

## Reversals Of 9th Circ. At High Court Last Term Show A Pattern

By Jack Karp

*Law360 (July 28, 2021, 3:39 PM EDT)* -- The frequency with which the U.S. Supreme Court overturned Ninth Circuit rulings this past term was not surprising, experts say, but the reversals do exhibit a pattern that may help predict which of the West Coast appeals court's decisions the justices will undo next.

The Supreme Court reversed 15 of the 16 Ninth Circuit rulings it considered in the October 2020 term, including high-profile cases over a California requirement that charities disclose donor tax information, a Golden State law allowing unions to organize workers on farms and candy makers' relationship to child slavery.

That reversal rate constitutes a slight increase from recent terms — it's the Ninth Circuit's highest percentage of overturned rulings since at least 2006, James Sigel, a partner in the appellate and Supreme Court practice group at Morrison & Foerster LLP, told Law360 Pulse.

But it isn't much out of line historically, according to Sigel and other experts. The Ninth Circuit is by far the largest circuit and handles a unique mix of cases given that the Western states that compose it often take novel approaches to legal issues.

While their frequency may not be unprecedented, though, many of the Ninth Circuit rulings the justices overturned this past term do have something in common: Multiple circuit judges dissented from the appeals court's refusal to rehear a panel decision en banc.

"These cases are not a random selection of Ninth Circuit cases," said Arthur Hellman, an emeritus professor at the University of Pittsburgh School of Law and an expert on the Ninth Circuit. "There is a pattern, and it's a very strong pattern."

### 'Dissentals'

In *Americans for Prosperity Foundation v. Bonta* and *Thomas More Law Center v. Bonta*, the Ninth Circuit declined to reconsider en banc its decision that a California rule forcing charities to disclose donor tax information is constitutional. Five judges dissented from that denial.

In *Cedar Point Nursery et al. v. Hassid et al.*, the Ninth Circuit denied a full court rehearing of its ruling that the California law allowing labor unions to organize agricultural workers on farms was not an unconstitutional taking. Eight judges dissented from that denial.

Eight judges also dissented from the appeals court's refusal to grant en banc rehearing in *Nestlé USA v. Doe I*. In that case, the appeals court revived a suit brought by workers who say they were trafficked and accuse Nestle and Cargill of abetting child slavery on African cocoa farms; the court said the workers' allegations fall within the scope of the Alien Tort Statute.

The justices overturned all three rulings.

This pattern also appears in three other Ninth Circuit cases reversed by the high court this past term, and it has become one of the best predictors of whether the Supreme Court will take up and eventually overturn a Ninth Circuit opinion, attorneys say.

"It's become this practice where if you get a lot of judges concurring in the dissent from denial of rehearing en banc, there is a much higher chance the Supreme Court would take a closer look at the decision," said Ben Feuer, chairman of the California Appellate Law Group and a member of the advisory board to the Ninth Judicial Circuit Historical Society.

Ninth Circuit judges' practice of dissenting from denial of en banc rehearing dates back 15 or 20 years, according to Feuer, who said the circuit's former Chief Judge Alex Kozinski called the decisions "dissentals."

The dynamic pretty much always involves conservative Ninth Circuit judges dissenting from the denial of en banc rehearing of what they deem a liberal decision, Feuer said.

"These started to be called letters to the Supreme Court," he added, "letters to Justice Alito or letters to Justice Thomas."

Those dissents were particularly visible this past term, according to Mark Kressel, a partner at Horvitz & Levy LLP and co-director of Pepperdine University School of Law's Ninth Circuit Appellate Advocacy Clinic.

The justices explicitly referred to those dissents from denial of rehearing en banc in several of their own decisions, he pointed out, a strong indication that those dissents were one of the reasons they chose to consider those cases.

"Sometimes they might give more weight, for example, to a judge's Ninth Circuit dissent from denial of rehearing en banc than they will to the actual cert petition," Kressel said.

### **The 'Myth' or Reality of the Liberal Ninth Circuit**

Conservative-leaning judges on the Ninth Circuit began writing these dissents because, with the appeals court's consistent majority of Democratic-appointed jurists, it was practically impossible for them to win enough votes to get full-court review of decisions they might see as liberal, Feuer said.

But in some of this past term's cases that exhibit that dynamic, like *U.S. v Cooley* and *Garland v. Dai*, the Supreme Court went on to reverse the Ninth Circuit's rulings unanimously.

The University of Pittsburgh's Hellman said that shows that the Ninth Circuit judges are "substantially" more liberal than even the liberal justices of the Supreme Court.

But other attorneys disagree. The "story" of the liberal, West Coast judges being overturned by the Supreme Court is "a little bit more myth than reality," Kressel said.

That "myth" is definitely not true now, Feuer said, after President Donald Trump appointed 10 judges to the appeals court, more than a third of its active judges. The court is now almost evenly divided between Democratic- and Republican-appointed judges.

"This is not sort of a heavily left-wing ideological court as it was at least at one point perceived to be," Feuer said. "Those impressions were probably off even then, but certainly not now."

What is more likely happening is that even if the Ninth Circuit is no longer as liberal as it was once thought to be, it still has many longstanding precedents that are maybe "more on the liberal side," particularly those involving issues of habeas corpus and immigration, Feuer said. And Ninth Circuit judges are bound by those precedents unless they overturn them en banc.

Several of the Supreme Court's Ninth Circuit reversals this term came in cases involving those precedents, Feuer said. The California law allowing union representatives onto business property to organize had been upheld for decades, for instance.

A more conservative Supreme Court with three Trump-appointed justices may be ready to undo those West Coast precedents, Feuer said.

"So you can't point to the 'crazy, liberal' Ninth Circuit as the reason for the high reversal rate," he said.

### **The Next Term**

Whether the notion of a liberal Ninth Circuit is reality or myth, the next Supreme Court term is likely to look a lot like the last one, these attorneys agree.

And dissents from denials of en banc rehearing are likely to continue playing a big role as well.

The Ninth Circuit still has a majority of active judges appointed by Democratic presidents, a situation that won't change until at least 2025 with President Joe Biden in the White House.

So having more Trump appointees on the Ninth Circuit may mean more judges writing and joining dissents from denial of en banc rehearing, Horvitz & Levy's Kressel said.

In fact, Hellman said a handful of the circuit's Trump-appointed judges have already been "very aggressive" about writing these dissents.

And the addition of Trump's three justices means the Supreme Court may be more attuned to the signals those Ninth Circuit judges are sending, Feuer said.

The high court has announced it will hear six Ninth Circuit cases next term so far. Several of them involve dissents from denial of en banc rehearing. Hellman said he expects all of those will be overturned.

"We're going to continue to see that when cases come from the Ninth Circuit, they're very, very likely to be reversed," Hellman said. "I think the justices have their eye on the Ninth Circuit."

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