents, tools, or communications devices.”<sup>142</sup> In addressing the issue of whether employees should be compensated for the additional time that carrying documents might incur, Sotomayor concluded that any increase in commuting time is de minimis and thus not compensable under the FLSA.<sup>143</sup> On this issue, Sotomayor also noted the practical administrative difficulties calculating additional commuting time would involve for employers.<sup>144</sup>

If Justice Sotomayor favors employees in a particular context, she appears to do so in cases involving the ADA. As a district court judge, she authored two opinions, one before the U.S. Supreme Court decided *Sutton v. United Air Lines*,<sup>145</sup> and one after, to determine whether a woman with dyslexia was disabled within the meaning of the ADA and therefore entitled to reasonable accommodations in taking the bar exam.<sup>146</sup> These decisions required that Sotomayor spend considerable effort to determine what the ADA requires for a plaintiff to be “substantially limited in a major life activity.” Her expertise in this area led her to dissent in *EEOC v. J.B. Hunt*.<sup>147</sup> In *Hunt*, the Second Circuit found that an employment policy that excluded some candidates for the position of long distance truck driving, based on use of certain medications, was not discriminatory because the applicants were not disabled or perceived to be disabled within the meaning of the statute.<sup>148</sup> The appellate court found that the EEOC failed to set forth evidence sufficient to establish that the employer perceived rejected applicants as substantially limited in their ability to perform a major life activity. According to the court, driving long distances is not a class of job nor a broad range of jobs within the meaning of the ADA, but rather a specific job with specific requirements. Consequently, the court concluded that the applicants’ exclusion

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<sup>141</sup> *Id.* at 370.

<sup>142</sup> *Id.* at 369.

<sup>143</sup> *Id.* at 371.

<sup>144</sup> *Id.*

<sup>145</sup> 527 U.S. 471 (1999) (holding that corrective devices must be considered in determining whether an individual is disabled under the ADA).

<sup>146</sup> Before *Sutton* was decided, Sotomayor concluded that taking the bar exam was like taking an employment test and, therefore, constituted the major life activity of working. See *Bartlett v. New York State Bd. of Law Exam’rs*, 970 F. Supp. 1094 (S.D.N.Y. 1997). On appeal, the Second Circuit found that the plaintiff was substantially limited in the major life activity of reading and did not consider whether the major life activity of working was at issue. *Bartlett v. New York State Bd. of Law Exam’rs*, 156 F.3d 321 (2d Cir. 1998). The Supreme Court vacated the Second Circuit’s judgment and remanded the case for reconsideration in light of its decision in *Sutton*. In 2001, Sotomayor concluded that the plaintiff was substantially limited in the major life activities of both reading and working and was entitled to reasonable accommodations in taking the bar. *Bartlett v. New York State Bd. of Law Exam’rs*, No. 93 Civ. 4986 (SS), 2001 U.S. Dist. LEXIS 11926, at \*9 (S.D.N.Y. Aug. 15, 2001).

<sup>147</sup> 321 F.3d 69 (2d Cir. 2003).

<sup>148</sup> *Id.* at 78.

from the job did not “constitute a substantial limitation in the major life activity of working.”<sup>149</sup> Sotomayor would have found that the applicants were disabled within the meaning of the ADA. She was convinced that the EEOC produced significant evidence that the employer regarded the applicants as substantially limited in the major life activity of working as truck drivers in general.<sup>150</sup>

Justice Sotomayor also read the ADA expansively in deciding *Parker v. Columbia Pictures*.<sup>151</sup> Vacating the district court’s grant of summary judgment in favor of the employer, Sotomayor authored the opinion, which maintained that a reasonable jury could find that the plaintiff could explain apparent conflicts between his benefits application and his affidavit to the court in order to prove he could perform the essential functions of the job.<sup>152</sup> The opinion endorses the mixed motives theory of causation, an issue previously unaddressed in the Second Circuit. Justice Sotomayor agreed with other circuits that have concluded that disability may be one motivating factor in an adverse employment action even if it is not its sole “but for” cause.<sup>153</sup> Justice Sotomayor reasoned that because the language and purpose of Title VII and the ADA are similar, there is nothing to suggest that Congress “intended different causation standards to apply to the different forms of discrimination.”<sup>154</sup>

#### D. The Supreme Court, Employment Law and Justice Sotomayor

In the area of employment law, Justice Sotomayor is likely to maintain the status quo on the U.S. Supreme Court. In the two 5-4 decisions on employment issues in the 2009 term, Sotomayor would clearly have joined the dissenting justices. In *Ricci v. DeStefano*, Sotomayor would have upheld the City’s decision to disregard exams that resulted in low scores for minority firefighters because the exams had a disparate impact on those employees in violation of Title VII.<sup>155</sup> In *Gross v. FBL Financial Services*,<sup>156</sup> Sotomayor would also have joined the dissenting justices. In *Gross*, the Supreme Court rejected a mixed motive theory in age discrimination claims.<sup>157</sup> Based on Sotomayor’s discussion of the mixed motive theory in *Parker v. Columbia Pictures*, it is clear that she would agree with the reasoning of the dissenting justices – that congressional intent and precedent both require that the language in the ADEA be read in a manner consistent with the language in Title VII. In the area of employment law, Sotomayor is most likely to make a substantial contribution to the Court in cases involving the ADA, a topic about which she appears to be particularly passionate.

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<sup>149</sup> *Id.* at 76 (quoting 29 C.F.R. § 1630.2(j)(3)(i)).

<sup>150</sup> *Id.* at 79 (Sotomayor, J., dissenting).

<sup>151</sup> 204 F.3d 326 (2d Cir. 2000).

<sup>152</sup> *Id.* at 335.

<sup>153</sup> *Id.* at 336.

<sup>154</sup> *Id.* at 336-37.

<sup>155</sup> See *supra* text accompanying notes 114-20.

<sup>156</sup> 129 S. Ct. 2343 (2009).

<sup>157</sup> See *id.* at 2351-52 (holding that a plaintiff bringing a disparate treatment claim must prove that age was the “but for” cause of the adverse employment action).

## VI. IMPLICATIONS FOR SUPREME COURT JURISPRUDENCE

Based on our analysis of the doctrinal areas discussed above, we believe that Justice Sotomayor will be neither pro nor anti-business in her general approach to deciding cases at the Supreme Court. This is consistent with the research on whether she has any general liberal or conservative bias. During her years on the Second Circuit, Sotomayor wrote more than 380 majority opinions. One study of her 226 majority opinions since 2001 found that 38 percent of them could be clearly defined as liberal in nature, but 49 percent of them fell clearly on the conservative end of the spectrum.<sup>158</sup>

Her district court decisions and opinions at the Second Circuit in the areas we analyzed provide evidence that Justice Sotomayor adheres closely to precedent. Where no precedent exists on the point at issue, she tends to reason from analogous precedent rather than resorting to a general policy analysis or showing bias for any particular category of plaintiff or defendant. However, in antitrust cases Justice Sotomayor has revealed a willingness to rely on economic theory rather than analogous precedent in such situations. This deviation from our general conclusions suggests that in areas for which Justice Sotomayor is analytically comfortable, she can and will write policy-shaping opinions rather than write only cautious opinions based on arguably analogous precedent. The circuit courts should be aware that Justice Sotomayor does not hesitate to reverse lower courts that she sees as having drifted afield of precedent.

Our analysis supports the view that Justice Sotomayor proceeds in a methodical way, carefully utilizing established, structured approaches to statutory analysis. This was true in technical areas such as anti-trust and ERISA. It also was true in employment law decisions where some commentators may have expected to see a more policy focused approach.

The one exception, if one would call it that, is that Justice Sotomayor's decisions and the opinions she has authored show significant deference to government actors. ERISA cases where she relied on a variety of DOL authority, even including Opinion Letters, illustrate this proclivity. It also is observable in the securities cases where she wrote that the SEC has substantial oversight authority and sentenced white collar criminal defendants to prison terms more frequently and for longer time periods than was the average for her fellow judges in the Southern District of New York.

At the same time, though, that Justice Sotomayor adheres to precedent, undertakes detailed analysis where appropriate, and shows deference to government actors, it is also clear that fairness and appropriate process can be considerations in her opinions. In the intellectual property area she invalidated a patent that otherwise would have been valid on the basis of inequitable conduct. In the ERISA cases involving disclosure, Justice Sotomayor considered whether a plan participant received sufficient disclosure to be able to understand the effect of plan terms on his benefit entitlement. Similarly, in the employment area, she wrote in dissent that it was important for a party to be given a real opportunity to understand how a court proceeding would affect her rights, particularly when the plaintiff had exhibited a limited ability to understand the situation.

Finally, Justice Sotomayor's attention to fairness appears to extend into her approach to awarding damages. In copyright decisions she tended to scale back awards in order to align awards with

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<sup>158</sup> See Coyle, *supra* note 64, at 1 (citing studies by Profs. Corey Yung, Frank Cross, and Stephanie Lindquist).

plaintiffs' damages. She took a similar approach in the ERISA cases where in two cases she focused on the plaintiffs actual damages and, in one case, specifically stated that windfall damages would be inappropriate.

Our analysis shows that Justice Sotomayor's decisions evade simplistic labels such as liberal or conservative. Her tenacious commitment to anchoring her decisions in existing bodies of law should comfort anyone concerned that Justice Sotomayor's appointment will increase judicial activism and disappoint those who hope that Justice Sotomayor will tilt the court in a particular ideological direction. Our observation of her commitment to fair play and balance suggests that she will provide compassion while authoring decisions that adhere to the rule of law. Thus, we conclude that Justice Sotomayor's description of her approach to judicial review quoted at the beginning of this essay is accurate. Accordingly, we expect the Justice to pen thoughtful and unpretentious decisions notable more for their content than their rhetoric.