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ESSAY: JUSTICE SOTOMAYOR ON THE SUPREME COURT: A BOON FOR BUSINESS?

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LEXISNEXIS SUMMARY:

... Part I discusses Justice Sotomayor's securities law decisions; Part II discusses antitrust decisions; Part III discusses ERISA decisions; Part IV discusses employment law decisions; and Part V discusses intellectual property decisions in the areas of copyright and patent law. ... 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. ... The Supreme Court, Securities Law, and Justice Sotomayor If the Roberts Court has a pro-business tilt - an issue subject to some dispute - Sotomayor's track record as a federal judge in securities cases and her role as Justice Souter's replacement suggest that she is unlikely to tilt the Court in a different direction. ... 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. ... Finally, the ERISA opinions authored by Justice Sotomayor indicate a view of appropriate damages that reinforces the sense of fairness that she brings to her decisions, and also comports with her view of ERISA's underlying goals. ... With no direct precedent, Sotomayor relied on the closest analogs: infringement actions for collective works and the treatment of microfilm. ... 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.

TEXT:

[*189] Introduction

"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." n1

THE recent confirmation hearings of now-Justice Sonia Sotomayor n2 followed the pattern of recent Supreme Court nominations. There was political grandstanding by members of both parties. n3 Justice Sotomayor declined to say how she might vote on a number of issues and gave ambiguous answers to some other questions. n4 In the end, of course, she was confirmed. But, the hearings offered only limited insight into the record Justice Sotomayor established during her time as a district court judge and her time on the Second Circuit Court of Appeals.

In this Essay, we offer our views on Justice Sotomayor's decisions across five areas of law pertaining to business, focusing primarily on her appellate decisions. In Parts I through V, we discuss separately each of those doctrinal areas and the extent to which any themes or common threads are found, or not found, in those areas. In general, we identified a number of themes, nearly all of which were consistent across the doctrinal areas. Part I discusses Justice Sotomayor's securities law decisions; Part II discusses antitrust decisions; Part III discusses ERISA decisions; Part IV discusses employment [*190] law decisions; and Part V discusses intellectual property decisions in the areas of copyright and patent law. Not surprisingly, and to the benefit of this Essay, we each bring our own individual perspective, language, and predisposition to the separate doctrinal discussions. In the Conclusion, 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 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. n5 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. n6

Sotomayor, a former prosecutor, n7 does seem to be somewhat deferential [*191] to government regulators and their roles as enforcers. n8 Her deference toward this enforcement role 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 forty-seven white-collar criminal prosecutions out of the total of 1,570 such cases handled by federal district judges in the Southern District of New York. n9 Sotomayor sentenced to prison fifty-two percent of the white-collar criminal defendants appearing in her court. By contrast, only forty-three percent of the white-collar criminal defendants in the courtrooms of her fifty-one fellow Southern District judges were sentenced to prison. Likewise, whereas Sotomayor sentenced forty-eight 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 thirty-four percent of similar defendants. n10

B. Securities Cases by the Numbers

Sotomayor decided as a trial judge or reviewed as an appellate judge twenty-six cases dating back to 1994 in which at least one issue involved Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") n11 and companion Rule 10b-5. n12 Of the twenty-six cases, three were actions brought by the SEC and two were criminal actions brought by the United States. n13 The SEC or United States prevailed in all five cases. In sixteen of the remaining twenty-one cases, the defendant was granted relief, usually on a motion to dismiss that was affirmed. In four cases, the defendant was [*192] granted some, but not all, of the relief requested or only one defendant was granted relief. In one case, the plaintiff won outright. n14

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. n15 In all but one case Sotomayor ruled in favor of defendants on the se-

curities 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. Upon her elevation to the Second Circuit in 1998, there were fourteen cases in which Sotomayor was part of a panel required to decide whether a trial court's pre-trial dismissal of private federal securities law claims was proper. In each case, the panel unanimously affirmed the dismissal. n16 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, n17 then Sotomayor's failure to reverse in any of these cases suggests an absence of activism in the securities field. [*193] This suggestion is consistent with at least one study, which ranked Sotomayor as "less activist" of both her peers across a range of cases on the Second Circuit and judges in other Circuits. n18

Overall, Sotomayor authored eleven Second Circuit opinions dealing with securities issues. Four of them are discussed in Section C as examples of general themes to be drawn from these cases. n19

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.*, n20 perhaps the most famous opinion authored by Justice Sotomayor in the securities field. *Dabit* concerns preemption by the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), n21 which was enacted in response to the perceived failure of the Private Securities Litigation Reform Act of 1995 ("PSLRA") n22 to curb perceived abuses by plaintiffs' lawyers in securities fraud litigation. n23 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 [*194] state courts on the basis of common law fraud or other non-federal claims. n24 SLUSA was enacted to resolve the problem by federalizing class action securities litigation. n25 SLUSA amended the Securities Act of 1933 ("Securities Act") n26 and the Exchange Act in substantially identical ways, by requiring suits to be brought in federal court, if certain conditions are met. n27

The issue on appeal in *Dabit* was whether, as the district court held, the state law claims were preempted by SLUSA. n28 Sotomayor, writing for the Second Circuit, found no preemption because plaintiff was a holder and not a buyer or seller of securities. n29 The Supreme Court had previously held in *Blue Chip Stamps v. Manor Drug Stores* n30 that a private litigant may bring an antifraud action only if he is an actual purchaser or seller of securities. n31 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." n32 Four months later, the Seventh Circuit took a contrary approach, n33 and the Supreme Court granted certiorari in *Dabit*, presumably to resolve the circuit split. In an 8-0 decision, [*195] 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. n34

An 8-0 decision may appear to be a definitive rejection of Justice Sotomayor's analysis, n35 but such a perception must be tempered. n36 First, two other judges on the Second Circuit panel, both of them Republican appointees, agreed with Sotomayor. n37 Second, the Supreme Court's opinion has been the subject of much critical commentary. n38 Whereas the Supreme Court decided *Dabit* mainly on the policy ground 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 - for example, the need to constrain securities fraud. n39 Third, three other circuits had previously reached the same conclusion reached by the Second Circuit in *Dabit*. n40 Sotomayor referred to this precedent in her opinion for the panel: "We note that this holding aligns us with every circuit court that has considered the question thus far." n41

Indeed, as an appellate judge, Sotomayor sometimes avoided resolving issues for which there was little or no precedent. An example of this approach can be found in *Official Committee of Unsecured Creditors of WorldCom, Inc. v. SEC*. n42 In this case, the Second Circuit, in another opinion written by [*196] Sotomayor, rejected a challenge by WorldCom'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, n43 under which the SEC is permitted to distribute to investors the money it collects through the settlement of its civil-enforcement actions. The Committee argued that the distribution plan in *WorldCom* 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 first concluded that the Committee had nonparty standing to appeal the district court's order, and then 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. n44 One of the other issues raised on appeal concerned the scope of creditors' committee's statutory authority. Sotomayor, noting that this is "a question for which there is little guiding precedent," decided that the bankruptcy court was best equipped to provide an answer. n45

A second theme that emerges from a review of Justice Sotomayor's opinions in the securities field is that she employs a 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, writing for the Second Circuit, analyzed the Fair Funds for Investors provision of Sarbanes-Oxley. As indicated supra, the Fair Funds provision permits the SEC to distribute to defrauded investors money it collects through settlement of civil-enforcement actions. In *WorldCom*, Sotomayor, writing for the Second Circuit, carefully analyzed the provision and determined, in a case of first impression both in the Second Circuit and elsewhere, that the appropriate standard of review by district courts of Fair Funds distribution plans should be the "fair and reasonable" standard. n46

A third theme is that Sotomayor exhibits a fair amount of deference to government regulators when they fulfill roles assigned to them by statute. [*197] This point is illustrated in *In re NYSE Specialists Securities Litigation* n47 and *WorldCom*. In the former case, Justice Sotomayor emphasized that the SEC has substantial oversight power to supervise, investigate, and discipline the NYSE. n48 In the latter case, Sotomayor again noted the Court's deference to the SEC when she observed that when the SEC distributes penalties to investors, it fulfills a role assigned to it by statute. *WorldCom* states: "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." n49 Similarly, in *Press v. Quick & Reilly, Inc.*, n50 Sotomayor affirmed the dismissal of investors' claims under Section 10(b) of the Exchange Act, Rule 10b-5, and Rule 10b-10. n51 In this case, investors claimed that broker-dealer defendants defrauded them by failing to disclose the receipt of fees from poor-performing money-market funds that the broker-dealers selected to automatically sweep up plaintiffs' uninvested funds. 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 interpretations of its regulations in its amicus brief, unless they are "plainly erroneous or inconsistent with the regulations," n52 and then "adopted the SEC's determination that no Rule 10b-10 violation occurred in this case." n53

Fourth, Sotomayor exhibits little, if any, pro-investor, anti-business bias. The overall statistics concerning securities cases she decided provide the best evidence of this point. n54 Finally, the statistics fail to support an argument that Sotomayor, during her tenure as a lower court judge, was an activist, [*198] policymaking judge in the area of securities. For example, as mentioned, since her elevation to the Second Circuit in 1998, there were fourteen 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 - an issue subject to some dispute n55 - Sotomayor's track record as a federal judge in securities cases and her role as Justice Souter's replacement suggest that she 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 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 seventeen years of experience that she has acquired 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, which have the most securities-intensive dockets in the United States. n56 Accordingly, Sotomayor's judicial background, among her other attributes, may serve to enhance and inform the Court's approach to securities 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. From the time she was [*199] appointed to the Second 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. n57 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 wrote six antitrust opinions as a circuit court judge. Of these, three were dismissals of the plaintiff's claims. Another opinion reversed a district court decision to grant a motion to dismiss some of the plaintiffs' claims, because granting that motion did not resolve the case. n58 The remaining two opinions she authored sided with plaintiffs. In the first, the Second Circuit affirmed the district court's determination that a group of retailers could be certified as a class. n59 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. n60

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 her analysis with precedent. Precedent, however, often fails to yield an unambiguous signal because many antitrust 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. Some themes observable in other areas of law emerge in her antitrust jurisprudence, and others do not. Fairness and due process, for example, are less significant factors in most of Justice Sotomayor's antitrust opinions, but they are [*200] discussed in two cases. There are no regulatory agencies for antitrust, so the theme of deference to government officials found in other areas of her jurisprudence is not a factor. Nonetheless, she seems very attuned to federal policy and justifies her most significant antitrust opinion, *Clarett v. National Football League*, on the grounds of deference to federal labor policy. n61 Justice Sotomayor appears to relish in economic exchanges with her colleagues and appears to be increasingly bold in her opinions.

Justice Sotomayor's first antitrust opinion as a circuit court judge, *Todd v. Exxon Corp.*, involved allegations that major oil companies were colluding to keep wages lower in a buying oligopsony by exchanging wage information about non-union (managerial, professional, and technical ("MPT")) employees. n62 In *Todd*, the district court 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 be a violation of Section 1 of the Sherman Act. n63 As with many antitrust cases, in *Todd* there were significant disputes about whether the plaintiff had alleged a plausible product market. Justice Sotomayor opined that the district court had erred by: (1) requiring the plaintiff to show that different MPT jobs were interchangeable, (2) rejecting product-market information based on industry-specific experience, and (3) rejecting such information based on industry recognition. n64 Other market information that Justice Sotomayor deemed relevant included evidence that the oil industry 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. n65

[*201] In *Todd*, Justice Sotomayor cited precedents established by the U.S. Supreme Court in price exchange antitrust cases decided in the 1960s and earlier. n66 She 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, MPT employees in the oil and petrochemical industry, in the continental United States and various submarkets thereof." n67 This market definition gave the defendants an eighty to ninety percent 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 militates against trial courts granting motions to dismiss before discovery has taken place. n68

Justice Sotomayor's second antitrust opinion as a circuit court judge, *In re Visa Check/Mastermoney Antitrust Litigation*, was a complex antitrust case where defendant credit card companies were alleged to have illegally tied their credit card services to a requirement that large retailers also honor debit cards issued by the credit card companies. n69 This "honor all cards" policy allegedly created an illegal tie-in, a possible violation of Section 1 of the Sherman Act. n70 The main dispute was whether the plaintiff retailers constituted a coherent class for litigation purposes. n71 Justice Sotomayor wrote that the district court had not abused its discretion in finding common issues of fact and law predominated, the action would be manageable, and that choosing a measure of damages was not required before certification. n72 In making this determination, Justice Sotomayor waded through competing economic reports from prominent academics. n73

[*202] Judge Jacobs dissented, opining that the class in this case would become unmanageable. n74 The dissent also contended that Justice Sotomayor misread the requirements of *Federal Rules of Civil Procedure* 23(a) and (c). n75

Responding to the dissent, Justice Sotomayor began by stating, "The 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." n76 Several more pages of the majority opinion confidently dismiss the dissent's arguments in much the same way.

In *Information Resources, Inc. v. Dun & Bradstreet Corp.*, both the plaintiff and defendant supplied retail-tracking services on the sale of packaged goods. n77 The plaintiff alleged that co-defendant Nielsen engaged in anticompetitive conduct in the form of tying and bundling contracts with buyers of retail tracking in violation of Sections 1 and 2 of the Sherman Act. n78 The tie took the form of lower prices if defendants' other services were also purchased. Defendants filed a motion to dismiss contending that: (1) the plaintiff lacked 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) the district court lacked 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. n79

Ultimately, Justice Sotomayor vacated the dismissal 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." n80 Later in the opinion she wrote, "There is still work to be done by the district court with respect to the claims included in the [*Federal Rule of Civil Procedure*] Rule 54(b) certification." n81 There is no doubt that this is a complex issue of law, but Justice Sotomayor reversed the district court because her careful analysis [*203] of the partial motion to dismiss led her to conclude that the decision of the district court would not ultimately resolve the case.

Justice Sotomayor again displayed intellectual rigor in *Innomed Labs, L.L.C. v. Alza Corp.*, ruling that even though the district court made two errors in its charge to the jury, the errors were not fundamental and therefore not sufficient to require a new trial. n82 The scenario in this case is familiar to experienced antitrust participants: A pharmaceutical manufacturer allegedly gave price breaks to one distributor but not another, who accordingly sued claiming price discrimination in violation of the Robinson-Patman Act. n83 The case went to trial and the jury found for the defendant on the Robinson-Patman claim.

Justice Sotomayor authored the 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. n84 She 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 in 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. n85

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 is *Clarett*, where the Second Circuit decided that the antitrust laws did not apply. n86 Her opinion is significant for a number of reasons and has been the subject of several law review commentaries. n87 A three-judge panel reversed the district court in a case where the plaintiff, a prospective NFL player, challenged the NFL's eligibility rule that prohibited teams from drafting players within three years of high school graduation. n88 *Clarett* contended that the NFL's refusal to allow him to enter the NFL draft was an illegal trade restraint that violated Section 1 of the Sherman Act. Justice Sotomayor 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 Sotomayor acknowledges that the line between antitrust and labor law in sports is especially murky. n89 However, 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. n90

I believe that the Second Circuit's ruling in *Clarett* was path-breaking, Bork-like, n91 and correct. The Sotomayor majority opinion rejected the Eighth Circuit test developed in *Mackey v. National Football League*, n92 concerning when antitrust laws can be used by plaintiffs challenging rules promulgated by professional sports leagues. n93 In

Mackey, the infamous Rozelle rule, which allowed NFL franchises to demand ransom from other teams for players that the franchises cut from the [*205] lineup, was toppled. n94 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 are very limited. Thus, most challenges to league rules, such as the one launched by Clarett, would be evaluated under antitrust standards that favor the plaintiff.

Although some law review commentators have criticized Sotomayor'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. n95 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. n96 In addition, Justice Sotomayor's opinion can be justified based on precedent in the Second Circuit n97 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 v. Salvino, Inc.*, the defendant was distributing trademarked materials owned by Major League Baseball Properties ("MLBP") without authorization. n98 The majority opinion of the Second Circuit affirmed the district court's dismissal of the defendant's counterclaim. n99 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 MLBP but violated the terms of the agreement. Essentially the appeal was based on the defendant's [*206] counterclaim 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 the Sherman Act.

The majority opinion runs forty-one pages, discussing the market for MLBP and other familiar bricks in antitrust analysis. n100 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 so doing avoids addressing directly the central contention of appellant Salvino." n101 Making sure there can be no doubt of her substantial disagreement with the analysis of the majority opinion, Justice Sotomayor stated, "before applying this alternative framework, however, I address the majority's flawed view that the Clubs have made no agreement on price." n102 The framework that Sotomayor refers to is called the "doctrine of ancillary restraints," n103 which she believes "is a superior method for analyzing the challenged restraints here." n104 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 other 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 purchases [sic] licenses from more than one Club in a central location). n105

[*207] 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." n106 Ultimately, the differences between the majority's and Sotomayor's opinions 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 of the University of Oklahoma*, n107 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

Although nominated to the U.S. Supreme Court by a progressive Democrat, Justice Sotomayor has relied on insight from conservative and free-market-oriented economists and jurists in her antitrust opinions. I believe that many may be surprised, some pleasantly, when Justice Sotomayor hears antitrust cases on the U.S. Supreme Court. She is well-versed in modern economic concepts and seems distanced from the "big is bad" mentality of some of the Supreme Court decisions in the 1950s and 1960s. n108 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.

III. Justice Sonia Sotomayor: Her ERISA Opinions

A. General Observations

All employee-benefit plans sponsored by private-sector employers in the United States are subject to the Employee Retirement Income Security Act of 1974 ("ERISA").ⁿ¹⁰⁹ ERISA provides for exclusive federal court jurisdiction for some types of employee benefit-related claims and concurrent jurisdiction for other claims. ERISA cases now make up a significant part of the labor [*208] and employment dockets of the federal courts.ⁿ¹¹⁰ 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 those cases. All five of the decisions Justice Sotomayor authored were on behalf of unanimous panels. Four of the five ERISA decisions she authored vacated or reversed and remanded the lower court decision.ⁿ¹¹¹ In one decision, the Second Circuit affirmed.ⁿ¹¹²

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 authored by Justice Sotomayor,ⁿ¹¹³ the Second Circuit confronted the question of what standard 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.ⁿ¹¹⁴ 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.ⁿ¹¹⁵

Careful, step-by-step analysis is another hallmark of the ERISA decisions authored by Justice Sotomayor. In *Layaou v. Xerox Corp.*, the Second Circuit [*209] addressed a claim that a plan's statutorily-required Summary Plan Description ("SPD") failed to adequately disclose plan provisions that resulted in plaintiff receiving a significantly lower retirement benefit than he had expected based on his understanding of the plan terms and earlier plan estimates.ⁿ¹¹⁶ 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 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.ⁿ¹¹⁷ Similarly, Sotomayor rejected simplistic arguments based on form and required the use of substantive analysis in *In re Bethlehem Steel Corp.*ⁿ¹¹⁸ and *Henry v. Champlain Enterprises.*ⁿ¹¹⁹

Sotomayor's interest in fairness and attention to process are apparent in *Layaou* and *Strom*, two ERISA disclosure cases. In each decision, the Second Circuit reversed the district court and found the disclosure to be inadequate.ⁿ¹²⁰ Both decisions focused on the obligation of plans and plan decisionmakers to give participants reasonable information about the participants' individual situations. In *Layaou*, 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.ⁿ¹²¹ In *Strom*, the court found it irrelevant whether the plaintiff had actual knowledge of the plan-review procedures where the plan administrator intentionally refused to comply with regulations requiring disclosure-of-claims procedures.ⁿ¹²²

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, her ERISA decisions cite a variety of Department of [*210] Labor ("DOL") authorities 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, ranging from final regulations to opinion letters. *Layaou* relied on final regulations regarding the content of SPDsⁿ¹²³ and *Strom* relied on notification requirements owed by a plan to benefit plan participants who file benefit claims.ⁿ¹²⁴ In *Henry*, the Second Circuit went further, looking to proposed regulations regarding the definition of "adequate consideration" in

an Employee Stock Ownership Plan ("ESOP") transaction. n125 The court noted that, although the proposed regulations "have no legal effect," other circuits had accepted the proposed definition. n126

The most interesting citation of agency authority occurs in *Marcella v. Capital District Physicians' Health Plan*, where the court quotes from three DOL opinion letters while at the same time stating that the letters did not have the status of regulation. n127 The district court had concluded that 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. n128 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." n129

[*211] In addition to her deference to the DOL, three of Justice Sotomayor's ERISA opinions refer to congressional intent. n130 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. n131 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." n132 Somewhat similarly, Justice Sotomayor wrote in *Henry* that "the aim of ERISA is "to make the plaintiffs whole, but not to give them a windfall." n133 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. n134

Finally, the ERISA opinions authored by Justice Sotomayor indicate a view of appropriate damages that reinforces the sense of fairness that she brings to her decisions, and also comports with her view of ERISA's underlying goals. 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 ..." n135 This approach reflects Sotomayor's view that, in ERISA cases, making plaintiffs whole is appropriate but windfalls are not. 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. n136 The Second Circuit directed the court on remand to consider the damages the plaintiff incurred, how he would have acted differently if he had received accurate information, and [*212] 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. n137 In both of these cases, the court focused 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. n138

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 often intricate questions involved in ERISA cases. In addition, ERISA cases often involve 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 implication 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. Her reliance on congressional intent also is intertwined with her belief that fairness has a role to play in decisions. With respect to congressional intent, Justice Sotomayor asserted in one opinion that Congress enacted ERISA as a "comprehensive remedial statute." n139 Her belief that ERISA is not only intended as remedial but also to be comprehensive in the availability of remedies seems to influence Justice Sotomayor's general approach to ERISA cases. For example, in the disclosure cases she has authored, it appears that she expects benefit plan participants to be treated fairly and with appropriate process.

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IV. 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 her "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." n140 The employment law decisions she has authored address Title VII n141 issues such as race discrimination, gender discrimination, and sexual harassment, as well as discrimination under the Americans with Disabilities Act ("ADA") n142 and the Age Discrimination in Employment Act ("ADEA"). n143 Justice Sotomayor has also considered a number of cases involving labor issues. In all of these cases, Justice Sotomayor paid careful attention to facts and applied the law methodically, considering all relevant precedent. She has interpreted antidiscrimination statutes fairly, mindful of Congress's intent in passing the law. Overall, her record on employment and labor law cases is balanced, showing no evident bias for or against business. While cases indicate that she holds 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 numerous employment law cases while sitting on the Second Circuit. 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 n144 as employees. n145 In [*214] several cases, the opinions she authored are split in nature, partially in favor of the employer and partially in favor of the employee. n146 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 *Ricci v. DeStefano*, a controversial decision regarding testing procedures for firefighters in New Haven, is no exception. Although Sotomayor did not author the Second Circuit's opinion, [*215] the case is worth mentioning because the Supreme Court's reversal of the decision and the brevity of the Second Circuit's opinion featured prominently in Sotomayor's confirmation process. n147 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." n148 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. n149 In reaching its decision, the district court relied on *Hayden v. County of Nassau*, a Second Circuit decision, which held that a race-conscious configuration of an entry-level police department exam did not violate Title VII. n150 A majority of the judges for the Second Circuit, including Sotomayor, voted not to rehear the case en banc. n151 The opinion emphasized that the lower court had relied on precedent that "clearly established 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." n152 The facts of the *Ricci* case sharply divided both the Second Circuit and the U.S. Supreme Court. Justice Sotomayor's position in the case confirms her inclination to opt for following precedent in difficult cases.

Justice Sotomayor's employment law decisions provide detailed review of the facts, aligning them with the necessary elements for a successful claim. Justice Sotomayor's thorough discussion in *Raniola v. Bratton* n153 illustrates her systematic approach to reviewing cases. In reversing the trial judge's dismissal of a female police officer's claims of discrimination based on hostile work environment and retaliation, n154 Sotomayor reviewed all of the facts in [*216] detail, disagreeing pointedly with the district court's 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. n155 She also cited authority from other circuit courts of appeal where the facts were substantially similar to the case under review. n156

Sotomayor's attention to details in the record has sometimes led her to champion the rights of due process and fairness in opportunities to be heard. For example, in *Brown v. Parkchester South Condominiums*, Justice Sotomayor authored the opinion reversing the district court's dismissal of an employment discrimination claim. n157 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").

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." n158

Justice Sotomayor's concern for due process is also evident in her vigorous dissent in *Neilson v. Colgate-Palmolive Co.* n159 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 [*217] formal, adversary hearing." n160 Sotomayor dissented, maintaining that the district court failed to give the plaintiff even the most basic notice before appointing a guardian ad litem to assume full control over her case. n161 According to Justice Sotomayor, the majority misinterpreted Supreme Court precedent, which she believed stood for the proposition that when a party exhibits a limited ability to 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. n162

Sotomayor, however, is not always convinced by a due process argument. In *Leventhal v. Knapek*, 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. n163 According to Sotomayor, neither liberty nor property interests protected by the Fourteenth Amendment were at issue. n164

Sotomayor also demonstrates some flexibility in the interest of fairness. In *Cruz v. Coach Stores, Inc.*, for example, the Second Circuit reversed the lower court's dismissal of the employee's claim of hostile work environment harassment. n165 Justice Sotomayor wrote that although the hostile work environment harassment claim might have been stated "more artfully, the essential elements of the charge do appear in the complaint" and the defendants had adequate notice of the claim. n166 Although Sotomayor found that the plaintiff did not establish a prima facie case of discrimination based [*218] on race, she nonetheless concluded that the evidence of racial harassment, together with other evidence, was pertinent to establishing a hostile work environment claim. n167 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*, Justice Sotomayor, writing for a unanimous panel, vacated the jury's punitive damage award of \$ 5 million and reduced the compensatory damages from \$ 575,000 to \$ 30,000. n168 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 award of punitive damages." n169 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. n170

Sotomayor indicates that she appreciates the practicalities of business. In *Singh v. City of New York*, 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. n171 Relying on the Portal-to-Portal Act, n172 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 sixty years of history and that this case did not "warrant such groundbreaking law." n173 Although interpretation of the Portal-to-Portal Act and the Fair Labor Standards Act ("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 [*219] compensate employees anytime those employees must commute to work with important documents, tools, or communications devices." n174 In addressing the issue of whether employees should be compensated for the additional time resulting from carrying documents, Sotomayor concluded that any increase in commuting time is de minimis and thus not compensable under the FLSA. n175 Confirming the practical business outlook Sotomayor took in this case, she also noted the administrative difficulties calculating additional commuting time would involve for employers. n176

If Justice Sotomayor favors employees in a particular context, she appears to do so primarily 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*, n177 and one after, in determining whether a woman with dyslexia was disabled within the meaning of the

ADA, and therefore entitled to reasonable accommodations in taking the bar exam. n178 These decisions required that Sotomayor spend considerable effort determining 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 Industries, Inc.* n179 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 [*220] of the statute. n180 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 neither a class of job nor a broad range of jobs within the meaning of the ADA, but rather a specific job with specific requirements. n181 Consequently, the court concluded that the applicants' exclusion from the job did not "constitute a substantial limitation in the major life activity of working." n182 If she had been a deciding judge, Sotomayor would have found that the applicants were disabled within the meaning of the ADA because 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. n183

Justice Sotomayor also read the ADA expansively in deciding *Parker v. Columbia Pictures*. n184 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. n185 The opinion endorsed 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 the sole "but for" cause. 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." n186

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

In the area of employment law, case precedent indicates that 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. n187 In *Gross v. FBL Financial Services*, n188 Sotomayor would also have joined the dissenting justices. In *Gross*, the Supreme Court rejected a mixed motive theory in age discrimination claims. n189 Based on Sotomayor's discussion of the mixed motive theory in deciding *Parker v. Columbia Pictures*, it is clear that she would agree with the reasoning of the dissenting justices in *Gross* - that congressional intent and precedent both require that the language in the ADA be read in a manner consistent with the language in Title VII. n190 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.

V. Justice Sonia Sotomayor: Her Copyright and Patent Law Opinions

A. General Observations

Justice Sonia Sotomayor brings considerable intellectual property experience with her to the Supreme Court. n191 The present discussion is limited to her copyright and patent opinions. These related areas of intellectual property are the areas of intellectual property with a constitutional [*222] mandate to promote innovation and creativity. n192 Therefore, this discussion provides a good overview of how Justice Sotomayor addresses the delicate balance between promoting creativity 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 copyright and patent decisions. Justice Sotomayor did not hear cases covering highly publicized patent and copyright issues such as music piracy, copyright length, and limits to public access of creative works. Moreover, business entities, especially in patent cases, tend to be on both sides of intellectual property litigation, thereby making a search for a pro or anti-business bias superfluous.

Justice Sotomayor proved to be a very competent copyright and patent jurist. Her copyright and patent decisions exhibit a strong attention to detail. Her opinions rely heavily on precedent. Rather than taking intuitive leaps when am-

biguity 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 copyright and patent 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 copyright and patent matters may partially be attributable to her private law firm experience representing trademark holders against infringers and counterfeiters. n193

In addition to cautious and careful analysis, Sotomayor's work exhibits constraint and a strong adherence to rules and established law. She has repeatedly adjusted awards in an effort to align her judgment with the plaintiff's actual losses and prior court practice. n194 In copyright cases, [*223] prevailing plaintiffs are entitled to receive statutory damages in amounts of up to \$ 100,000 per infringement. n195 Despite this significant discretion, she typically granted awards, consistent with prior court practice, of \$ 20,000-\$ 30,000 per infringement and sometimes less. n196 Analogously, she refused to award injunctive relief in situations where she believed justice would not be served by such a grant. n197 Finally, when parties acted in bad faith, she has also appealed to equitable principles to bar their recovery. n198

B. Copyright and Patent Cases by the Numbers

As a Second Circuit and district court judge, Justice Sotomayor presided over multiple copyright cases and four patent law cases. n199 She did not author any Second Circuit copyright opinions and none of the copyright appellate decisions were divided. A subsequent decision disagreed with part of one of Justice Sotomayor's patent procedural opinions, n200 and one of her district court copyright decisions was reversed. n201

C. Themes in Copyright and Patent Cases

1. Patent Cases

Justice Sotomayor's patent law decisions illustrate her comfort in addressing highly technical issues. In *Intellectual Property Development, Inc. v. UA-Columbia of Westchester, Inc.* (IPD I), Sotomayor issued an opinion in one of the earliest Markman claim construction hearings. n202 Her ruling, which generally favored the plaintiff, n203 broadly interpreted the term "high frequency" in the context of television broadcasts. She concluded that, based on intrinsic evidence, someone skilled in the art would understand high frequency to refer to the VHF range. n204 In a subsequent related ruling, the Court of Appeals for the Federal Circuit ("CAFC") disagreed with Justice Sotomayor's conclusion. n205 Although they did not question her reasoning, they rejected her narrow reliance on intrinsic evidence, concluding that judges can consult standard dictionaries in construing terms.

In *Dow Corning v. Biomet, Inc.*, the one clear victory for a patent holder, Sotomayor displayed her strong grasp of one of the more difficult concepts in patent law. n206 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. n207 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. Sotomayor rejected the estoppel argument after reviewing the claim record in *Dow Corning*. n208 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. n209

[*225] 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 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. n210 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. n211 Thus, whereas the CAFC was willing to "improve" the law, Sotomayor's allegiance to precedent resulted in an outcome in line with the Supreme Court's interpretation.

Perhaps Sotomayor's most interesting patent decision, *Refac International v. Lotus Development Corp.*, provides an illustration of her keen sense of justice. n212 In an infringement action, Lotus asserted that the patent should be invalidated due to the patentee's inequitable conduct before the patent examiner. n213 In providing evidence that the patent claim met the enablement standard for patentability, n214 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 that the parties deliberately omitted this material information with intent to deceive, and she therefore invalidated the patent on the basis of inequitable conduct. n215 On appeal, the CAFC affirmed Sotomayor's decision but provided interesting commentary. n216 The CAFC suggested that finding inequitable conduct based on the omission of employment history may seem severe but was not an abuse of discretion. n217 Thus, the CAFC seemed to imply that while many judges would not have treated this behavior so harshly, it was acceptable and was within her discretion. n218

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2. Copyright Cases

Unlike her patent law cases, Justice Sotomayor's copyright cases are more balanced between the rights of 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*, n219 Sotomayor displayed her facility with the fact/expression dichotomy used to distinguish between protected and unprotected content. n220 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 about 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. n221

Justice Sotomayor's most significant copyright case was *Tasini v. New York Times*. n222 This case of first impression concerned the definition of "revision of a collective work." The mostly verbal contracts between the freelance-author plaintiffs and newspaper and magazine defendants did not provide for revisions. n223 The Copyright Act of 1976 allows journals a limited privilege to reprint an entire original volume as a collective work without compensating copyright holders. n224 Therefore, journals could publish reprints of entire magazines or distribute magazines and articles on microfilm and microfiche without additional royalty payments. An ambiguity arose when the *New York Times* and other defendants began making their articles available on electronic databases such as LexisNexis. Authors argued that such reproductions were not revised collective works but were, instead, [*227] disaggregated reproductions of their copyright protected articles that required additional compensation. n225

With very little guidance from authorities, Sotomayor ruled that it was a revision because the entire magazine was reproduced on LexisNexis. Relying on precedent drawn from infringement of collective works, Sotomayor applied a substantial similarity standard. n226 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 parts of the collective work is not infringement. Using this framework, Sotomayor concluded that placing entire periodicals on LexisNexis is a substantially similar work and would constitute infringement of a periodical's copyrights if published without the respective periodical's permission. n227 Moreover, the treatment of microfilm and microfiche mandated this conclusion since little distinction can be drawn between the electronic and film-based media. n228 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. n229 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. n230

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 relying on no preexisting legal theory based its decision on a non-legal analogy. Much of the Supreme Court's legislative history discussion in *Tasini* focused on the unjust system authors had previously faced when negotiating contracts with [*228] powerful publishers. n231 Thus, in rejecting the closest legal parallels, the Supreme Court may have been attempting to extend the congressional effort to stem the abuse of freelance authors in their negotiations with large media corporations. In essence, the Supreme Court may have engaged in an act of "policymaking" in *Tasini*. By contrast, Justice Sotomayor, in relying on established law to guide her in determining the ambiguous allocation of rights for revisions of collective works under the Copyright Act, produced a decision that was value-neutral.

D. The Supreme Court, Copyright and Patent Law, and Justice Sotomayor

Justice Sotomayor's experience as both a district and circuit court judge can provide valuable experience to the Supreme Court. In cases of first impression, the Supreme Court operates with few constraints. Without significant constraints, there is little to prevent the personal biases of justices from influencing their decisions. I believe Sotomayor's years of experience in subordinate courts can help provide an anchor or reality check for the Court. She has, and I believe, will continue to strongly adhere to precedent in copyright and patent 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.

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 copyright and patent cases. Her sense of fairness and balance will provide a moderating influence in copyright and patent cases.

Conclusion: 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 [*229] her years on the Second Circuit, Sotomayor wrote more than 380 majority opinions. One study of her 226 majority opinions since 2001 found that thirty-eight percent of them could be clearly defined as liberal in nature, but forty-nine percent of them fell clearly on the conservative end of the spectrum. n232

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 compose 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 away from precedent.

In deciding cases that impact business, our analysis supports the view that Justice Sotomayor proceeds in a methodical way, carefully utilizing established and structured approaches to statutory analysis. This was true in technical areas such as antitrust and ERISA. It was also 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, including even Opinion Letters, illustrate this proclivity. Her deference to government is also 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 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 [*230] 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 down awards in order to align them with plaintiffs' damages. She took a similar approach in the ERISA cases when 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 in securities law, antitrust law, ERISA law, employment law, and intellectual property law evade simplistic labels such as liberal or conservative. Her tenacious commitment to anc-

horing her decisions in existing bodies of law should comfort those in the business community who are 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 business decisions notable more for their content than their rhetoric.

Legal Topics:

For related research and practice materials, see the following legal topics:

Governments Courts Judges Securities Law Liability Private Securities Litigation Federal Preemption Torts Business Torts Fraud & Misrepresentation Actual Fraud General Overview

FOOTNOTES:

n1. Nomination of Sonia Sotomayor to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 111th Cong. (2009) [hereinafter Nomination Hearing] (opening statement of Judge Sonia Sotomayor, nominee, U.S. Supreme Court), available at http://judiciary.senate.gov/hearings/testimony.cfm?id=3959&wit_id=8102.

n2. 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.

n3. See, e.g., Nomination Hearing, *supra* note 1 (statement of Sen. Al Franken, Member, S. Comm. on the Judiciary), available at http://judiciary.senate.gov/hearings/testimony.cfm?id=3959&wit_id=8101 ("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."); *id.* (statement of Sen. Jeff Sessions, Member, S. Comm. on the Judiciary), available at http://judiciary.senate.gov/hearings/testimony.cfm?id=3959&wit_id=515 ("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.").

n4. See, e.g., Jonathan Turley, Editorial, Retire the "Ginsburg Rule": Supreme Court Nominee Hearings Are Most Noteworthy for What They Don't Reveal, *USA Today*, July 16, 2009, at A9.

n5. See, e.g., Anna C. Henning & Kenneth R. Thomas, CRS Report for Congress, Judge Sonia Sotomayor: Analysis of Selected Opinions 47, No. R40649 (Jun. 19, 2009), available at <http://www.fas.org/sgp/crs/misc/R40649.pdf> ("As a group, Judge Sotomayor's opinions in the securities context appear to favor neither corporations nor investors.").

n6. See *infra* note 232 and accompanying text.

n7. 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 her nomination by President George H.W. Bush in 1991 and confirmation by the Senate in 1992. See U.S. Sup. Ct., *The Justices of the Supreme Court 3* (2009), <http://www.supremecourtus.gov/about/biographiescurrent.pdf>.

n8. See *infra* notes 47-53 and accompanying text.

n9. 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/>.

n10. *Id.*

n11. *15 U.S.C. § 78j(b)* (2006). Section 10(b) prohibits the "use or employment, 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." *Id.*

n12. *17 C.F.R. § 240.10b-5* (2009). Rule 10b-5, promulgated by the SEC under the authority of the Exchange Act is the "catch-all" anti-fraud provision. See Posting of Christine Hurt to The Conglomerate, More on Sotomayor's Securities Law Record, <http://www.theconglomerate.org/2009/06/more-on-sotomayors-securities-law-record.html> (June 5, 2009) (concluding that Justice Sotomayor's record in securities cases shows "no evidence of runaway shareholder empathy").

n13. Hurt, *supra* note 12.

n14. *Id.* Of the twenty-one cases, one Second Circuit case (*Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 395 F.3d 25 (2d Cir. 2005), discussed *infra* notes 20-41 and accompanying text) was reversed by the Supreme Court, another Second Circuit case requested rehearing but was denied, and four other Second Circuit cases requested certiorari but were denied. One district court opinion was reversed in part and affirmed in part.

n15. Mary Eaton & Roger Netzer, Guest Column, Sonia Sotomayor's Securities Law Opinions - What President Obama's Supreme Court Nominee Might Mean for Private Securities Litigation, Securities Docket, 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, at A16 (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").

n16. Eaton & Netzer, *supra* note 15.

n17. 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.

n18. See *id.* (citing studies by Professors Corey Yung, Frank Cross, and Stephanie Lindquist).

n19. The remaining seven Second Circuit opinions authored by Justice Sotomayor concerning securities issues are: *Gerber v. MTC Elec. Tech. Co.*, 329 F.3d 297 (2d Cir. 2003), cert. denied sub nom., *Daiwa Sec. Am. Inc. v. Kayne*, 540 U.S. 966 (2003); *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113 (2d Cir. 2003), cert. denied, 540 U.S. 1012 (2003); *LNC Inv., Inc. v. Nat'l Westminster Bank, N.J.*, 308 F.3d 169 (2d Cir. 2002), cert. denied sub nom., *LNC Inv., Inc. v. First Fid. Bank*, 538 U.S. 1033 (2003); *Moore v. PaineWebber, Inc.*, 306 F.3d 1247 (2d

Cir. 2002); *United States v. Falcone*, 257 F.3d 226 (2d Cir. 2001); *Sec. Investor Prot. Corp. v. BDO Seidman, LLP*, 222 F.3d 63 (2d Cir. 2000); *LNC Invs., Inc. v. First Fid. Bank, N.A. N.J.*, 173 F.3d 454 (2d Cir. 1999).

n20. 395 F.3d 25 (2d Cir. 2005), rev'd sub nom., *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71 (2006).

n21. Pub. L. No. 105-353, 112 Stat. 3227 (codified in scattered sections of 15 U.S.C.).

n22. Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 and 18 U.S.C.).

n23. 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); *Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 107-08 (2d Cir. 2001) (noting SLUSA's response to PSLRA's perceived failure).

n24. See H.R. Rep. No. 105-803, at 14 (1998) (Conf. Rep.) (quoting Joseph A. Grundfest & Michael A. Perino, Securities Litigation Reform: The First Year's Experience: A Statistical and Legal Analysis of Class Action Securities Fraud Litigation Under the Private Securities Litigation Reform Act of 1995 (Stan. L. Sch. Sec. Class Action Working Paper Series Clearinghouse, Release No. 97.1) Feb. 27, 1997, available at http://securities.stanford.edu/research/studies/19970227firstyr_firstyr.html (noting increase in state court cases that mirrored decrease in federal cases following passage of PSLRA)). This perception persists in the courts and elsewhere. See, e.g., *Michael v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 521 F.3d 1278, 1280 (10th Cir. 2008) ("This 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 the existence of so-called "federal flight").

n25. 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.

n26. 15 U.S.C. §§77a-77aa (2006).

n27. See, e.g., *Proctor v. Vishay Intertech., Inc.*, 2009 WL 3260535, at 1 n.1, 4 (9th Cir. Oct. 9, 2009); *Madden v. Cowen & Co.*, 576 F.3d 957, 970 (9th Cir. 2009).

n28. 395 F.3d 25, 29-30 (2d Cir. 2005).

n29. *Id.* at 43-44.

n30. 421 U.S. 723 (1975).

n31. *Id.* at 749.

n32. *Dabit*, 395 F.3d at 43.

n33. *Kircher v. Putnam Funds Trust*, 403 F.3d 478 (7th Cir. 2005), vacated on other grounds, 547 U.S. 633 (2006).

n34. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71 (2006) (Justice Alito took no part in the consideration of the case).

n35. The Washington Times characterized the Supreme Court's opinion as a judicial "smackdown." See Editorial, *Sotomayor's Smackdown*, 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.").

n36. See Eaton & Netzer, *supra* note 15.

n37. Judges James L. Oakes and Richard C. Wesley were the other members of the Second Circuit panel that decided *Dabit*. Oakes was appointed by President Richard M. Nixon and Wesley was appointed by President George W. Bush. Biography of James L. Oakes, Federal Judicial Center, <http://www.fjc.gov/servlet/tGetInfo?jid=1806>; Biography of Richard C. Wesley, Federal Judicial Center, <http://www.fjc.gov/servlet/tGetInfo?jid=3006>.

n38. See, e.g., Larry E. Ribstein, *Dabit*, Preemption, and Choice of Law, 2006 *Cato Sup. Ct. Rev.* 141, 141 (2006).

n39. See *id.* at 151-52.

n40. 395 F.3d 25, 35 (2d Cir. 2005) (citing *Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 292 F.3d 1334, 1340 (11th Cir. 2002); *Falkowski v. Imation Corp.*, 309 F.3d 1123, 1129 (9th Cir. 2002); *Green v. Ameritrade, Inc.*, 279 F.3d 590, 597-98 (8th Cir. 2002)).

n41. *Id.* at 43.

n42. 467 F.3d 73 (2d Cir. 2006).

n43. 15 U.S.C. § 7246(a) (2006).

n44. *WorldCom*, 467 F.3d at 79, 81.

n45. *Id.* at 79. Justice Sotomayor also noted that the issue was not argued before the district court. *Id.*

n46. *Id.* at 82-84.

n47. 503 F.3d 89 (2d Cir. 2007), cert. denied sub nom., *Cal. Pub. Employees' Ret. Sys. v. N.Y. Stock Exch., Inc.*, 128 S. Ct. 1707 (2008).

n48. *Id.* at 101.

n49. *WorldCom*, 467 F.3d at 84.

n50. 218 F.3d 121 (2d Cir. 2000).

n51. *17 C.F.R. § 240.10b-10* requires a broker-dealer to disclose to its customers any remuneration that it receives from third parties in connection with a customer transaction.

n52. *218 F.3d at 128* (quoting *Auer v. Robbins*, 519 U.S. 452 (1997)).

n53. *Id.* 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*. 395 F.3d 25, 34 (2d Cir. 2005). The Chevron rule is that 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, 843-44 (1984).

n54. See *Eaton & Netzer*, *supra* note 15.

n55. See, e.g., Robin S. Conrad, *The Roberts Court and the Myth of a Pro-Business Bias*, 49 *Santa Clara L. Rev.* 997 (2009).

n56. 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 Circuit 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>.

n57. *Major League Baseball Props. v. Salvino, Inc.*, 542 F.3d 290, 334 (2d Cir. 2008) (Sotomayor, J., concurring).

n58. See *Info. Res., Inc. v. Dun and Bradstreet Corp.*, 294 F.3d 447 (2d Cir. 2002).

n59. See *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124 (2d Cir. 2001), cert. denied sub nom., *Visa U.S.A. v. Wal-Mart Stores*, 536 U.S. 917 (2002).

n60. See *Todd v. Exxon Corp.*, 275 F.3d 191 (2d Cir. 2001).

n61. *369 F.3d 124, 143* (2d Cir. 2004), cert. denied, 544 U.S. 961 (2005).

n62. *Todd*, 275 F.3d at 196-97; *In re Compensation of Mang'l, Prof'l & Tech'l Employees, No. 1471, 2008 U.S. Dist. LEXIS 63633* (D.N.J., Aug. 19, 2008) (relating to *Todd* proceeding). *Todd* was one of four cases involving MPT employees. The cases were eventually consolidated and 10 employees pursued the litigation as individuals, not a class, and that litigation was dismissed in Aug. 2008 by the granting of the defendants' motion for a summary judgment.

n63. *Todd*, 275 F.3d at 198 ("Section 1 of the Sherman Act prohibits "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.") (quoting 15 U.S.C. § 1 (2000)).

n64. *Id.* at 201-05.

n65. *Id.* at 208-11. As discussed in note 62, *supra*, ultimately, the District Court for New Jersey granted summary judgment for the defendants based on the plaintiffs' inability to credibly define a market. *In re Compensation, 2008 U.S. Dist. LEXIS 63633*, at 39.

n66. *Id.* at 198-99 (quoting *United States v. Container Corp. of Am.*, 393 U.S. 333 (1969); *Sugar Inst. v. United States*, 297 U.S. 553 (1936)).

n67. *Id.* at 199.

n68. *Id.*

n69. 280 F.3d 124, at 129-30 (2d Cir. 2001), superseded by rule, *Fed. R. Civ. P. 23(g)*, as recognized in *Attenborough v. Const. & Gen. Bldg. Laborers' Local 79*, 238 F.R.D. 82, 93 (S.D.N.Y. 2006).

n70. *Id.*

n71. *Id.* at 134.

n72. *Id.* at 135-42.

n73. *Id.* at 134-35.

n74. 280 F.3d at 148 (Jacobs, J., dissenting).

n75. *Id.* at 150, 153 (citing *Fed. R. Civ. P. 23(a)*, (c)).

n76. *Id.* at 142 (Sotomayor, J.) (quoting *Fed. R. Civ. P. 23(a)(4)*).

n77. 294 F.3d 447, 448 (2d Cir. 2002)

n78. See *id.* at 449.

n79. *Id.* at 449-50 (citing 15 U.S.C. § 6a (2006)).

n80. *Id.* at 453.

n81. *Id.*

n82. 368 F.3d 148, 152 (2d Cir. 2004).

n83. *Id.* at 153-55 (citing 15 U.S.C. §§13-13b, 21a (2006)).

n84. *Innomed*, 368 F.3d at 155.

n85. *Id.* at 161-62 (quotation omitted).

n86. 369 F.3d 124, 125 (2d Cir. 2004).

n87. See, e.g., Michael A. McCann & Joseph S. Rosen, Legality of Age Restrictions in the NBA and the NFL, *56 Case W. Res. L. Rev.* 731, 740 (2006) (discussing Clarett as "arguably the most crucial decision concerning age and professional sports eligibility.") (footnote omitted).

n88. *369 F.3d at 126.*

n89. *Id. at 130.*

n90. *Id. at 138-39.*

n91. In *NCAA v. Board of Regents*, 468 U.S. 85, 101 (1984), Justice Stevens stated that, "As Judge Bork has noted: "Some activities can only be carried out jointly. Perhaps the leading example is league sports. When a league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal on the ground that there are no other professional lacrosse teams." (quoting R. Bork, *The Antitrust Paradox* 278 (1978)). Bork's analysis in *The Antitrust Paradox* was cited in the NCAA case for the proposition that league cooperation among competitive franchises, such as NFL franchises, does not automatically violate Section 1 of the Sherman Act because, without cooperation among the franchises or members of the league, there is no product.

n92. *543 F.2d 606 (8th Cir. 1976).*

n93. *Clarett*, *369 F.3d at 133-34* (declining to follow the Eighth Circuit's test in *Mackey*, *543 F.2d at 614*).

n94. *Mackey*, *543 F.2d at 609 n.1.*

n95. See, e.g., 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, 49-50 (2005). But see Symposium, Maurice Clarett's Challenge, 15 *Fordham Intell. Prop. Media & Ent. L.J.* 391 (2005).

n96. See, e.g., Michael A. McCann and Joseph S. Rosen, Legality of Age Restrictions in the NBA and NFL, *56 Case W. Res.* 731 (2006) ("The NFL and NBA are the only major sports organizations that prohibit players from entrance until a prescribed period after high school graduation." The authors then cite NASCAR, professional tennis, professional golf, and professional boxing.).

n97. See *Clarett*, *369 F.3d at 133-34* (citing *Local 210, Laborers' Int'l Union v. Labor Relations Div. Associated Gen. Contractors of Am.*, *844 F.2d 69, 80 n.2 (2d Cir. 1988)* (declining to follow *Mackey*); *United States Football League v. Nat'l Football League*, *842 F.2d 1335, 1372 (2d Cir. 1988)* (finding *Mackey* "not consistent with" Second Circuit precedent)).

n98. *542 F.3d 290, 295 (2d Cir. 2008).*

n99. *Id. at 294.*

n100. *Id. at 293-334.*

n101. *Id. at 334* (Sotomayor, J., concurring) (noting "that the exclusive arrangement between the Major League Baseball clubs ... and MLBPA removes all price competition between the Clubs on the licensing of intellectual property" in violation of § 1 of the Sherman Act).

n102. *Id. at 334-35*.

n103. *Id. at 338*.

n104. *Id. at 341*.

n105. *Id. at 337*.

n106. *Id.*

n107. *Id.* (citing *NCAA*, 468 U.S. 85, 101).

n108. See, e.g., *United States v. Phila. Nat'l Bank*, 374 U.S. 321 (1963); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

n109. 29 U.S.C. §§1001-1461 (2006).

n110. See United States District Courts, Civil Cases Filed, by Nature of Suit (2007), <http://www.uscourts.gov/judicialfactsfigures/2007/Table404.pdf>.

n111. *Strom v. Siegel Fenchel & Peddy P.C. Profit Sharing Plan*, 497 F.3d 234 (2d Cir. 2007); *Henry v. Champlain Enters.*, 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).

n112. *In re Bethlehem Steel Corp.*, 479 F.3d 167 (2d Cir. 2007).

n113. *Strom*, 497 F.3d at 243.

n114. *Id. at 243-44* (citing *Nichols v. Prudential Ins. Co.*, 406 F.3d 98 (2d Cir. 2005)).

n115. *Id.*

n116. 238 F.3d at 208, 210.

n117. *Id. at 207-11*.

n118. 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 determined not by its label but by when it is earned).

n119. 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).

n120. *Layout*, 238 F.3d at 211; *Strom*, 497 F.3d at 246.

n121. 238 F.3d at 211.

n122. 497 F.3d 234, 246 (2d Cir. 2007).

n123. 238 F.3d at 209.

n124. 497 F.3d at 244-45.

n125. 445 F.3d at 618.

n126. *Id.* at 619.

n127. 293 F.3d at 48 (2d Cir. 2002).

n128. *Id.* at 50.

n129. *Id.* (quotation omitted).

n130. *Layaou v. Xerox Corp.*, 238 F.3d 205, 210 (2d Cir. 2001); *Henry v. Champlain Enters.*, 445 F.3d 610, 624 (2d Cir. 2006); *Marcella*, 293 F.3d at 45-46.

n131. See, e.g., *Aetna Health v. Davila*, 542 U.S. 200, 208 (2004) ("The 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.") (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987)).

n132. 238 F.3d at 210.

n133. 445 F.3d at 624.

n134. *Marcella*, 293 F.3d at 45-46.

n135. 445 F.3d at 624.

n136. *Layaou*, 238 F.3d at 208.

n137. *Id.* at 213.

n138. See *supra* note 131.

n139. *Layaou*, 238 F.3d at 210.

n140. Nomination Hearing, *supra* note 1.

n141. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 *Stat.* 241 (codified as amended in pertinent part at 42 *U.S.C.* § 2000e (2006)).

n142. 42 *U.S.C.* §§12101-12213 (2006).

n143. 29 *U.S.C.* §§621-634 (2006).

n144. Cases in which Justice Sotomayor favored employees include: *EEOC v. J.B. Hunt Transp., Inc.*, 321 *F.3d* 69, 78-79 (2d *Cir.* 2003) (Sotomayor, J., dissenting) (finding that there was a genuine dispute of material fact with respect to whether the EEOC established discrimination, and therefore dissenting from majority's affirmation of the district court's grant of summary judgment); *Brown v. Parkchester South Condominiums*, 287 *F.3d* 58, 61 (2d *Cir.* 2002) (remanding case for an evidentiary hearing on whether the filing deadline should be equitably tolled); *Raniola v. Bratton*, 243 *F.3d* 610, 618 (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 Indus.*, 204 *F.3d* 326, 341-42 (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, 658 (2d *Cir.* 1999) (Sotomayor, J., dissenting) (disagreeing with decision that appointment of a guardian ad litem was appropriate from a due process perspective).

n145. Cases in which Justice Sotomayor favored the employer include: *Ricci v. DeStefano*, 530 *F.3d* 87, 87 (2d *Cir.* 2008) (per curiam) (holding that City's decision to discard the results of a promotional exam was not intentional race-based discrimination), *rev'd* by 129 *S. Ct.* 2658 (2009); *Singh v. City of New York*, 524 *F.3d* 361, 364 (2d *Cir.* 2008) (holding that employees are not entitled to compensation for carrying inspection documents during their commute under the Fair Labor Standards Act) (citing 29 *U.S.C.* §§201-219 (2006)); *Washington v. County of Rockland*, 373 *F.3d* 310, 321 (2d *Cir.* 2004) (rejecting claims of retaliatory discrimination by black employees on the grounds that they did not prove a causal connection between the retaliatory conduct and protected speech to constitute discrimination); *Williams v. R.H. Donnelly Corp.*, 368 *F.3d* 123, 129 (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, 78 (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, 176 (2d *Cir.* 2001) (reversing trial court's ruling against an employer after a bench trial).

n146. See, e.g., *Cruz v. Coach Stores*, 202 *F.3d* 560, 573 (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 Univ. Hosp.*, 196 *F.3d* 89, 98, 101 (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).

n147. See, e.g., Nomination Hearing, *supra* note 1 (statements of Frank Ricci, Lieutenant Ben Vargas, and Peter Kirsanow), available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=3986>.

n148. 530 *F.3d* at 87.

n149. *Ricci v. DeStefano*, 554 *F. Supp. 2d* 142, 160 (D. Conn. 2006).

n150. *Id.* at 157 (citing *Hayden v. County of Nassau*, 180 *F.3d* 42, 52-53 (2d *Cir.* 1999)).

n151. See *Ricci*, 530 F.3d at 88. Seven judges, including Justice Sotomayor, concurred in the denial of rehearing en banc; six judges dissented from the denial of rehearing en banc.

n152. *Id.* at 90 (citing *Hayden*, 180 F.3d 42 and *Bushey v. N.Y. State Civil Serv. Comm'n*, 733 F.2d 220 (2d Cir. 1984)). In a dissenting opinion, Justice Ginsburg references the district court's reliance on *Hayden* as precedent. See *Ricci v. DeStefano*, 129 S. Ct. 2658, 2696 (2009) (Ginsburg, J., dissenting).

n153. 243 F.3d 610 (2d Cir. 2001).

n154. *Id.* at 618, 625-26.

n155. See *id.* at 617-23 (citing precedent from Supreme Court and Second Circuit cases related to hostile work environment); *id.* at 623-25 (citing precedent from Supreme Court and Second Circuit cases related to the retaliation claim).

n156. *Id.* at 617 (citing *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 563 (6th Cir. 1999) for the proposition that multiple incidents of harassment may, in the aggregate, create a hostile work environment); *id.* at 620 (citing *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1473 (3d Cir. 1990) and *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 910-11 (1st Cir. 1988) as examples of cases where courts found that workplace sabotage is relevant to a claim of hostile work environment).

n157. 287 F.3d 58 (2d Cir. 2002).

n158. *Id.* at 60 (citing *Boos v. Runyon*, 201 F.3d 178, 184 (2d Cir. 2000)) (quoting *Canales v. Sullivan*, 936 F.2d 775 (2d Cir. 1991)).

n159. *Neilson v. Colgate-Palmolive Co.*, 199 F.3d 642 (2d Cir. 1999).

n160. *Id.* at 651-52 (citing *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970)).

n161. *Id.* at 659 (Sotomayor, J., dissenting).

n162. *Id.* (citing *Covey v. Town of Somers*, 351 U.S. 141, 145-47 (1956)).

n163. 266 F.3d 64, 77-78 (2d Cir. 2001).

n164. *Id.* 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 "to constitute deprivation of a liberty interest, the stigmatizing information must be both false and made public by the offending governmental entity." *Id.* (quoting *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 446 (2d Cir. 1980)).

n165. 202 F.3d 560, 568 (2d Cir. 2000). 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.

n166. *Id.* at 569.

n167. See *id.* at 572.

n168. 112 F. App'x. 92, 93 (2d Cir. 2004).

n169. *Id.* at 94 (quoting *Farias v. Instructional Sys., Inc.*, 259 F.3d 91, 101 (2d Cir. 2001)).

n170. *Id.* at 95.

n171. 524 F.3d 361, 364 (2d Cir. 2008).

n172. 29 U.S.C. § 254(a) (2006).

n173. *Singh*, 524 F.3d at 370.

n174. *Id.* at 369.

n175. *Id.* at 371.

n176. *Id.*

n177. 527 U.S. 471, 482 (1999) (holding that corrective devices must be considered in determining whether an individual is disabled under the ADA).

n178. 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. N.Y. State Bd. of Law Exam'rs*, 970 F. Supp. 1094, 1121-26 (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. N.Y. State Bd. of Law Exam'rs*, 156 F.3d 321, 324 (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 v. N.Y. State Bd. of Law Examiners v. Bartlett*, 527 U.S. 1031 (1999). On remand 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. N.Y. State Bd. of Law Exam'rs*, No. 93-4986, 2001 U.S. Dist. LEXIS 11926, at 9 (S.D.N.Y. Aug. 15, 2001).

n179. 321 F.3d 69 (2d Cir. 2003).

n180. *Id.* at 78.

n181. *Id.* at 75.

n182. *Id.* at 76 (citing *Sutton*, 527 U.S. at 493).

n183. *Id.* at 79 (Sotomayor, J., dissenting).

n184. *204 F.3d 326 (2d Cir. 2000)*.

n185. *Id.* at 335.

n186. *Id.* at 336-37.

n187. See *supra* notes 147-152 and accompanying text.

n188. *129 S. Ct. 2343 (2009)*.

n189. *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).

n190. See *id.* at 2353 (Stevens, J., dissenting).

n191. Ed Shanahan, IP a Key Part of Sotomayor Package, Law.com, May 27, 2009, <http://www.law.com/jsp/iplawandbusiness/PubArticleIPLB.jsp?id=1202431010683> (available through subscription only) (on file with the Virginia Law & Business Review Association).

n192. U.S. Const. art. I § 8, cl. 8. Trademark law has a different conceptual foundation in that it is designed to protect consumers rather than holders of intellectual property rights. See Lee B. Burgunder, *Legal Aspects of managing Technology* 8 (4th ed. 2007) ("The role of trademarks is not to provide creative incentives; rather, trademarks function to increase distributional efficiency by making products easy for consumers to locate without confusion.").

n193. Shanahan, *supra* note 191.

n194. See, e.g., *Top Rank, Inc. v. Allerton Lounge, Inc.*, 96-7864, 1998 U.S. Dist. LEXIS 22671 (S.D.N.Y. Mar. 24, 1998) (adjusting a magistrate's damage recommendation in a copyright infringement case to more closely reflect the plaintiff's actual losses and to be consistent with prior court practice).

n195. *17 U.S.C. § 504(2)* (2008) (increased to \$ 150,000 in 1999).

n196. *Peer Int'l Corp. v. Luna Records, Inc.*, 887 F. Supp. 560, 569 (S.D.N.Y. 1995) (stressing that statutory damages are not supposed to provide a windfall while substantially reducing damage request).

n197. See *Krueger Int'l v. Nightingale Inc.*, 915 F. Supp. 595, 613 (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).

n198. *Refac Int'l v. Lotus Dev. Corp.*, 81 F.3d 1576 (Fed. Cir. 1996).

n199. *Atlantis Silverworks v. Door to the World*, No. 97-3809, 1998 U.S. Dist. LEXIS 15291 (S.D.N.Y. September 30, 1998); *Intellectual Prop. Dev., Inc. v. UA-Columbia of Westchester, Inc. (IPD I)*, No. 94-6296, 1998 U.S. Dist. LEXIS 3901 (S.D.N.Y. Mar. 24, 1998); *Refac*, 81 F.3d 1576; and *Dow Corning Wright Corp. v. Biomet, Inc.*, No. 91-5341, 1993 U.S. Dist. LEXIS 2261 (S.D.N.Y. Mar. 2, 1993).

n200. *IPD I*, 1998 U.S. Dist. LEXIS 3901. See *infra* notes 203, 205 for discussion of subsequent case history.

n201. 972 F. Supp. 804 (S.D.N.Y. 1997), *rev'd*, 206 F.3d 161 (2d Cir. 1999), *aff'd*, 533 U.S. 483 (2001).

n202. 1998 U.S. Dist. LEXIS 3901 at 2. Justice Sotomayor held her Markman hearing in *IPD I* the year after the Supreme Court decision requiring patent claims-construction hearings. *Id.*; *Markman v. Westview Instruments Inc.*, 517 U.S. 370 (1996).

n203. Justice Sotomayor did not render a final decision in this case. It was reassigned on her elevation to the Second Circuit Court of Appeals. See *Intellectual Prop. Dev., Inc. v. UA-Columbia Cablevision of Westchester, Inc. (IPD II)*, No. 94-6296, 2002 U.S. Dist. LEXIS 17 (S.D.N.Y.), *aff'd in part*, 336 F.3d 1308 (Fed. Cir. 2003).

n204. *IPD I* at 27.

n205. *Intellectual Prop. Dev., Inc. v. UA-Columbia of Westchester, Inc. (IPD III)*, 336 F.3d 1308, 1322 (Fed. Cir. 2003).

n206. No. 91-5341, 1993 U.S. Dist. LEXIS 2261 (S.D.N.Y. Mar. 2, 1993).

n207. 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).

n208. 1993 U.S. Dist. LEXIS 2261, at 7-9.

n209. *Id.* at 9.

n210. *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 234 F.3d 558 (Fed. Cir. 2000), *rev'd*, 535 U.S. 722 (2002).

n211. 535 U.S. 722 (2002).

n212. 887 F. Supp. 539 (S.D.N.Y. 1995), *aff'd*, 81 F.3d 1576 (Fed. Cir. 1996).

n213. *Id.* at 540.

n214. 35 U.S.C. § 112 (2008).

n215. *Id.* at 552-53.

n216. *Refac Int'l v. Lotus Dev. Corp.*, 81 F.3d 1576, 1584 (Fed. Cir. 1996).

n217. *Id.*

n218. *Id.*

n219. 955 *F. Supp.* 260 (*S.D.N.Y.* 1997).

n220. *Id.* at 265.

n221. *Id.* at 266.

n222. 972 *F. Supp.* 804 (*S.D.N.Y.* 1997), rev'd, 206 *F.3d* 161 (*2d Cir.* 1999), aff'd, 533 *U.S.* 483 (2001).

n223. Only the Sports Illustrated magazine contract contemplated republication. *Id.* at 807.

n224. 17 *U.S.C.* 201(c) (2008).

n225. *Tasini*, 972 *F. Supp.* at 808-09.

n226. *Id.* at 825 (citing *Key Publ'ns, Inc., v. Chinatown Today Publ'g Enters.*, 945 *F.2d* 509, 514 (*2d. Cir.* 1991) ("[to prove infringement of a compilation] what must be shown is substantial similarity between those elements, and only those elements, that provide copyrightability to the allegedly infringed compilation")).

n227. *Id.*

n228. *Id.* at 822.

n229. *N.Y. Times Co. v. Tasini*, 533 *U.S.* 483 (2001).

n230. *Id.* at 503.

n231. *Id.* at 512 ("Authors risked losing their rights ... when publishers, exercise their superior bargaining power over authors.").

n232. See Coyle, *supra* note 17, at 1.