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O'Connor's Measured Approach Visible In Insurance Cases

By **Jennifer Mandato**

Law360 (December 6, 2023, 9:28 PM EST) -- The late Justice Sandra Day O'Connor's evenhanded judicial approach hardly wavered when considering insurance cases despite their relative rarity before the high court, with her thoughtfulness shining through on issues ranging from insurance for deposits to gender-based pension plans and states' taxation of insurers.

The late Justice Sandra Day O'Connor, shown in this 1981 file photo of her taking her oath, is often remembered for being the deciding vote in close decisions. (AP Photo/The White House, File)

Justice O'Connor was no stranger to forging her own path. As the first female justice to sit on the bench, she is often remembered for being the deciding vote in close decisions, having a preference for balancing tests when analyzing a case and recognizing that the legislature also has an important role in the issues before the court.

The justice hewed close to her preferred approach even when considering cases involving the insurance

industry.

"I think the court is always a little nervous when it takes the technical cases like insurance," Stewart Schwab, a professor at Cornell University Law School who clerked for Justice O'Connor in her second term, told Law360. The court doesn't feel as "at home" as it may in certain constitutional law cases, but nevertheless takes on certain insurance disputes to hand down the necessary decisions, he explained.

For an industry that state law largely reigns over, federal issues or constitutional issues don't come up as often, Peter Halprin, a partner at Pasich LLP, told Law360.

"As a result, we have kind of a patchwork in this country of different regimes," Halprin said.

Justice O'Connor, however, was overly aware of the unprecedented position she'd been selected for and brought a dignified approach to her work.

Here, Law360 looks at a few of the insurance-related opinions Justice O'Connor delivered and how she left her mark on an industry that doesn't often head to the high court.

FDIC v. Philadelphia Gear Corp.

In 1986, Justice O'Connor wrote for a 6-3 majority that the Federal Deposit Insurance Corp. didn't have to insure a standby letter of credit backed by a contingent promissory note as a "deposit," reversing and remanding a Tenth Circuit decision.

The FDIC was appointed as the receiver of a bank that provided a $145,000 letter of credit to a customer of Philadelphia Gear Corp. According to court records, the letter of credit was intended to provide payment to the seller only if the buyer of the invoiced goods failed to make payment.

Following an issue of nonpayment, Philadelphia Gear sued the FDIC in an attempt to recuperate the maximum $100,000 in deposit insurance, arguing that the letter of credit was an insured deposit. Both an Oklahoma federal court and the Tenth Circuit sided with Philadelphia Gear.

Looking at the FDIC's definition of letter of credit and promissory note and Congress' acceptance of those definitions, Justice O'Connor determined that the court was "constrained" to conclude that "deposit" doesn't include a standby letter of credit backed by a contingent promissory note.

"Congress' focus in providing for a system of deposit insurance — a system that has been continued to the present without modification to the basic definition of deposits that are 'money or its equivalent' — was clearly a focus upon safe-guarding the assets and 'hard earnings' that businesses and individuals have entrusted to banks," Justice O'Connor wrote.

According to court records, Philadelphia Gear "surrendered absolutely nothing to the bank," despite seeking to collect deposit insurance. Further, Philadelphia Gear's customer never surrendered any assets unconditionally to the bank in exchange for the promissory note.

Thus, when the bank went into receivership, neither the customer nor Philadelphia Gear lost anything except the ability to use the bank to reduce Philadelphia Gear's risk in the event of nonpayment.

Charles Rothfeld, who represented the FDIC while with the Solicitor General's Office, remembered receiving the court's opinion as a gratifying moment.

"There was some complexity in that case and some unsettled questions of administrative law, not just about insurance but more generally and what kinds of authority the court can rely on to decide cases," Rothfeld told Law360.

Recalling his experience arguing in front of Justice O'Connor, Rothfeld noted that she was typically the first justice to ask questions at argument.

"She was very persistent when she had points that she thought were central to a case and the answer to particular questions would make a big difference in how the case should be decided," he said.

Arizona Governing Comm. v. Norris

In 1983, Justice O'Connor wrote a concurring opinion to a 5-4 ruling led by U.S. Supreme Court Justice Thurgood Marshall. The court's ruling upheld the Ninth Circuit's decision that an Arizona state agency's retirement plan discriminated on the basis of sex, violating Title VII of the Civil Rights Act of 1964.

Since 1974, Arizona has offered its state employees the opportunity to enroll in a deferred compensation plan offered by several pre-selected insurers. The insurers, however, used sex-based mortality tables to calculate employees' benefits, leaving male employees to receive larger monthly payments than their female counterparts based on the understanding that women on average live longer than men.

In April 1978, Nathalie Norris filed suit, accusing the state and the governing committee of violating Title VII by administering an annuity plan that discriminated on the basis of sex. Both an Arizona federal court and the Ninth Circuit held that the state's plan violated Title VII before the case was heard before the Supreme Court.

As the deciding vote, Justice O'Connor aligned herself with Justice Marshall's decision that the case reflected the high court's 1978 ruling in Los Angeles Dept. of Water & Power v. Manhart where the court held that Title VII prohibits an employer from treating certain employees less favorable than others because of their race, religion, sex or national origin.

"An individual woman may not be paid lower monthly benefits because women as a class live longer than men," Justice Marshall said.

A mark of Justice O'Connor, however, was her ability to focus on the case at hand and not get swept up in broader implications.

"What we, if sitting as legislators, might consider wise legislative policy is irrelevant to our task," Justice O'Connor wrote in her concurring opinion. "Our decision must ignore (and our holding has no necessary effect on) the larger issue of whether considerations of sex should be barred from all insurance plans, including individual purchases of insurance, an issue that Congress is currently debating," she added.

Schwab clerked for Justice O'Connor during the term in which Arizona Governing Comm. v. Norris was decided and said the case was one that the late justice took a special interest in, compounded by the knowledge that people would be looking to her in sex-discrimination cases.

Justice O'Connor, however, was partly convinced that the better approach in discrimination cases was to focus on the individual being discriminated against, Schwab said.

"Part of Justice O'Connor's style was, let's decide what's before us and leave for other days as much as we can," Schwab told Law360.

In reviewing the awarded relief, Justice O'Connor was the second deciding vote of the ruling. She joined Justice Lewis F. Powell Jr. and three other justices in ruling that liability should be prospective only.

She disagreed with Justice Marshall's opinion that relief should be applied retroactively, that retired female employees should be awarded benefits they had previously lost out on because of the actuarial tables.

"A retroactive holding by this court that employers must disburse greater annuity benefits than the collected contributions can support would jeopardize the entire pension fund," she said.

Proactive relief was widely supported by others in the insurance industry, who submitted multiple amicus

briefs warning the court of possible bankruptcy by way of retroactive relief.

Amy J. Gittler, now a principal at Jackson Lewis PC, argued the case on behalf of Norris.

While Gittler was unsure if Justice O'Connor "bought into" the insurance industry's arguments, she noted that the justice was a "practical kind of solution-oriented" and believed that mentality to be why Justice O'Connor split her vote.

Gittler added that Justice O'Connor was the first trial judge she appeared before, and only five years later, Gittler argued her first Supreme Court case before the justice.

"I felt a lot of weight on my shoulders," Gittler said in bringing a case surrounding sex-segregated actuarial tables before the first female Supreme Court justice.

Metropolitan Life Ins. Co. v. Ward

Schwab, Justice O'Connor's former clerk, remembers the justice for her "grace under pressure," "her civility towards all sides" and "recognition of the need for compromise on many of the tough issues."

The justice, however, was not afraid to break from the majority, which she showed with a scathing dissenting opinion in the 5-4 decision. Justice O'Connor contested the majority's holding that a state can't tax out-of-state insurers at a higher rate than domestic insurers.

She wrote that the majority's "astonishing" holding was unsupported by precedent and "subtly distort[ed] the constitutional balance. She maintained that the court overlooked its prior decisions in which the Supreme Court ruled that unless a classification infringes on fundamental personal rights, the court must presume constitutionality and require only that the challenged classification be rooted in a legitimate state interest.

"It is obviously legitimate for a state to seek to promote local business and attract capital investment, and surely those purposes animate a wide range of legislation in all 50 states," she added.

Led by Metropolitan Life Insurance Co., a group of insurers incorporated outside the state of Alabama filed claims with the Alabama Department of Insurance in 1981, asserting that the state's domestic preference tax statute violated the Equal Protection Clause and sought refunds of taxes paid from 1977 through 1980.

Since 1955, the state imposed "substantially lower" tax rates for gross premiums on domestic insurance companies than on out-of-state, or foreign, companies. Based on this, a foreign insurance company doing the same type and volume of business in Alabama as a domestic company, on average, paid three to four times as much in gross premiums tax, the opinion said.

On cross-motions for summary judgment in May 1982, a trial court ruled that the statute didn't violate the Equal Protection Clause because, in addition to raising revenue, it encouraged the formation of new domestic insurance companies and encouraged capital investment by foreign insurance companies in Alabama assets.

Following multiple appellant rulings in the state's favor, the Supreme Court ultimately noted probable jurisdiction.

In a majority opinion led by Justice Powell, the court ruled that the tax was discriminatory and the state's reasoning for implementing such a tax was not legitimate under the Equal Protection Clause.

Justice O'Connor, however, focused her dissent greatly on the McCarran-Ferguson Act, which entrusts states with the authority to regulate the business of insurance.

"The drafters of the act were sensitive to the same concerns Alabama now vainly seeks to bring to this

court's attention: the greater responsiveness of local insurance companies to local conditions, the different insurance needs of rural and industrial states, the special advantages and constraints of state-by-state regulation, and the importance of insurance license fees and taxes as a major source of state revenues," she wrote.

Justice O'Connor asserted that the reality of insurance regulation and taxation for the time justified a "uniquely local perspective."

"Insurance regulation and taxation must serve local social policies including assuring the solvency and reliability of companies doing business in the state and providing special protection for those who might be denied insurance in a free market, such as the urban poor, small businesses and family farms," Justice O'Connor wrote.

"She got what I was trying to sell," Warren Lightfoot, a retired partner of Lightfoot Franklin & Wright who argued for the state, said to Law360. What Lightfoot tried to get the justices to see, he said, was that in their decision was the opportunity to encourage states in their efforts to build up industry, attracting good employment and insurance work.

"Insurance companies offer very good pay and it's a boon to [the state's] economy if it can attract new insurance companies to incorporate in Alabama," Lightfoot said. "That's why [the state gave] this tax break on the premiums, not to discriminate, just as an economic measure."

Following his sole argument before the high court, Lightfoot went on to get to know Justice O'Connor on a personal level. He was commissioned in 2007 to sculpt the bronze portrait of the justice that sits in the Supreme Court, aiming to capture her true essence in his art.

"There was this elegant toughness about her, she's truly a lady, but underneath that exterior was steel," Lightfoot told Law360.

--Editing by Amy Rowe and Nick Petruncio.

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