Eye on the Bench

Judges

First Circuit's Chief Judge Sandra Lynch Breaks New Ground on Multiple Fronts

It is entirely appropriate that the court over which Chief Judge Sandra L. Lynch of the U.S. Court of Appeals for the First Circuit presides is a ''first.''

Lynch has defined her career and built her reputation as one of the most influential judges in the country with several opinions on questions of first impression, not just for the First Circuit, but among all circuits.

Her 1995 nomination to the court was her first judicial appointment, and though some raised questions about her lack of experience on the bench, then-Sen. John Kerry (D-Mass.) spun the criticism into a compliment of her litigation experience, noting he ''always feared [] appearing in front of a judge who had little practical experience, or sensitivity for what it was like to practice before the bar.''

The late Sen. Edward M. Kennedy (D-Mass.) called her ''one of the most uniquely qualified individuals to come before this committee, or any other committee.''

She was the first woman to serve on the First Circuit, and is also its first female chief judge. Prior to her appointment she was the first woman to chair the litigation department at prestigious Foley Hoag LLP in Boston, and was the first woman to clerk at the U.S. District Court for the District of Rhode Island.

Then and Now. In 2004 Lynch was ranked 11th among active federal circuit court judges by a study attempting to quantify overall ''merit'' for possible U.S. Supreme Court nominees.

Current Supreme Court Justice Samuel A. Alito Jr., then of the U.S. Court of Appeals for the Third Circuit, came in 16th by comparison.

The study, by Stephen J. Choi & G. Mitu Gulati, *Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance*, 78 S. Cal. L. Rev. 38, 23-118 (2004), analyzed a three-year sample of opinions from 1998-2000 and calculated individual judicial metrics for ''Productivity,'' ''Opinion Quality'' and ''Independence.'' The authors adjusted the statistics to reflect workload differences between the circuits and weighed them together for the overall composite ranking.

Lynch took top honors in the individual ''Opinion Quality'' categories, ranking first in outside-circuit citations and third in total citations, averaging nearly twice as many citations per published majority opinion as Alito. Only the famously prolific Judges Richard A. Posner and Frank H. Easterbrook of the U.S. Court of Appeals for the Seventh Circuit, who also ranked first and second overall, scored higher.

The article's 2004 publication coincided with that year's media speculation that Lynch would be a shortlist contender for nomination to the high court if John

Chief Judge Sandra L. Lynch

Some notable opinions authored by Chief Judge Lynch in important areas of law include:

Administrative Law: *Aronov v. Napolitano*, 62 F.3d 84 (1st Cir. 2009) (en banc). Lynch's en banc opinion, reversing a panel decision from which she had dissented, held the Equal Access to Justice Act precluded recovery of attorneys' fees by a Russian national whose background check for naturalization was taking so long that he sued the government to speed up the process.

Business Law: Currently pending before the Supreme Court—*Lawson v. FMR LLC* (See discussion below.)

Constitutional Law: *Family Winemakers of California v. Jenkins*, 92 F.3d 1 (1st Cir. 2009). Because all Massachusetts wineries qualify as ''small,'' an exception to the state's three-tier liquor regulation scheme that allows ''small'' wineries both in-state and out-of-state to ship directly to consumers, wholesalers or retailers at their choice violates the commerce clause because the effect of the scheme favors in-state wineries.

Criminal Law: *United States v. Rivera*, 3 F.3d 542 (1st Cir. 1996). Lynch was not on the original First Circuit panel that held that a defendant who raped his victim during a carjacking couldn't have his maximum sentence increased for causing ''serious bodily injury,'' because ''there was no evidence of any cuts or bruises in her vaginal area,'' and ''no record evidence'' she ''suffered either 'extreme physical pain' or any of the other listed injuries'' incorporated in 18 U.S.C. § 2119(2), because ''she testified only that she was raped, without any specific description of the assault.'' But Lynch first requested that the court reconsider en banc, and after the case failed to garner enough votes for rehearing, wrote a powerful dissent from the order denying rehearing that was picked up by Congress and transformed into the 1996 Carjacking Correction Act.

Civil Procedure: Same issue currently pending before Supreme Court—*Yaman v. Yaman*, 730 F.3d 1 (1st Cir. 2013)(82 U.S.L.W. 430, 9/24/13). Lynch's opinion joined the First and Second circuits in a split with the Ninth and Eleventh circuits. The Supreme Court granted certiorari on the Second Circuit case to resolve whether the ''now settled'' defense under the Hague Convention on the Civil Aspects of International Child Abduction is subject to equitable tolling. Lynch's opinion held that the one-year period that triggers consideration of the ''now settled'' defense is not subject to tolling, as did the Second Circuit.

Kerry won the presidency, despite already having two New Englanders on the bench in Justices David H. Souter and Stephen G. Breyer.

At that point in her career, no Lynch opinion had ever been reversed outright by the Supreme Court, and she had been reversed in part only once. But since 2005, when Chief Justice John G. Roberts Jr. took over from the late William H. Rehnquist, and Alito ascended to the seat Roberts was meant to fill for retiring Justice Sandra Day O'Connor, the result has been the opposite—no Lynch opinions have been upheld.

She has been reversed twice and ''granted-vacated-remanded'' by the Supreme Court three times, and though she voted with the majority on the panel in two First Circuit cases that were upheld, the Supreme Court has not affirmed any opinions authored by Lynch since O'Connor retired.

Current Term Two-fer. Lynch has a chance to improve her score with the Roberts court in the current term, where two cases in which she authored the First Circuit's opinion have already been argued.

Whistle-blower protection: In *Lawson v. FMR LLC*, 670 F.3d 61 (1st Cir. 2012), *argued* 82 U.S.L.W. 3291 (U.S. Nov. 12, 2013) (No. 12-3), Lynch's opinion below reversed the district court and held that the whistle-blower provision of the Sarbanes-Oxley Act dealing with fraud does not apply to employees of contractors that perform work for public companies.

It was a question of first impression not only for the First Circuit, but at the federal appellate level in general, and the case has wide ranging implications for the financial services industry, its employees and the corporate structures of SOX-regulated entities regardless of how the Supreme Court rules.

Lynch's opinion had to interpret the scope of Section 806 of SOX, titled ''Protection for Employees of Publicly Traded Companies Who Provide Evidence of Fraud.''

Reviewing the statutory language of 18 U.S.C. § 1514A(a), similarly titled ''Protection for Employees of Publicly Traded Companies,'' and its legislative history, Lynch concluded that the act protects only employees, not contractors, of public companies.

The plaintiffs are employees of a private company that was working under contract as an advisor for mutual funds.

Lynch's opinion made a statement about the relative authorities of courts and administrative review boards when she said that though the Department of Labor and the Securities and Exchange Commission both supported the plaintiffs, Congress had not ''given authority'' to the SEC or the DOL to ''interpret the term 'employee' in § 1514A(a),'' and so there was no basis for deference under *Chevron U.S.A. v. Natural Res. Def. Council Inc.*, 467 U.S. 837 (1984). Further, she said the statute was not ambiguous, so there was nothing for the agencies to interpret.

If the high court continues its recent pattern and reverses Lynch's opinion, it could expand by orders of magnitude the protective umbrella under which whistle-blowers may fall, which could have the positive effect of encouraging more whistle-blowers to come forward, but might lead to even more conservative management practices as critics fear.

In 2009, Lynch wrote the opinion for the court on another question of first impression establishing objective standards for making a prima facie case of retaliation under Section 1514A of the Sarbanes-Oxley Act (*Day v. Staples Inc.*, 555 F.3d 42 (1st Cir. 2009)) (77 U.S.L.W. 1494, 2/17/09).

''To have an objectively reasonable belief there has been shareholder fraud, the complaining employee's theory of such fraud must at least approximate the basic elements of a claim of securities fraud,'' Lynch wrote.

''A disagreement with management about internal tracking procedures which are not reported to shareholders is not actionable,'' she said.

Child abduction: The second Supreme Court case this term in which Lynch has a stake, albeit an indirect one, involves a Second Circuit decision that aligns with the opinion Lynch wrote in a similar First Circuit case, *Yaman v. Yaman*, 730 F.3d 1 (1st Cir. 2013) (82 U.S.L.W. 430, 9/24/13). The Second Circuit's ruling puts the First and Second circuits in a split with the Ninth and Eleventh circuits.

The Supreme Court granted review on *Lozano v. Alvarez*,, 697 F.3d 41 (2d. Cir 2012) *argued* 82 U.S.L.W. 3355 (U.S. Dec. 11, 2013), No. 12-820, to resolve whether the ''now settled'' defense under the Hague Convention on the Civil Aspects of International Child Abduction is subject to equitable tolling.

Lynch's opinion, in line with the later Second Circuit ruling, held that the one-year period that triggers consideration of the ''now settled'' defense is not subject to tolling.

Lynch analyzed the text and drafting history of the convention, as well as precedent from courts of other signatory nations, to conclude the one-year period does not operate as a statute of limitations. She also cited the solicitor general's Supreme Court amicus brief for *Lozano* in support of ''a desire to have a clear trigger point for assertion of the defense: the date of wrongful removal.''

During oral argument at the Supreme Court, counsel for the father whose child was taken to a different country by her mother said it was important to avoid making the rule that ''if you abduct your child and you conceal your child for 12 months, you will be rewarded.''

But Lynch's opinion made clear that federal courts have discretion to order the return of a child even when one of the convention's defenses has been established. Even if the district court determined that the children were, in fact, ''now settled'' in their new country, such a finding does not mean the court has no authority to order the return of the children, she said.

While ''[t]here is very little law providing guidance'' as to how a court ''is to weight the different factors as to return,'' Lynch said courts should consider the abducting parent's misconduct.

In another recent child abduction case involving a different legal issue, Lynch wrote that the Airline Deregulation Act preempted state tort claims against an airline for selling tickets for a flight to Egypt to a mother and her two children, despite ''red flags'' that the children were being abducted from their father (*Bower v. EgyptAir Airlines Co.*, 731 F.3d 85 (1st Cir. 2013) (82 U.S.L.W. 493, 10/8/13).

The ADA says that a state ''may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier.''

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Lynch's opinion aligned the First Circuit with the majority of other circuits that have held ''service'' includes ''items such as the handling of luggage, in-flight food and beverage provisions, ticketing, and boarding procedures.''

Trimming Cy Pres Tree. Chief Justice John G. Roberts Jr. is on the lookout for a case in which the Supreme Court can decide whether cy pres settlements are constitutional in class action litigation, he made clear in a statement accompanying the court's denial of certiorari in a case about privacy concerns on Facebook (*Marek v. Lane,* U.S., No. 13-136, cert. denied 11/4/13) (82 U.S.L.W. 677, 11/5/13).

Lynch answered some of those questions for the First Circuit in 2012, when she wrote a landmark opinion addressing for the first time procedural and substantive standards for distribution of cy pres funds, in which retired Justice David H. Souter, sitting by designation, joined (*In re Lupron Marketing & Sales Practices Litig.,* 677 F.3d 21 (1st Cir. 2012)) (80 U.S.L.W. 1473, 5/1/12).

Though the First Circuit affirmed the district court's decision making process and recipient selection for $11.4 million of unclaimed funds from a $40 million consumer settlement, Lynch expressed ''unease with federal judges being put in the role of distributing cy pres funds at their discretion,'' and set a precedent generally requiring compliance with § 3.07 of the American Law Institute's Principles of the Law of Aggregate Litigation.

The First Circuit adopted the ALI Principles' ''reasonable approximation'' test for determining recipients ''whose interests reasonably approximate those being pursued by the class.''

Lynch's opinion was clear that any unclaimed funds should go first to compensate class members fully, but in this case, because claimants had already received a payment above their damages, the court refused to award a windfall of triple damages to avoid creating a ''perverse incentive'' to bring suits where large numbers of class members were unlikely to make claims, or to withhold information from absent class members.

Lynch said, ''having judges decide how to distribute cy pres awards both taxes judicial resources and risks creating the appearance of judicial impropriety. A growing number of scholars and courts have observed that the specter of judges and outside entities dealing in the distribution and solicitation of settlement money may create the appearance of impropriety.''

A 2009 Lynch opinion established the availability of cy pres awards in the First Circuit for the first time, and also interpreted the scope of Federal Rule of Civil Procedure 23(c)(1)(B) in a question of first impression, holding incorporation by reference to prior orders certifying classes can still fulfill the requirement to ''define the class and the class claims, issues, or defenses'' (*In re Pharmaceutical Industry Average Wholesale Price Litigation,* 588 F.3d 24 (1st Cir. 2009) (78 U.S.L.W. 1327, 12/8/09).

Lynch noted at the time that ''[c]ourt-mandated cy pres distributions, as opposed to court-approved settlements using cy pres, are controversial,'' but because that case involved a settlement agreement, the court ''need not reach the questions raised by court-created cy pres funds,'' she said.

''The question before us is not whether the settlement complies with the ALI draft, but whether the district court abused its discretion in approving the cy pres part of the settlement,'' Lynch said.

'Serious Bodily Injury' Dissent. A defining moment early in Lynch's career came from a case in which she did not even sit on the original panel.

In *United States v. Rivera,* 83 F.3d 542 (1st Cir. 1996), the First Circuit held that a defendant who raped his victim during a carjacking could not have his maximum sentence increased for causing ''serious bodily injury,'' because ''there was no evidence of any cuts or bruises in her vaginal area,'' and ''no record evidence'' she ''suffered either 'extreme physical pain' or any of the other listed injuries'' incorporated in 18 U.S.C. § 2119(2), because ''she testified only that she was raped, without any specific description of the assault.''

Intellectual 'Candlepower' Illuminates Careers

Two of Lynch's former clerks—both veteran partners at large firms today—spoke with BNA about how her influence prepared them for success:

Charles L. ''Chip'' Becker, partner at Kline & Specter, PC, Philadelphia, clerked in 1997-1998 and said, ''It goes without saying that she has an outstanding intellect,'' and that ''she is a superb appellate judge.''

Rita F. Lin, partner at Morrison & Foerster, LLP, San Francisco, clerked in 2003-2004 and called Lynch ''deeply practical,'' and ''a gifted jurist.''

Both spoke highly of Lynch's ability to craft sophisticated opinions while staying grounded in ''human dimensions'' of the law.

Lynch has the ''candlepower to work through complex doctrinal issues, but she does not see her role as spouting legal principles for their own sake,'' Lin said. ''She pays attention to why the litigants are taking particular positions,'' and focuses on ''the real-world effects that her ruling will have,'' she said.

Lynch ''writes opinions that are comprehensive yet without loose language that might create problems down the road,'' Becker said. ''She works hard to understand the practical implications of her decisions.''

This ''rigorous approach'' to resolving issues makes her tough at oral argument, Becker said. ''All the truisms apply fully to Judge Lynch,'' he said.

Lawyers must know the record and the law, be prepared for ''really tough'' questions, and be prepared to give ''strong and honest answers'' in return, Becker said.

Most importantly, ''the lawyer must understand the larger implications of the case,'' and ''appreciate that briefs are often just the starting point for argument,'' he said.

Despite her challenging style, ''I view her broadly as a lawyer's judge,'' Becker said. ''Being Judge Lynch's clerk was challenging and rewarding. I reflect often on the lessons learned in her chambers,'' he said.

The appeals court overturned the sentence enhancement the district court had applied.

Lynch first requested that the court reconsider en banc, and after the case failed to garner enough votes, wrote a powerful dissent from the order denying rehearing en banc that was picked up by Congress and transformed into the 1996 Carjacking Correction Act.

Lynch said she doubted Congress ''intended the statute to be applied in such a way that a brutal rape could fail to constitute a 'serious bodily injury,' or that the application of that term to rape could be made to turn on whether the victim testified as to how much the rape physically hurt her.''

Such a result would be ''wholly at odds with larger considerations of congressional sentencing policy and intent,'' and the holding in this case ''is directly contrary to the intent of the statute and Congress would be appalled at this outcome,'' she said.

Then-Sen. Joe Biden (D-Del.) agreed, calling the holding ''absolutely outrageous'' when he introduced the bill on the Senate floor.

Marriage + Money = Monsanto 'Controversy.' In 1999, Lynch was one of eight federal appellate judges accused of violating federal law and the code of judicial conduct by not recusing herself from a 1997 case in which she or her spouse had a financial interest, according to a study prepared by the Community Rights Counsel and reported on by the Washington Post, the Boston Globe and other New England-area media outlets.

In *Vartanian v. Monsanto*, 131 F. 3d 264 (1st Cir. 1997), Lynch voted on a unanimous panel that upheld a summary judgment order in favor of agricultural giant Monsanto Co. The court issued its opinion on Dec. 15.

Just three weeks earlier, on Nov. 22, Lynch had gotten married, and according to the report there was Monsanto Co. stock in her new husband's IRA portfolio.

The Washington Post reported that Lynch didn't learn of the problem until a reporter called her about the story. No disciplinary action was taken.

Perhaps fittingly, *Vartanian v. Monsanto* was a prominent case about non-disclosure issues.

The court's holding, on a question of first impression, established the standard to apply in determining when an employer's consideration of an employee severance program gives rise to a fiduciary duty of disclosure under the 1974 Employee Retirement Income Security Act.

The court held that ''a serious consideration of a change in plan benefits'' that mandates disclosure ''exists when (1) a specific proposal which would affect a person in the position of the plaintiff (2) is being discussed for purposes of implementation (3) by senior management with the authority to implement that change.''

Lynch in Key Practice Areas:

Administrative Law

■ *Aronov v. Napolitano*, 562 F.3d 84 (1st Cir. 2009)(en banc). Lynch's opinion, reversing a panel decision from which she had dissented, held the Equal Access to Justice Act precluded recovery of attorneys' fees by a Russian national.

■ *Dickow v. United States*, 654 F.3d 144 (1st Cir. 2011). Lynch's opinion gave Chevron deference to the IRS's denial of an estate tax refund request in a case of first impression at the federal appellate level, interpreting Treasury regulations on permissible extensions to prevent the IRS from granting an executor a second extension of time for filing an estate tax return unless he qualified for one of the good cause exceptions in Section 6081 and 6511(b)(2)(A) of the Internal Revenue Code.

■ *Fitzgerald v. Harris*, 549 F.3d 46 (1st Cir. 2008). In a question of first impression at the federal appellate level, Lynch's opinion held that the federal Wild and Scenic Rivers Act doesn't preempt state laws relating to the management of protected rivers designated as state-administered.

■ *Mellen v. Trustees of Boston Univ.*, 504 F.3d 21 (1st Cir. 2007). In a question of first impression at the federal appellate level, Lynch's opinion interpreted seemingly conflicting Department of Labor regulations and held that Boston University correctly counted holidays as ''leave'' under the Family and Medical Leave Act in calculating the maximum amount of intermittent family leave a financial manager was entitled to take.

■ *Cablevision of Boston v. Pub. Improvement Comm'n of Boston*, 184 F.3d 88 (1st Cir. 1999). The 1996 Telecommunications Act does not place an ''affirmative obligation'' on local governments to enact regulations that create effective competition among telecommunications providers.

Business Law

■ *Skirchak v. Dynamics Research Corp.*, 508 F.3d 49 (1st Cir. 2007). Held a provision barring class claims in an employment arbitration program unconscionable under Massachusetts contract law.

■ *Patco Construc. Co. v. People's United Bank*, 684 F.3d 197 (1st Cir. 2012). A bank's antifraud data security procedures were not ''commercially reasonable'' under Article 4A of the Uniform Commercial Code, meaning a construction company did not have a burden to make sure employees complied with them, as it would if the procedures were reasonable. Lynch's opinion reversed the district court's grant of summary judgment, and remanded for that court to decide whether commercial customers have duties when security procedures are flawed, but the parties settled the case.

■ *Chiang v. Verizon New England Inc.*, 595 F.3d 26 (1st Cir. 2010). Lynch's opinion joined the First Circuit with the majority of courts that have considered the issue, holding Section 1681s-2b of the Fair Credit Reporting Act provides a private right of action, and that the plaintiff bears the burden of proving that the investigation of the ''furnisher'' of information to consumer reporting agencies into disputed information was objectively unreasonable.

■ *Rederford v. US Airways Inc.*, 589 F.3d 30 (1st Cir. 2009). In a question of first impression at the federal appellate level, Lynch's opinion first found that a customer service representative's Americans with Disabilities Act cause of action is a ''claim'' covered by the federal bankruptcy code, then held that because ''front pay'' can be offered as an alternative to reinstatement under the ADA, the right to that remedy and the other remedies the employee sought was within the jurisdic-

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tion of the bankruptcy court, and so disallowed and discharged in the airline's 2003 bankruptcy proceedings.

Constitutional Law

■ *Yeo v. Sch. Comm. of Lexington*, 131 F.3d 241 (1st Cir. 1997) (en banc), *cert. denied*, 524 U.S. 904 (1998). En banc opinion reversed an earlier panel decision, from which she dissented, and held that the actions of high school student newspaper and yearbook editors could not be attributed to school and town officials to create ''state action'' as required by the First Amendment, when the students rejected pro-abstinence advertisements submitted to the publications.

■ *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008). Lynch's opinion affirmed the dismissal of claims, by religiously objecting parents, that a Massachusetts school district violated the free exercise clause by failing to give prior notice that their children would be exposed to books depicting gay partners and gay marriage.

■ *Braunstein v. McCabe*, 571 F.3d 108 (1st Cir. 2009). In a question of first impression at the federal appellate level, Lynch's opinion held that debtors do not have a right to jury trials in actions by trustees seeking the turnover of property during bankruptcy proceedings.

■ *Franklin Memorial Hosp. v. Harvey,* 575 F.3d 121 (1st Cir. 2009). Maine's free care laws, which require hospitals in the state to provide free care to individuals whose income is less than 150 percent of the federal poverty guidelines, do not constitute an unconstitutional regulatory taking under *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

■ *Igartua v. United States,* 654 F.3d 99 (1st Cir. 2011). Residents of Puerto Rico, though U.S. citizens, lack the right to vote and be represented by a member of the U.S. House of Representatives, because Puerto Rico is not a state, and the text of the Constitution ''plainly limits'' that right ''to citizens of a state.''

■ *Largess v. Mass. Sup. Jud. Court,* 373 F.3d 219 (1st Cir. 2004). Though the opinion was delivered per curiam, Lynch voted on the unanimous panel that held Massachusetts' highest state court did not violate the clause of the U.S. Constitution guaranteeing every state ''a Republican Form of Government'' when it ordered the state to recognize same-sex marriages.

■ *Becker v. Federal Election Comm'n,* 230 F.3d 381 (1st Cir. 2000). Federal Election Commission regulations allowing corporate funding of nonprofit, nonpartisan organizations staging federal candidate debates do not facially violate a provision of the Federal Election Campaign Act barring corporate contributions or expenditures ''in connection with'' any federal election. The Act's provision is ''imprecise,'' and when read together with exceptions allowing corporate expenditures to encourage voting and registration, leaves the statute ambiguous, but the FEC's construction is permissible, Lynch said.

Criminal Law

■ *United States v. Kearney*, 672 F.3d 81 (1st Cir. 2012). In a question of first impression for the First Circuit, Lynch's opinion held a defendant convicted of offenses involving child pornography must pay restitution to the person depicted in the illegal images, even if he had no role in creating the images he distributed on the internet. The restitution statute requires the government to demonstrate proximate causation, but the other courts that have reached that conclusion are requiring too much to justify restitution, she said.

■ *United States v. Knott*, 256 F.3d 20 (1st Cir. 2000). For a criminal defendant to obtain an award of attorney's fees for ''vexatious'' prosecution under the Hyde Amendment, he must show not only that the prosecution lacked either legal merit or factual foundation, but also that the circumstances objectively demonstrate that the government harbored malice or an intent to harass or annoy.

■ *United States v. Gates*, 709 F.3d 58 (1st Cir. 2013). Lynch voted on the panel that held, on question of first impression in the circuit, that ''in the ordinary course and within the confines'' of the Speedy Trial Act exclusion provisions, defense counsel has the power to seek an STA continuance without first informing his client or obtaining his client's personal consent.

■ *Goncalves v. Reno*, 144 F.3d 110 (1st Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999). In a habeas corpus proceeding, Lynch's opinion held, contrary to the attorney general's position, that under the 1996 Antiterrorism and Effective Death Penalty Act courts could review a claim by an alien that Congress did not intend to repeal habeas corpus in the AEDPA and that Congress did not intent to preclude Board of Immigration Appeals review of an application for discretionary relief from deportation which was pending before the agency at the time AEDPA was adopted.

■ *In re Pharmatrak Inc. Privacy Litig.*, 329 F.3d 9 (1st Cir. 2003). Addressing ''important questions about the scope of privacy protection afforded internet users''

'Speed' to SCOTUS

In *United States v. Wurie,* 724 F.3d 255 (1st Cir. 2013) (81 U.S.L.W. 1696, 5/28/13), Lynch was not on the original panel that held police need a warrant to search the data on an arrestee's mobile phone, creating a circuit split on a closely watched issue.

But she again made a notable statement on denial of rehearing en banc (82 U.S.L.W. 187, 8/6/13). Lynch said, ''I vote to deny rehearing en banc not because the case does not meet the criteria[]. It clearly does. Indeed, the issues are very important and very complex.''

Rather, she said, ''I think the preferable course is to speed this case to the Supreme Court for its consideration.''

Differing standards that federal and state courts have developed and applied to the issue ''provide confusing and often contradictory guidance to law enforcement,'' Lynch said. ''Only the Supreme Court can finally resolve these issues, and I hope it will.''

Lynch's urging proved prescient. The high court granted the solicitor general's petition for a writ of certiorari on Jan. 17, docket no. 13-212.

under the 1986 Electronic Communications Privacy Act, Lynch's opinion held that neither a drug company's agreement with an online profiling firm for the creation of non-identifying Web site usage statistics, nor consumers' use of the Web site, amounted to ''consent'' for purposes of federal wiretap law, to the profiling firm's interception of personal data submitted by consumers to the site.

Civil Procedure

■ *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24 (1st Cir. 2009)(78 U.S.L.W. 1327, 12/8/09). Established the availability of cy pres awards in the First Circuit for the first time, and also interpreted the scope of Federal Rule of Civil Procedure 23(c)(1)(B) in a question of first impression, holding incorporation by reference to prior orders certifying classes can still fulfill the requirement to ''define the class and the class claims, issues, or defenses.'' Lynch noted at the time that ''[c]ourt-mandated cy pres distributions, as opposed to court-approved settlements using cy pres, are controversial,'' but because that case involved a settlement agreement, the court ''need not reach the questions raised by court-created cy pres funds,'' she said.

■ *Amoche v. Guarantee Trust Life Ins. Co.*, 556 F.3d 41 (1st Cir. 2009). Siding with the majority of circuits in a circuit split, the First Circuit held that Under the Class Action Fairness Act, a defendant removing a case from state to federal court must show a ''reasonable probability'' that the amount in controversy exceeds $5 million—the equivalent of a ''preponderance of the evidence'' standard. Lynch's opinion emphasized the amount is to be calculated at the time of removal.

■ *Awuah v. Coverall North America Inc.,* 703 F.3d 36 (1st Cir. 2012) (81 U.S.L.W. 946, 1/8/13). Narrowed a putative class of and enforced a mandatory arbitration clause in Massachusetts contracts with individual franchisee janitors, reversing the district court. A group of janitors could not join a class that was proceeding without arbitration, because the underlying arbitration clauses in contracts they signed, that the other group had not signed, were enforceable under Massachusetts state law, which does not impose any special notice requirement on arbitration clauses. The Federal Arbitration Act would prevent such a requirement if the state tried to impose one, Lynch said.

Biographical Highlights

Born: 1946 in Oak Park, Ill.

Nominated by: William J. Clinton, 1995 (to seat vacated by current U.S. Supreme Court Justice Stephen G. Breyer), has served as Chief Judge since 2008.

Law School: Boston University School of Law, cum laude, 1971

Legal Career: Law clerk, Hon. Raymond Pettine, U.S. District Court, District of Rhode Island, 1971-1973; Assistant attorney general, Commonwealth of Massachusetts, 1973-1974; Instructor, Boston University Law School, 1973-1974; General counsel, Massachusetts Department of Education, 1974-1978; Private practice, Boston, Massachusetts, 1978-1995; Special counsel, Judicial Conduct Commission of Massachusetts, 1990-1992.

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