



Alliance for Justice
Business and Consumer Litigation
Report on Supreme Court Nominee Judge Sonia Sotomayor¹

Judge Sonia Sotomayor has a wealth of experience in business and consumer litigation garnered from her time spent as a judge, in private practice, and through her public service activities. On the bench, Judge Sotomayor has served on the United States Court of Appeals for the Second Circuit and on the United States District Court for the Southern District of New York – both courts known for handling a particularly large number and variety of cases affecting businesses and consumers. In private practice, Judge Sotomayor spent eight years as a commercial litigator with a focus on intellectual property law, but also working on matters involving, among other subjects, banking, employment, product liability, antitrust, securities, real estate, contract, environment, franchising, and agency law.² And in the course of her serving on the Board of the State of New York Mortgage Agency, Judge Sotomayor participated in the administration of programs designed to facilitate home ownership by low- and moderate-income families.

In ruling on business disputes and consumer issues, Judge Sotomayor continues her practice of careful attention to the facts of each case, deference to the legislature, and adherence to legal precedents. In these areas, Judge Sotomayor’s rulings are generally uncontroversial and well within the legal mainstream. While Judge Sotomayor’s manifest familiarity with the facts of each case allows her to recognize the impact her decision will have on the parties involved in a case, she betrays no preset notions or biases that result in a pattern of finding for particular categories of plaintiffs or defendants. Business and consumer cases before Judge Sotomayor appear to be decided based on the particular facts presented and a fair application of the relevant law to those facts.

Judge Sotomayor has garnered support in the business community and was endorsed by the United States Hispanic Chamber of Commerce (“USHCC”). In connection with this endorsement, USHCC described Judge Sotomayor as having “a reputation for deciding cases that impact the business community with careful attention to applicable law and precedent, thoroughly reviewing the facts of the case, and understanding the real world impact of her

¹ The Alliance for Justice thanks the following people who contributed to this report: Natalia Sorgente; Brina Milikowsky; Jennifer Meinig; Andrea Johnson; Jenny Downey; Michael McGregor; and Isaac Shieh.

² See *U.S. Senate Comm. on the Judiciary, Questionnaire for Judicial Nominees* (“Sotomayor Questionnaire”), at 145-46, available at <http://judiciary.senate.gov/nominations/SupremeCourt/Sotomayor/upload/Questionnaire-2009.pdf>.

rulings.”³ USHCC Board Chair David C. Lizárraga added: “Her life experiences have taught her how to be a responsible and fair jurist. Legal experts have recognized that she has a balanced approach to reviewing cases, and her positions relating to business are also well balanced.”

Labor Law

Judge Sotomayor’s opinions in labor cases provide examples of her deference to Congressional intent, reliance on precedent, and careful investigation of the facts presented in each case. While Judge Sotomayor cannot be pigeonholed as pro-union, pro-employer, or pro-employee, her rulings show judicial restraint and a respect for the National Labor Relations Board and Congress’ national labor policy favoring collective bargaining. Overall, Judge Sotomayor’s labor opinions show a jurist concerned with consistency and equitable application of the law.

The Baseball and Football Cases

Two cases that Judge Sotomayor listed in her Senate Questionnaire as among the most significant she has presided over are labor cases that reveal Judge Sotomayor’s willingness to give teeth to national labor laws when appropriate.

The first of those cases is *Silverman v. Major League Baseball Player Relations Comm. Inc.*, 880 F. Supp. 246 (S.D.N.Y. 1995), *aff’d*, 67 F.3d 1054 (2d Cir. 1995) – the case where Judge Sotomayor ended the 1995 baseball strike by issuing an injunction against baseball owners that allowed the players to go back to work and the baseball season to begin. At the time the case was before Judge Sotomayor, the baseball strike was the longest work stoppage in professional sports history and had caused the cancellation of the 1994 World Series. Judge Sotomayor ruled against the owners because after negotiations between the players and owners became difficult, the owners tried to unilaterally change the terms of the collective bargaining agreement under which the players had been working. Judge Sotomayor held that this was an unfair labor practice and issued an injunction to protect the public interest, to maintain public confidence in the country’s labor laws, to avoid irreparable injury to the players, and to put the players and owners in the same bargaining position they were in before the strike.

In *Clarett v. National Football League*, 369 F.3d 124 (2d Cir. 2004), Judge Sotomayor wrote for a unanimous panel that upheld the National Football League’s eligibility requirements in the face of an antitrust challenge brought by a player. The player, Maurice Clarett, was a highly celebrated football star from Ohio State University who won several awards while leading his team to the national championship during his freshman year of college. *Id.* at 125-26. Off-the-field problems led to Clarett’s suspension for his entire sophomore year, but instead of sitting the year out, Clarett wanted to enter the NFL’s draft. *Id.* at 126. However, the NFL rules limited eligibility to players who were three years removed from their high school graduation (allowing most collegiate juniors and all collegiate seniors to enter the draft). *Id.* Under this requirement, Clarett was a year shy of eligibility. *Id.* Clarett sued arguing that the agreement among football

³ See *USHCC Endorses Judge Sotomayor for Supreme Court*, June 8, 2009, available at http://ushcc.com/_data/n_0001/resources/live/090609%20USHCC%20Endorses%20Sotomayor%20Nomination.pdf

teams to enforce eligibility rules amounted to an unreasonable restraint of trade and unlawful collusion among competitors. Judge Sotomayor rejected Clarett's argument and upheld the eligibility rules based on Supreme Court and Second Circuit precedent that "recognized that in order to accommodate the collective bargaining process, certain concerted activity among and between labor and employers must be held to be beyond the reach of the antitrust laws." *Id.* at 130.

Labor Management Relations Act

Judge Sotomayor's opinions in cases brought under the Labor Management Relations Act (LMRA), an amendment to the National Labor Relations Act (NLRA) often referred to as the Taft-Hartley Amendments, show careful and thorough analysis of precedent and facts, and fair application of the law. Generally, cases brought under the LMRA involve unfair representation claims made by employees against their union under § 301 of the Act, or breach of contract claims between unions and employers under § 303 of the Act. In these cases, Judge Sotomayor has shown restraint in declining to grant on summary judgment when there are contested issues of material fact, strictly adheres to precedent regarding arbitration awards, rules on motions to dismiss only after a thorough examination of all the pleadings and arguments, and awards sanctions and attorneys' fees equitably.

On the Second Circuit, Judge Sotomayor considered a case brought by union members who alleged that the union had violated its duty of fair representation when it amended certain terms of a settlement agreement with the plaintiffs' former employer without ratification by concerned union members. *White v. White Rose Food*, 237 F.3d 174 (2d Cir. 2001). Judge Sotomayor, writing for a unanimous panel, reversed a district court decision entered after a bench trial finding that the union violated its duty of fair representation. Judge Sotomayor held that the union's decision to amend the settlement agreement was not arbitrary or irrational in that it avoided further litigation and gave its union members prompt access to the benefits of the settlement agreement. Further, Judge Sotomayor found that federal labor law does not require every employer-union contract to be ratified by its members and thus, where a union's constitution and by-laws do not require ratification of a contract amendment, a union cannot be found to have violated its duty of fair representation based on a failure to submit a contract amendment to its membership for ratification. *Id.* at 182-84.

In the District Court in *Gorwin v. Local 282*, 1997 U.S. Dist. LEXIS 3822 (S.D.N.Y. 1997), Judge Sotomayor considered cross motions for summary judgment in an unfair representation case filed by a worker and his labor union. The employee alleged that he was initially fired for complaining that he was not being paid the legally required minimum wage and that the union represented him in an arbitration dispute that resulted in his reinstatement with back pay, but that upon returning to work he was fired again in bad faith and the union failed to fairly represent him in the arbitration following his second firing. Judge Sotomayor carefully evaluated all the facts presented and found that a jury could reasonably find for either party. Accordingly, she ruled that the issues before her were "of triable fact inappropriate for summary judgment." *Id.* at *37.

Although Judge Sotomayor is open to fairly considering the facts and arguments made before her, her imposition of sanctions in several labor cases demonstrates that she frowns upon frivolous litigation and is evenhanded and fair in doling out sanctions. For example, in *Paese v. New York Seven-Up Bottling Co.*, 158 F.R.D. 34 (S.D.N.Y. 1994), the defendant, Soft Drink & Brewery Workers Union, Local 812, moved for sanctions under Rule 11 of the Federal Rules of Civil Procedure against a plaintiff's attorney who brought a frivolous unfair representation suit against the union under § 301 of the LMRA. *Id.* at 35-36. Judge Sotomayor noted that although the plaintiff's attorney had grounds to commence the suit, he did not have grounds to continue prosecution of the suit after discovery, where it became clear that the plaintiffs had absolutely no evidence of causation, a required element to prove their claim. *Id.* at 37. Judge Sotomayor commented that although sanctions are discretionary, she would impose sanctions "because [the plaintiffs' attorney's] conduct in bringing this suit to trial, long after discovery should have revealed the factual insufficiency of his clients' claims, is precisely the type of willful, wasteful and unjustifiable behavior Rule 11 proscribes." *Id.* at 38. She further stated that pardoning the "conduct would serve only to encourage other disgruntled union members and their attorneys to run to court whenever they are outvoted, thus depleting the limited resources of the unions as well as those of an extremely overburdened judiciary." *Id.* However, she reduced the sanctions requested by the union considerably, reasoning that "a sanctions award of \$2,000.00 sufficiently redresses the violation, and will amply deter [the plaintiffs' attorney], a solo practitioner . . . from engaging in such wasteful conduct in the future." *Id.* at 39; *see also Corporate Printing Co. v. New York Typographical Union No. 6*, 886 F. Supp. 340 (S.D.N.Y. 1995) (granting only a reprimand to an employer for violating Rule 11 because at the time of the sanctions proceeding the union and employer had settled the dispute out of court); *Schepis v. Local Union No. 17, United Bd. of Carpenters & Joiners*, 989 F. Supp. 511 (S.D.N.Y. 1998) (granting the plaintiff attorneys' fees and costs associated with remanding the case back to state court when the union had improperly removed to federal court where no federal jurisdiction existed).

Fair Labor Standards Act

The Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, originally enacted in 1938, remains the preeminent method of protecting and enforcing the rights of workers. The Act applies to workers engaged in interstate commerce or in the production of goods for commerce. It established a national minimum wage, guaranteed higher pay for overtime in certain jobs, and prohibited most child labor. Generally, employers doing at least \$500,000 of business or gross sales in a year are subject to FLSA's requirements unless an exception applies.

Judge Sotomayor's FLSA opinions demonstrate a methodical approach and an inclination to allow cases to move forward on the facts. *See Hoffman v. Sbarro*, 982 F. Supp. 249 (S.D.N.Y. 1997); *Realite v. Ark Restaurants Corp.*, 7 F. Supp. 2d 303 (S.D.N.Y. 1998). Two decisions in this area are notable: *Archie v. Grand Cent. P'ship*, 997 F. Supp. 504 (S.D.N.Y. 1998) and *Singh v. City of New York*, 524 F.3d 361 (2d Cir. 2008).

Her decision in *Archie v. Grand Cent. P'ship*, 997 F. Supp. 504 (S.D.N.Y. 1998), shows that she rejects a cramped interpretation of "interstate commerce" that would narrow applicability of the FLSA and that she views skeptically efforts by employers to place employees outside of the Act's protections on the basis of their socioeconomic status. In *Archie*, former

homeless and jobless participants in an employment program claimed that the three non-profit entities overseeing it violated the FLSA by failing to pay minimum wage. *Id.* at 504. The key issues were whether the entities constituted an “enterprise” engaging in interstate commerce and whether the plaintiffs were “employees” under the FLSA, or merely “trainees.” Judge Sotomayor held that there was an enterprise and that the homeless people working there were actual employees. *Id.* at 531, 537. She addressed the more nuanced question of whether they were employees by finding that because the entities derived an immediate advantage in the marketplace from the defendants’ labor, the defendants qualified as employees under the FLSA rather than trainees. Moreover, the homeless workers had an expectation they would be paid.

The *Singh* case demonstrates her willingness to rule in favor of employers where appropriate. In *Singh*, the plaintiffs were fire alarm inspectors who claimed that New York City violated the FLSA by not compensating them for their commuting time despite requiring that they carry inspection documents at all times during the commute. *Singh*, 524 F.3d at 361. Under both the FLSA and a later amendment, the Portal-to-Portal Act, employees may only be compensated for commuting time where they are performing work that is integral and indispensable to a principal activity of their employment. Judge Sotomayor, writing for a unanimous panel on the Second Circuit, affirmed the district court and found that the “mere carrying of documents” is not “work” under the FLSA. *Id.* at 364. Employing the “predominant benefit standard,” Judge Sotomayor found that the fire alarm inspectors, not the City, were the primary beneficiaries of the commuting time. Therefore the employer did not have to compensate them for the entire commute. Judge Sotomayor then concluded that although employees may be compensated for additional commuting time, they could not in this instance because the extra time in the instant matter was *de minimis*, and, as a matter of law, not compensable under the FLSA. *Id.*

Securities

As a judge in the Southern District of New York and on the Second Circuit, Judge Sotomayor has ruled in dozens of actions brought under various federal securities laws. Judge Sotomayor has approached these cases with her usual rigor and carefully reviews both the facts and relevant precedents before coming to a decision. A selection of Judge Sotomayor’s securities cases will be discussed: the first, *Dabit v. Merrill Lynch*, 395 F.3d 25 (2d Cir. 2005), *rev’d* 547 U.S. 71 (2006), because Judge Sotomayor’s opinion written for a unanimous Second Circuit panel was reversed by the Supreme Court; the second, *In re NYSE Specialists Securities Litigation*, 503 F.3d 89 (2d Cir. 2007), because Judge Sotomayor listed the case as one of the ten most significant cases over which she presided; and the third, *SEC v. Softpoint, Inc.*, 958 F. Supp. 846 (S.D.N.Y. 1997), because it is an example of Judge Sotomayor’s careful examination of the record and her desire to ensure fairness and uniformity in the cases before her.

In *Dabit v. Merrill Lynch*, the Second Circuit considered the scope of federal preemption under the Securities Litigation Uniform Standards Act of 1998 (“SLUSA”). SLUSA was enacted after Congress found that securities plaintiffs, many with weak or frivolous claims, were trying to avoid the heightened pleading requirements for federal securities cases by filing class actions suits in state courts to force companies to enter into expensive settlements. Accordingly, SLUSA provided that class actions alleging certain securities violations must be brought in

federal court and governed exclusively by federal law. The *Dabit* plaintiffs filed class action suits complaining that they were harmed by Merrill Lynch when it issued rosy investment information designed to court favor with its investment banking clients at the expense of people seeking unbiased investment information. The disputed question before the Second Circuit was whether the plaintiffs could sue under state law or whether they could only sue under the more restrictive federal law. Judge Sotomayor, writing for a unanimous Second Circuit panel that included Judges Oakes and Wesley, held that SLUSA did not preempt all of the plaintiffs' claims, but only those that alleged a purchase or sale of securities. *Dabit*, 395 F.3d at 43-44. Notably, Judge Sotomayor was concerned that applying a broad preemption rule would mean that certain claims would be barred altogether because federal law does not encompass the claims of people who were harmed but were not purchasers or sellers of securities. *Id.* The Supreme Court, however, reversed and held that SLUSA did preempt class action claims brought by purchasers and non-purchasers alike. *Merrill Lynch v. Dabit*, 547 U.S. 71, 86-89. This decision was largely based on the Supreme Court's view that "[a] narrow reading of the statute would undercut the effectiveness of the [securities laws establishing heightened pleading requirements] and thus run contrary to SLUSA's stated purpose . . . [and] also would give rise to wasteful, duplicative litigation." *Id.* at 86.

In the case *In re NYSE Specialists Securities Litigation*, Judge Sotomayor wrote for another unanimous Second Circuit panel including Chief Judge Jacobs and Judge Leval and considered whether the district court properly dismissed claims brought against the New York Stock Exchange ("NYSE") based on allegations that the NYSE failed to fulfill its regulatory role and was thus liable for harm resulting from securities law violations perpetrated by the firms it was supposed to regulate. Two questions were presented: first, whether the NYSE enjoyed absolute immunity from suit relating to the misconduct of the firms it regulated; and second, whether the plaintiffs had standing to bring a claim under Section 10(b) of the Securities and Exchange Act of 1934 for misrepresentations it allegedly made related to how it regulated and the daily functioning of the NYSE market. On the first issue, Judge Sotomayor affirmed the district court and held that, the NYSE was entitled to absolute immunity with respect to any complaints about its actions when it was acting pursuant to the regulator authority delegated to it by the SEC. 503 F.3d at 96-99. However, Judge Sotomayor reasoned that the district court imposed an incorrectly narrow standing requirement with respect to the Section 10(b) claims and remanded to the district court for further consideration of the misrepresentation claim.

Finally, in *SEC v. Softpoint, Inc.*, Judge Sotomayor presided over an SEC action stemming from various securities violations perpetrated by a cash register company, Softpoint, and various people associated with Softpoint. Although the case presented was relatively straightforward in that the SEC had amassed ample evidence that the securities laws were violated, Judge Sotomayor refused to allow the SEC to impose much stiffer penalties on one of the individual defendants. She wrote that "[t]he Court is deeply troubled by the manner in which penalties have been sought by the SEC in this case," and believed that the SEC's decision to seek civil penalties of \$100,000 from three co-defendants and \$847,248 from a fourth whose behavior was no more egregious was "a fundamental inconsistency." 958 F. Supp. at 868. Judge Sotomayor, accordingly, reduced the fourth penalty to \$100,000 in an effort rectify this unfairness.

Environment

Judge Sotomayor has only written one opinion addressing the substantive requirements of an environmental law, but it was a case of nationwide significance and strongly suggests that she will be a strong and positive voice on the Court when it comes to environmental issues. Judge Sotomayor wrote the opinion in *Riverkeeper, Inc. v. EPA*, 475 F.3d 83 (2d Cir. 2007), *rev'd in part sub nom., Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498 (2009), a major environmental case that ultimately went to the Supreme Court. The opinion reviewed EPA's final rule promulgating regulations under Clean Water Act § 316(b) applicable to existing power plants and related to minimizing the environmental impact of cooling water intake structures. Challenges to EPA's rule came from state and environmental petitioners arguing that EPA's rule was too lenient and from industry petitioners arguing that EPA's rules were too strict. Judge Sotomayor's very careful and well-reasoned opinion interpreted the statute in a way that would lead to more protective environmental regulations. The most significant finding in the opinion was that where the Clean Water Act directed that cooling water intake structures utilize the "best technology available for minimizing adverse environmental impact," that "standard permits cost-effectiveness considerations to influence the choice among technologies whose performance does not essentially differ from the performance of the best-performing technology whose cost the industry can reasonably bear, but that the statute does not permit the EPA to choose BTA [*i.e.*, the "best technology available"] on the basis of cost-benefit analysis." *Id.* at 101.

This issue was appealed to the Supreme Court and while Justice Sotomayor's reasoning did not persuade the majority of the Court, it was adopted and amplified in a vigorous dissent written by Justice Stevens and joined by Justices Souter and Ginsburg.

Antitrust

Judge Sotomayor has authored several antitrust opinions on the Second Circuit, which together display her willingness to preserve a plaintiff's access to the courts as well as her tendency to issue narrow rulings tailored to the case before her. For example, in *Information Resources, Inc. v. Dun & Bradstreet Corp.*, 294 F.3d 447 (2d Cir. 2002), a retail tracking service sued its competitor, alleging numerous anticompetitive practices in the United States and abroad. Judge Sotomayor, writing for a unanimous panel, recognized the "important question" before the court as to whether to categorize the plaintiff's relationship with its foreign affiliates as one of a manufacturer toward its foreign dealers or as one of a supplier, in this case of data processing. *Id.* at 451. However, the Second Circuit declined to reach the merits of the question because the district court had improperly granted partial summary judgment by failing to specify which claims it had dismissed. *Id.*; *see also Innomed Labs, LLC v. ALZA Corp.*, 368 F.3d 148 (2d Cir. 2004) (finding harmless error where the court erroneously instructed the jury that the Robinson-Patman Act, which prohibits price discrimination in commodities distribution agreements, would not apply to a contract for patented products).

In a major decision on the Second Circuit, Judge Sotomayor interpreted antitrust laws to preserve or promote employees' ability to advocate on their own behalf or seek a remedy from their employer when economically injured. In *Todd v. Exxon Corp.*, 275 F.3d 191 (2d Cir. 2001), Judge Sotomayor preserved the plaintiff workers' ability to sue their employers under

antitrust law for artificially depressing their wages. Writing for a unanimous panel, Judge Sotomayor vacated a district court's judgment and held that plaintiffs, former and current employees of fourteen oil and petrochemical companies, had adequately alleged a Sherman Antitrust Act violation where they claimed that the companies shared information regarding compensation of nonunion managerial, professional, and technical employees and used that information to set artificially low salaries. Rejecting the district court's determination that plaintiffs had not pleaded a plausible product market or alleged that the market structure was susceptible to collusive activity, Judge Sotomayor evaluated the nature of the information exchanged among the companies. Noting that the information involved present and future salaries and company-specific information, exchanged by the companies at frequent meetings but never made available to the employees, Judge Sotomayor determined that such characteristics were "precisely those that arouse suspicion of anticompetitive activity." *Id.* at 213.

In another case, *Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290 (2d Cir. 2008), Judge Sotomayor wrote a separate concurrence which demonstrates her resistance to a "rigid" application of the antitrust laws. *Id.* at 335. Judge Sotomayor joined the majority's decision that Major League Baseball Properties ("MLBP") was entitled to summary judgment on Salvino's Sherman Antitrust Act challenges to MLBP's exclusive agreement with Major League Baseball and each Major League baseball team to license team names and logos for use on retail products for local, national, and international distribution. She wrote separately, however, to express her disagreement with the majority's conclusion that the licensing agreement did not constitute price fixing. Judge Sotomayor concluded that the agreement contained exclusivity and profit-sharing clauses which effectively eliminated price competition between the clubs for trademark licenses, even if the agreement did not specify a price to be charge. Such an agreement to eliminate price competition is "the essence of price fixing." *Id.* However, in the present case, the exclusivity and profit-sharing provisions of the agreement were reasonably necessary to achieve MLBP's efficiency-enhancing purposes, so Judge Sotomayor agreed that MLBP had not violated the Sherman Act. *Id.* at 340.

Finally, in an antitrust decision notable for its procedural victory for class action plaintiffs, Judge Sotomayor affirmed the district court's decision certifying a class of retailers and retail associations who sued several credit card companies. In re *Visa Check/Mastermoney Antitrust Litigation*, 280 F.3d 124 (2d Cir. 2001), *cert. denied*, *Visa U.S.A. Inc. v. Wal-Mart Stores, Inc.*, 536 U.S. 917 (2002). Plaintiffs alleged that the defendants violated federal antitrust laws with an "honor all cards" policy requiring merchants who accepted the companies' credit cards to also accept their debit cards. Judge Sotomayor, writing for the majority, concluded that the plaintiffs could maintain a class action because common issues of law and fact predominated the matter, and, citing the powerful policy considerations favoring certification, she criticized the dissent's contention that certification might coerce the defendants into a settlement. *Id.* at 145. Interestingly, however, five years later, Judge Sotomayor was part of a panel that disavowed the relatively lenient standard applied in In re *Visa Check* to determinations on whether the class action requirements had been met. In re: *Initial Public Offering Securities Litigation*, 471 F.3d 24 (2d Cir. 2006).

Intellectual Property

Judge Sotomayor has a wealth of professional experience in intellectual property law, both in private practice and on the bench. Prior to becoming a federal judge, she was a successful litigator with the Manhattan law firm of Pavia and Harcourt. Her knowledge of the intricacies of intellectual property law is evident in her rulings. Judge Sotomayor's copyright, trademark, and patent decisions show a careful investigation of the facts and reasoned decisions with evenhanded results.

Copyright

As a federal trial and appellate judge, Judge Sotomayor authored eleven copyright decisions. In these cases, Judge Sotomayor's copyright decisions found for plaintiffs alleging copyright infringement, *see, e.g., Top Rank, Inc. v. Allerton Lounge, Inc.*, 1998 U.S. Dist. LEXIS 22671 (S.D.N.Y. 1998), and for defendants in nearly equal numbers. Although betraying no bias, she comes down firmly when making a decision for or against a party, and has no qualms dismissing plaintiffs' infringement claims outright when they fail to produce evidence to support their claims, *see, e.g., Favia v. Lyons Partnership*, 1996 U.S. Dist. LEXIS 5306 (S.D.N.Y. 1996); *Screenlife Establishment v. Tower Video*, 868 F. Supp. 47 (S.D.N.Y. 1994).

Judge Sotomayor authored an intellectual property decision while on the district court that was reviewed on appeal by both the Second Circuit and the Supreme Court. That case was *Tasini v. New York Times Co.*, 972 F. Supp. 804 (S.D.N.Y. 1997). The *Tasini* plaintiffs were freelance authors who sued the New York Times and other publications for republishing their work in electronic databases and on CD-ROM without permission. Judge Sotomayor granted the defendants' motion for summary judgment and rejected plaintiffs' copyright infringement claims, holding that a section of the Copyright Act allowed the defendants to reissue or revise collective works and re-publish the plaintiffs' articles in different media. *Id.* at 812-13, 827. On appeal, both the Second Circuit Court and Supreme Court disagreed and held that republication of plaintiffs' articles in internet or electronic libraries, without plaintiffs' permission, infringed authors' copyrights and was not protected by the Copyright Act. *New York Times Co. v. Tasini*, 533 U.S. 483 (2001); *Tasini v. New York Times Co.*, 192 F.3d 356 (2d Cir. 1999).

In her other cases, however, Judge Sotomayor's rulings were upheld on appeal. For example, in *Castle Rock Entertainment v. Carol Publ. Group*, 955 F. Supp. 260 (S.D.N.Y. 1997), Judge Sotomayor granted plaintiff's motion for summary judgment on their copyright infringement claims and this decision was affirmed by the Second Circuit. *Castle Rock Entertainment v. Carol Publ. Group*, 150 F.3d 132 (2d Cir. 1998). In that case, the producers and owners of the *Seinfeld* television series sued the author and publisher of a book of trivia called *The Seinfeld Aptitude Test* ("SAT"). *Castle Rock*, 955 F. Supp. at 261. Judge Sotomayor reasoned that "both the 'facts' in the various *Seinfeld* episodes, and the expression of those facts, are plaintiffs creation," *id.* at 266, and thus, the plaintiffs' appropriation of those invented facts was copyright infringement. The Second Circuit agreed holding that "The SAT unlawfully copies from *Seinfeld* and [] its copying does not constitute fair use and thus is an actionable infringement." *Castle Rock*, 150 F.3d at 132.

In a case that was not appealed, *Peer Int'l Corp. v. Luna Records*, 887 F. Supp. 560 (1995), the plaintiffs were the owners of music copyrights who discovered that Luna Records was making and distributing recordings of their songs without a license or without paying the proper royalties. Judge Sotomayor granted plaintiffs' motions for summary judgment, finding that the copyright infringement was clear and the defendants' infringement was willful. Judge Sotomayor awarded plaintiffs enhanced statutory damages, attorney fees, injunctive relief, and ordered the defendants to produce all infringing copies for destruction. Notably, Judge Sotomayor ruled that in some cases involving willful copyright infringement, Congress intended courts to award damages for the purpose of deterring such conduct, in addition to compensation for actual damages, *id.* at 568, and she held one defendant personally because he had the ability to supervise the infringing copyright activities and had a direct economic interest in the activity at issue. *Id.* at 565. In a later order in the same case, Judge Sotomayor reduced some of the awarded attorney's fees because plaintiffs' attorneys did not properly justify their fees and expenses. *Peer Int'l Corp. v. Luna Records*, 1995 U.S. Dist. LEXIS 7875. Similarly, in *Top Rank, Inc. v. Allerton Lounge, Inc.*, 1998 U.S. Dist. LEXIS 22671 (S.D.N.Y. 1998), Judge Sotomayor disagreed with the magistrate on the issue of damages and significantly increased plaintiff's damages award. *Id.* at *2. She justified this by saying increased damages were necessary to deter defendant's willful but non-pattern conduct. *Id.*

Trademark

Judge Sotomayor has not authored any particularly high-profile trademark cases, yet this is an area of the law in which she has significant experience. During her years as a partner at the firm Pavia & Harcourt, Judge Sotomayor handled numerous trademark matters, and two of the 10 "most significant litigated matters" she listed on her Senate Judiciary Committee Questionnaire were trademark lawsuits which she litigated while in private practice. In particular, she handled almost all of the cases involving her client Fendi, including trademark and trade dress infringement claims, and on behalf of Fendi she organized and ran an anti-counterfeiting program for a group of major trademark owners. On the bench, Judge Sotomayor has issued clear and narrow trademark rulings, split almost evenly in terms of whether she ruled in favor of the plaintiff or defendant.

On the Second Circuit, Judge Sotomayor authored two opinions for unanimous panels reviewing claims brought under the Anticybersquatting Consumer Protection Act (ACPA) of 1999, 15 U.S.C. § 1125(d), alleging that the defendants engaged in "cyberpiracy," "cybersquatting," or "domain-name hijacking" by acquiring rights in Internet domain names which are identical or confusingly similar to plaintiffs' trademarks. The ACPA allows trademark holders to bring suits *in rem*, against the domain name itself, if the trademark holder cannot obtain personal jurisdiction over the registrant or the registrant cannot be located after good faith efforts to do so. In *Mattel, Inc. v. Barbie-Club.com*, 310 F.3d 293 (2d Cir. 2002), the Second Circuit affirmed the district court's dismissal of plaintiff's claims for lack of *in rem* jurisdiction, holding that the ACPA provides for *in rem* jurisdiction only in the judicial district in which the registrar, registry, or other domain-name authority that registered or assigned the disputed domain name is located and not, as Mattel argued, in any court in which a certificate of a domain name's registration has been deposited.

In *Storey v. Cello Holdings, L.L.C.*, 347 F.3d 370 (2d Cir. 2003), Judge Sotomayor reversed the district court's dismissal of a complaint based on *res judicata* where the parties had previously gone to court to dispute a domain name registration. Storey and Cello Holdings had fought through two earlier proceedings over the domain name "cello.com"; the first, a district court lawsuit brought by Cello, was dismissed with prejudice; the second, a Uniform Domain-Name Dispute-Resolution proceeding brought by Cello, which awarded the domain name to Cello. Storey then brought this action against Cello under the ACPA for a declaration that his use of cello.com was not unlawful. The district court ruled that the original federal lawsuit barred Cello from bringing the subsequent administrative proceeding and Storey was therefore entitled to the domain name. On appeal, Judge Sotomayor concluded instead that the administrative decision was relevant only insofar as it permitted Storey to file the action under the ACPA, but she rejected Cello's argument that the administrative panel's rejection of Storey's *res judicata* defense has any bearing on the issue presented before the Second Circuit. Rather, the court considered the question whether the original federal lawsuit barred Cello from contesting Storey's use of the domain name. Judge Sotomayor concluded that the present action was predicated on conduct that post-dated the original lawsuit, when Storey offered to sell the domain name to Cello. Accordingly, it was possible for Cello to allege a legally sufficient claim under the ACPA based on events that transpired since the first law suit. In reaching this decision, Judge Sotomayor noted that Congress intended the ACPA to make rights to a domain-name registration "contingent on ongoing conduct rather than to make them fixed at the time of registration." *Id.* at 385. Recognizing that their decision "makes a prior judgment in favor of a domain-name registrant a less powerful tool to stave off subsequent suits by a trademark owner" than if they held that *res judicata* applied to bar Cello's arguments, the court asserted that it did "not leave domain-name registrants without recourse to the tools of preclusion that lessen the burdens of successive litigation." *Id.* at 386-87. Furthermore, the court stated that it did not expect its decision to create substantial uncertainty for settling litigations because "even claims based on ongoing conduct ordinarily can be extinguished so long as the settlement agreement is clearly drafted." *Id.* at 387.

In a more routine trademark case, Judge Sotomayor authored the opinion in *Playtex Prods. v. Georgia-Pacific Corp.*, 390 F.3d 158 (2004), affirming the district court's grant of summary judgment to defendant on plaintiff's trademark infringement and related claims. Judge Sotomayor clearly and faithfully applied the balancing factors laid out by Second Circuit precedent to determine whether the defendant's mark was likely to confuse consumers as to the source or sponsorship of its product. Notably, Judge Sotomayor applied the "considerable deference" standard of review to the lower court's rulings on the predicate facts, rather than the more deferential "clearly erroneous" standard suggested by some prior Second Circuit cases. *Id.* at 162 n.2.

Bankruptcy

Judge Sotomayor's decisions on the Second Circuit concerning bankruptcy law are well-reasoned and well-supported by the law. Writing for unanimous panels on the Second Circuit, Judge Sotomayor's bankruptcy opinions appear to reflect careful attention to the particular facts of the case, reliance on precedent, adherence to statutory text and congressional intent, and deference to governmental agencies when acting in their areas of expertise.

In cases involving individuals, Judge Sotomayor's opinions indicate a concern that all parties be afforded a fair opportunity to be heard, and that the rights of all parties, whether they are debtors or creditors, be respected in accordance with the laws enacted by Congress.

For example, Judge Sotomayor authored a unanimous opinion holding that a father could not use bankruptcy to evade his child-support obligations. *In re Maddigan*, 312 F.3d 589 (2d Cir. 2002). After a family court awarded the mother custody of their daughter and ordered the father to pay the legal expenses incurred by the mother in the custody proceeding, the father filed for bankruptcy and sought a bankruptcy "discharge" relieving him from his obligation to pay the legal fees. *Id.* at 592-93. The Second Circuit held that the father's obligation could not be discharged in bankruptcy, applying a provision of the Bankruptcy Code that exempts from discharge any debts owed to a debtor's child "in the nature of . . . support." *Id.* at 593. Noting that this statutory exception had been read broadly under prior decisions of the Second Circuit and other courts to reflect the congressional goal favoring enforcement of family obligations over the general bankruptcy policy of debt relief, the court concluded that the father's obligation was "in the nature of . . . support" because the legal fees were incurred in a custody proceeding concerning the welfare of his daughter and the family court had ordered the father to pay such fees based on the mother's limited financial resources. *Id.* at 593.

Similarly, in another opinion by Judge Sotomayor for a unanimous Second Circuit panel, the court held that a lower court should not have thrown out an individual debtor's bankruptcy appeal based on a procedural error. *In re Harris*, 464 F.3d 263 (2d Cir. 2006). Although the debtor erred by failing to include in the appellate record a transcript of the decision being appealed, Judge Sotomayor wrote that the lower court should have considered lesser sanctions or given the debtor an opportunity to rectify the error, and should have "explain[ed] why it is in the interest of justice to all parties, including secured and unsecured creditors, to dismiss a bankruptcy appeal on procedural grounds rather than to continue to the merits of the appeal." *Id.* at 272. Carefully reviewing the facts at issue in the bankruptcy court, Judge Sotomayor noted that there were "serious questions on the merits" of the debtor's appeal that might also result in recoveries for creditors, which the lower court should have taken into account before dismissing the appeal. *Id.* at 273.

In a case addressing compensation for the victims of securities fraud by a company that went bankrupt, Judge Sotomayor wrote for a unanimous panel of the Second Circuit holding that a district court properly approved a plan by the Securities and Exchange Commission to distribute a \$750 million civil penalty it collected from Worldcom to the victims of Worldcom's fraud. *Official Comm. of Unsecured Creditors of Worldcom, Inc. v. S.E.C.*, 467 F.3d 73 (2d Cir. 2006). The Second Circuit concluded that the district court properly granted deference to the SEC and found its plan to be fair and reasonable under the "Fair Funds for Investors" provision of the Sarbanes-Oxley Act of 2002 because the plan would distribute the penalty funds to injured investors who had received the least amount of compensation from other sources, including Worldcom's bankruptcy case. *Id.* at 84-85. Addressing an objection by the creditors committee in the Worldcom bankruptcy that the plan improperly allocated funds to shareholders while denying compensation to certain categories of bondholders who would normally enjoy priority over shareholders under the Bankruptcy Code, Judge Sotomayor acknowledged that "there is tension between the priority assigned to claims under the Bankruptcy Code and the Fair Fund provision, which empowers the SEC to distribute funds among injured investors outside the

bankruptcy proceeding.” *Id.* at 85. But finding “no indication in the Fair Funds provision [of the Sarbanes-Oxley statute] . . . that the SEC must follow the Bankruptcy Code’s claim priorities when developing a distribution plan,” Judge Sotomayor concluded that “it is not our role to mitigate this tension,” but rather only to enforce the Fair Funds provision as enacted by Congress. *Id.*

Finally, in a commercial case having international implications, Judge Sotomayor wrote an opinion for a unanimous panel of the Second Circuit holding that a bankruptcy court properly granted a petition by an Argentine telecommunications company to enforce the terms of a restructuring plan approved by an Argentine court under Argentina’s Insolvency Law. *In re Bd. of Dirs. of Telecom Argentina*, 528 F.3d 162 (2d Cir. 2008). The restructuring plan approved in the Argentine proceedings modified the Argentine company’s bond obligations to its multinational investors, including investors in the United States. *Id.* at 166. Applying a provision of the Bankruptcy Code authorizing bankruptcy courts to recognize and enforce foreign insolvency proceedings if certain factors are satisfied (since replaced by a more comprehensive framework for recognizing such proceedings under chapter 15 of the Bankruptcy Code), the Second Circuit concluded that under the particular facts of the case, the bankruptcy court properly recognized the Argentine insolvency proceedings because U.S. investors were afforded an adequate opportunity to vote on and object to the restructuring plan in the Argentine proceedings, and because those proceedings did not violate U.S. public policy reflected in the Trust Indenture Act of 1939 and the Bankruptcy Code. *See id.* at 171. Under these circumstances, Judge Sotomayor wrote that the bankruptcy court appropriately granted comity to the Argentine proceedings in accordance with congressional intent and Second Circuit precedent recognizing the need for cooperation between U.S. and foreign courts in administering cross-border insolvency proceedings. *Id.* at 174-75.

Federal Arbitration Act

As a general matter, Judge Sotomayor's opinions are pro-arbitration, in accordance with Congress’s intent that the Federal Arbitration Act (“FAA”) reverse traditional judicial hostility to arbitration agreements. *See e.g., Local 300, Nat’l Postal Mail Handlers Union v. United States Postal Serv.*, 1994 U.S. Dist. LEXIS 16610 (S.D.N.Y. 1994) (holding that the Court had no jurisdiction to hear a claim of breach of a settlement agreement until arbitration was completed because the collective bargaining agreement contained a broad arbitration clause); *Corporate Printing Co. v. New York Typographical Union No. 6*, 1994 U.S. Dist. LEXIS 9728 (S.D.N.Y. 1994) (declining to vacate an arbitration award after finding that the award was well within the scope of the arbitrator’s authority); *New York Hotel & Motel Trades Council v. Hotel Ass’n*, 1993 U.S. Dist. LEXIS 16615 (S.D.N.Y. 1993) (declining to vacate an arbitration award after finding that the arbitrator did not exceed his authority by interpreting an implied contract term). As both a district court and appellate judge, Judge Sotomayor seems to have ruled against the party seeking arbitration or defending the validity of an arbitration award only in compelling circumstances -- *e.g.*, situations involving complex international bankruptcy proceedings, *Allstate Ins. Co. v. Hughes*, 1994 U.S. Dist. LEXIS 16802 (S.D.N.Y. 1994), situations involving issues relating to the basic power of the federal courts, *Bloomingtondale’s v. SEIU*, 1998 U.S. Dist. LEXIS 6413 (S.D.N.Y. 1998) (applying controlling precedent that dictated that an arbitrator’s award could only be vacated if the court determined the dispute was not arbitrable), and

situations involving important consumer privacy rights, *Sprecht v. Netscape Commc'ns Corp.*, 306 F.3d 17 (2d Cir. 2002).

In the single arbitration case squarely addressing consumer protection issues, *Sprecht*, Judge Sotomayor upheld the right of consumers to bring a class action suit against a corporation alleged to have stolen plaintiffs' personal information. 306 F.3d at 21. In *Sprecht*, Netscape users sued after discovering that a free plug-in software program intended to facilitate downloading captured user information and transferred the information back to the company. *Id.* The Netscape users filed suit in federal district court alleging violations of both the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510 *et seq.*, and the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, and Netscape moved to stay the court proceedings and compel arbitration. *Id.* The district court denied the motion and, writing for a unanimous Second Circuit panel, Judge Sotomayor affirmed the ruling. She held that the plaintiffs had not agreed to be bound by the plug-in program's license terms (which included the arbitration provision) because a reasonably prudent internet user in similar circumstances would not have been put on inquiry notice of the existence of the license terms before downloading the free software. *Id.* at 32. The court further held that the arbitration clause in the plaintiffs' license agreement with Netscape was not sufficiently broad to cover the claims regarding the plug-in software. *Id.* at 38.

Consumer Protection

In the consumer protection arena – including product liability, deceptive and unfair trade practices, and fair debt collection practices – Judge Sotomayor's cases are consistent with her general jurisprudence that reflects careful attention to the fact of each case, a desire to give each party an opportunity to present its claims or defenses, and a willingness to rule definitively when the situation warrants.

Product Liability

Two product liability cases came before Judge Sotomayor – one while she was a district court judge and one while she was an appellate court judge. Although Judge Sotomayor has ruled in favor of product liability plaintiffs in the only two products liability cases to come before her, her opinions do not seem results driven.

On the district court, Judge Sotomayor preserved a plaintiff's products liability claim while diminishing his litigation costs in *Bowers v. Navistar International Transportation Corp.*, 1993 U.S. Dist. LEXIS 6129 (S.D.N.Y. May 10, 1993). Bowers filed suit alleging that he was injured by a dump truck with an inadequate back-up alarm system. The City of New York and the NYC Department of Transportation, third-party defendants, moved for separate trials on Bowers' products liability and negligence claims. Judge Sotomayor denied the motion for a separate trial, finding that Bowers' complaint presented fundamentally intertwined claims necessitating extensive testimony from the same fact and expert witnesses with respect to both whether the City and Department of Transportation were negligent in selecting, installing, and operating the back-up alarm system and whether the maker of the alarm system was liable for a defective product. The court also held that separate trials would "truncate settlement

negotiations, encourage lengthy and duplicative litigation, and postpone adjudication of liability for Bower's severe injuries.” *Id.* at *13.

As a member of the Second Circuit, Judge Sotomayor wrote an opinion reinstating a jury verdict awarding damages to a plaintiff suing a car manufacturer for negligent design of a cruise control mechanism. *Jarvis v. Ford Motor Co.*, 283 F.3d 33 (2d Cir. 2002), *cert. denied*, 537 U.S. 1019 (2002). Jarvis sustained serious injuries in a car accident in her six-day-old Ford Aerostar and sued Ford for negligence and strict products liability. The jury returned a verdict for Jarvis on her negligence claim, but the district court found the evidence insufficient to support a verdict for Jarvis and granted Ford’s motion for judgment as a matter of law. On appeal, the Second Circuit held there was a legally sufficient evidentiary basis to find for Jarvis, who was not required under settled New York state law to establish what specific defect had caused the car to malfunction when a defect may be inferred from proof that the product did not perform as intended by the manufacturer. Jarvis presented evidence that hundreds of additional Aerostar owners experienced similar problems and an expert offering a theory of why the cruise control had malfunctioned and an inexpensive remedy for this problem. The Second Circuit unanimously concluded a reasonable jury could credit this evidence over Ford’s evidence of the unlikely nature of the specific defect Jarvis had posited, *id.* at 43-44, and Judge Sotomayor’s opinion accordingly vacated the district court’s judgment and ordered a reinstatement of the verdict and damages award.

Deceptive and Unfair Trade and Debt Collection Practices

Judge Sotomayor has considered a number of cases with allegations that a defendant engaged in a deceptive or unfair trade practice. In each of these cases, Judge Sotomayor has carefully considered the facts of the case and the relevant precedent before ruling. Four cases are notable in this area as they demonstrate Judge Sotomayor’s desire to allow cases to proceed where there is a colorable claim and her willingness to firmly rule once the facts have been developed.

As a district court judge, Judge Sotomayor ruled that a company’s claim under the Minnesota Deceptive Trade Practices Act could go forward against CBS. *Aequitron Medical, Inc. v. CBS, Inc.*, 1994 U.S. Dist. LEXIS 942 (S.D.N.Y. Feb. 2, 1994). The company claimed that a CBS segment unfairly disparaged its infant heart rate and respiration monitors and Judge Sotomayor rejected CBS’s motion to dismiss the claim on various grounds. Judge Sotomayor properly ruled that on a motion to dismiss, her role was to determine only whether Aequitron’s complaint stated a valid claim such that it should be permitted to proceed with its litigation and offer evidence in support of its claim.

Consistently, in a Second Circuit case raising issues under the Fair Debt Collection Practices Act (“FDCPA”), *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292 (2d Cir. 2003), Judge Sotomayor overturned a district court’s dismissal before discovery and exhibited her inclination to allow the facts of a case to develop if the plaintiff has stated a viable claim. In *Miller*, the plaintiff sued two law firms and a non-attorney referral network engaged in the practice of debt collection alleging that they violated the FDCPA provision prohibiting “the false representation or implication that any individual is an attorney or that any communication is

from an attorney.” *Id.* at 300-01. Writing for a unanimous court, Judge Sotomayor overruled the district court’s dismissal of this claim and held that the plaintiff’s allegation that debt collection letters were sent on attorney letterhead without any meaningful attorney involvement was sufficient to allow him an opportunity to further develop the record. *Id.* at 295-96.

FTC v. Micom Corp., 1997 U.S. Dist. LEXIS 3404 (S.D.N.Y. March 12, 1997), is an example of a case where Judge Sotomayor ruled decisively to protect consumers where the facts warranted. In *Micom*, the Federal Trade Commission sought the court’s help in stopping a fraudulent telemarketing business that sold services of little or no value related to obtaining certain Federal Communications Commission licenses. Judge Sotomayor first issued a temporary restraining order based on the facts presented by the FTC and subsequently issued a final judgment and order that barred the defendants from offering any investment or application filing service involving a license or permit issued by the federal government. Judge Sotomayor’s order also included a \$1.6 million judgment against the company to be distributed to the victims of the fraud (unless such distribution was impractical) and a ban on misrepresentations regarding any investment or telemarketing offering.

Judge Sotomayor, however, has also ruled against claims of deceptive trade practices. Sitting on a Second Circuit panel, Judge Sotomayor was one of the judges that, in a summary order, affirmed a district court’s decision on summary judgment ruling against a credit card holder who claimed, among other things, that Citibank violated the Connecticut Unfair Trade Practices Act. *Carrier v. Citibank*, 180 Fed. Appx. 296 (2d Cir. 2006). The facts on summary judgment showed that one of the plaintiff’s employees illegally charged over \$100,000 on his credit card over the course of two years. The plaintiff, however, never looked at any of his credit card bills and signed checks paying Citibank each month in full. In addition, on several occasions, Citibank questioned some of the charges, but the employee was able to provide the requisite security information on the account and validated the charges. Under the circumstances, Judge Sotomayor and her Second Circuit colleagues agreed with the district court that Citibank was not obligated to refund the amounts charged by the rogue employee because the plaintiff’s actions in failing to review his bills, failing to contest any charges as they accrued, and paying his bills without protest invested apparent authority in the employee such that the charges would be considered authorized.

Conclusion

In sum, an examination of Judge Sotomayor’s record in business and consumer cases demonstrates her consistency as a jurist. In these subject matters, as in the criminal justice context, Judge Sotomayor approaches each case with an open mind and a willingness to immerse herself in the relevant facts and applicable law. Her opinions in this areas show no predisposition to favor plaintiffs or defendants, a sensitivity to the arguments of all parties, appropriate deference to the legislature, and faithful application of precedent.