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GUEST COLUMN

Backdoor natural gas regulation on trial

By Cory L. Andrews

Earlier this year, the U.S. Supreme Court heard oral argument in *ONEOK v. Learjet*, a case that will determine the scope of the Federal Energy Regulatory Commission's (FERC) field preemption under the Natural Gas Act (NGA). The case arises from various state suits brought by commercial and industrial end users of natural gas against defendant natural gas companies, alleging the defendants violated state antitrust law by inflating index rates for natural gas, causing the plaintiffs to pay higher retail rates.

While it is undisputed the NGA preempts state law claims directed at conduct affecting the wholesale rates for natural gas, the Supreme Court must now consider whether such claims are preempted when the same alleged conduct affects both wholesale *and retail* rates. Reversing the district court, the 9th U.S. Circuit Court of Appeals rejected ONEOK's preemption argument on the basis that the state law claims brought by the plaintiff-purchasers arose from retail gas transactions.

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DAILY APPELLATE REPORT

CIVIL LAW

Civil Rights: City of Sunnyvale may restrict possession of large capacity firearm magazines. *Fyock v. City of Sunnyvale,* U.S.C.A. 9th, DAR p. 2574

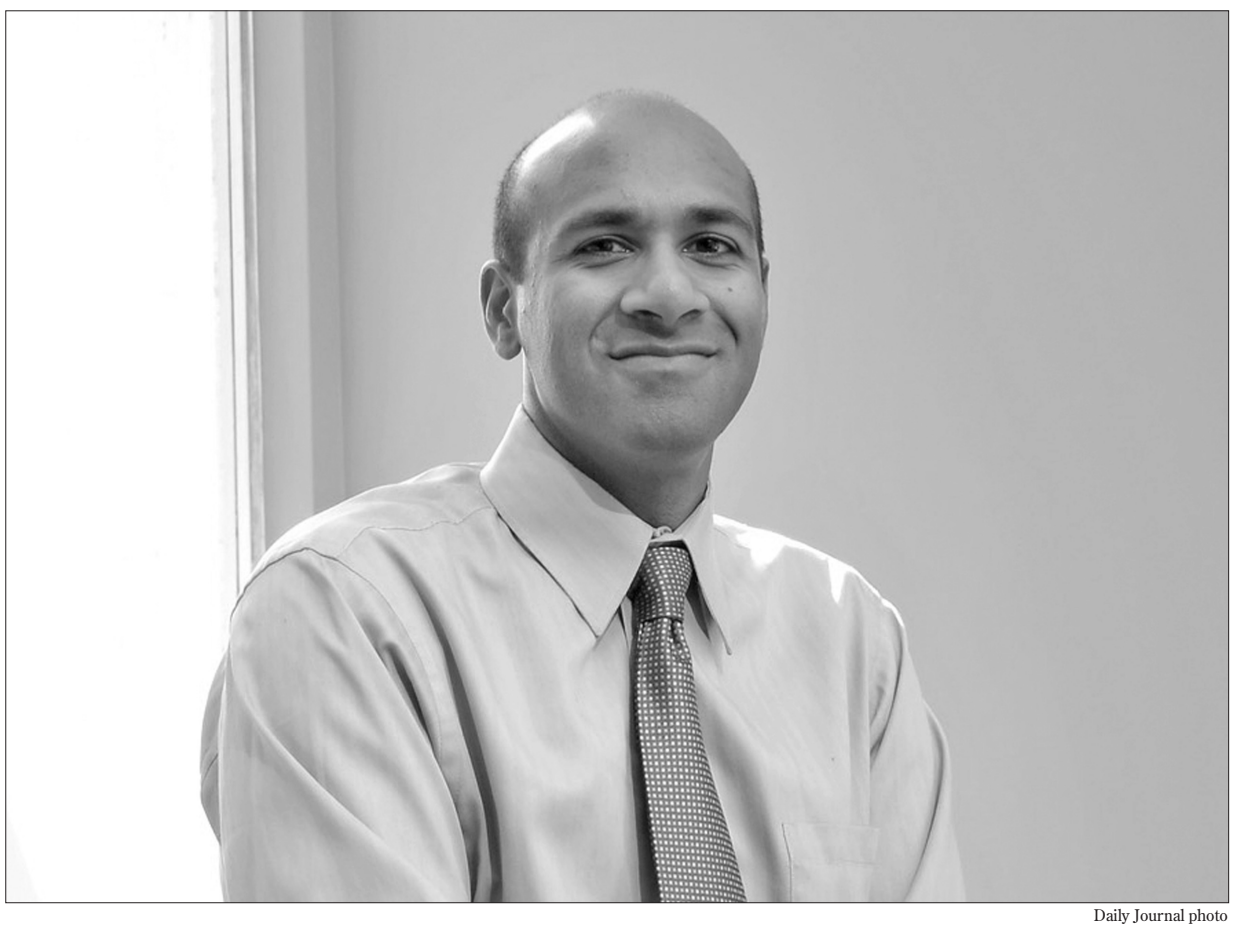
Contracts: FIRREA does not immunize the FDIC against claims for breach of pre-receivership contracts. *Bank of Manhattan v. FDIC,* U.S.C.A. 9th, DAR p. 2569

Insurance: Refusal to defend insured, though plaintiff's complaint and policy's express coverage had some overlap, may have been breach of contract. *Gonzalez v. Fire Insurance Exchange,* C.A. 6th, DAR p. 2579

Juveniles: Juvenile court errs in its denial of appellant's Cal. Welfare and Institutions Code Section 388 petition to terminate legal guardianship of her children. *In re Priscilla D.,* C.A. 5th, DAR p. 2565

Juveniles: Court has no power to seal juvenile's records under Welfare and Institutions Code Section 781 for Section 707 enumerated offense. *In re G.Y.,* C.A. 6th, DAR p. 2550

Taxation: Eleventh Circuit must reconsider Alabama's justification for asymmetrical taxing of rail carriers compared to competitors, where taxes are 'roughly equivalent.' *Alabama Dept. of Revenue v. CSX Transportation Inc.,* U.S. Supreme Court, DAR p. 2543



Daily Journal photo

Ahilan Arulanantham of the ACLU, who helped persuade Judge Dolly M. Gee to rule that immigrant detainees with mental disabilities must be appointed legal counsel, expressed confidence in the new court-appointed monitor.

New lawyer picked as government monitor

By Laura Hautala
Daily Journal Staff Writer

A former law clerk for U.S. District Judge Dolly M. Gee, just five years out of law school, has been appointed by the judge to oversee the implementation of a historic order forcing the Department of Homeland Security to provide attorneys for immigrant detainees found to be mentally incompetent.

Lawyers representing immigrant plaintiffs expressed confidence in the appointee, Katherine B. Mahoney, who until Friday worked at a San Francisco immigration law firm. She now works as a contract attorney at a San Francisco nonprofit.

"I think her appointment probably reflects that Judge Gee has a great deal of confidence in her ability to take on the task," said Ahilan Arulanantham, deputy legal director at ACLU Southern California and a lead attorney in the case, which deals with immigrants with significant cognitive impairments.

The lawsuit arose out of repeated individual cases in which immigrants remained stranded in detention for years because they weren't competent to represent themselves.

The government does not automatically provide attorneys in immigration proceedings, and a large proportion of detained immigrants don't have lawyers. Gee issued an injunction in 2013 as part of the larger lawsuit, requiring the Department of Homeland Security to provide representation for immigrants with mental disabilities.

Mahoney was Gee's clerk when the case proceeded through her courtroom.

The injunction applies only to California, Arizona and Washington, but around the same time, the federal agency announced it would roll out a similar policy for the entire country. Mahoney will be monitoring the three states covered by the injunction.

Bill Ong Hing, a professor at University of San Francisco School of Law specializing in immigration issues, said a monitor is much needed. Immigration judges need to be reminded that they should stop and assess immigrants to see if they are really competent, he said.

"It goes against what immigration judges are accustomed to doing," Hing said. "They just are so accustomed to proceeding without counsel."

Gee's injunction requires detainees be screened for mental disabilities from the beginning, Arulanantham said, and that information flows from the detention center to the immigration court, as well as among attorneys in the case.

In addition to having access to documents about the implementation of the injunction, Mahoney will have the ability to sit in on immigration proceedings and visit mentally disabled immigrants in detention centers throughout the three states involved.

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Court upholds ammo rules

9th Circuit panel says Sunnyvale ordinance banning guns holding more than 10 rounds can stand

By John Roemer
Daily Journal Staff Writer

Municipalities' right to promote gun safety by limiting weapons' ammunition load got a boost Wednesday from a 9th U.S. Circuit Court of Appeals panel.

A Sunnyvale ordinance restricting the possession of firearm magazines that hold more than ten rounds was at issue. The panel refused to issue a preliminary injunction against the law while its constitutionality is debated before a federal judge. *Fyock v. City of Sunnyvale*, 2015 DJDAR 2574.

Other California cities, which are considering similar ordinances, have been waiting for the opinion, lawyers said.

It was the latest Second Amendment opinion from the circuit in about a year, and it drew the promise of an immediate appeal from the gun rights lobby and praise from gun control groups.

In 2014, the circuit told California cities to issue concealed carry permits without requiring "good cause" documentation.

The 9th Circuit has not decided yet whether to rehear that case en banc. *Peruta v. County of San Diego*, 742 F.3rd 1144.

Both the large-capacity magazine and the concealed carry issues are candidates for U.S. Supreme Court review, though one constitutional scholar questioned whether they will get there.

"Today's decision tees up another Supreme Court decision on the Second Amendment," said Adam Winkler of UCLA School of Law. "The question is whether the justices will swing at it. They have been avoiding Second Amendment cases now for five years, despite a host of very important questions that need to be answered."

Sunnyvale voters passed a large-capacity magazine restriction in 2013 to enhance public safety in the wake of recent mass shootings in the U.S., the opinion said.

Gun rights proponents hired Erin E. Murphy of Bancroft PLLC, a former Chief Justice John G. Roberts law clerk, to argue for an injunction before the circuit panel last November. She could not be reached.

Representing Sunnyvale was Roderick M. Thompson of Farella Braun & Martel LLP with colleague Anthony P. Schoenberg.

"This is consistent with 9th Circuit Second Amendment jurisprudence in favor of reasonable restrictions," Schoenberg said. "It gives a preview of how the court might view the merits."

Sunnyvale sought to close a loophole permitting possession of large-capacity magazines caused by the lapse in 2004 of the federal Violent Crime Control and Law Enforcement Act, which had prohibited their possession.

The decision affirmed Senior U.S. District Judge Ronald M. Whyte of San Jose and returned the case to his court for further litigation on the ordinance's merits.

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Judge offers harsh assessment of all lawyers in AutoZone case

By Matthew Blake
Daily Journal Staff Writer

SAN DIEGO — A federal judge appeared poised on Wednesday to significantly shrink a $185 million jury verdict reached against AutoZone Stores Inc., understood to be the largest employment discrimination award in American history.

U.S. Magistrate Judge William V. Gallo of the Southern District ended a nearly four-hour post-trial hearing pitting AutoZone against former employee Rosario Juarez with no decision on the auto parts supplier's motion for a new trial, though he stated from the bench, "We see jury numbers that appear to have no basis in rational evidence."

The pregnancy discrimination case has been litigated for seven years and climaxed with a fiercely argued two-week jury trial in November. On Wednesday, Gallo pushed the parties to reach a settlement and report back to the court within a week. The judge also criticized both Juarez's attorney, Lawrance A. Bohm, and AutoZone lawyer Nancy E. Pritikin, concluding that "each side knows in their hearts and minds" what their winning and losing arguments are by now.

Bohm, of the Bohm Law Group, said after the hearing he is actively trying to reach a settlement and that his client would accept significantly reduced damages, but that AutoZone will not sit down to talk. Pritikin, a shareholder at Littler Mendelson PC, referred all questions to an AutoZone spokesman who did not return a message left on Wednesday.

Juarez sued AutoZone in 2008 alleging that despite an exemplary job performance, AutoZone demoted her from a store manager after she became pregnant and later fired her allegedly in retaliation for filing a complaint with the state's Department of Fair Employment and Housing. A jury awarded Juarez $870,000 in compensatory damages plus $185 million in punitive damages following Bohm's argument that jurors send a message to the corporation. *Juarez v. AutoZone Stores Inc.*, CV08-417 (S.D. Cal., filed March 5, 2008).

After the trial, attorneys for AutoZone accused Bohm and his colleagues of improper contact with jurors, including asking inadmissible questions, talking to a juror who was dismissed before the punitive damages phase of the trial and telling the jury not to talk to the defense after it delivered its verdict.

In court Wednesday, Gallo appeared persuaded by arguments made by Pritikin that jurors "could not unring the bell" of inadmissible questions Bohm directed toward them.

For example, Pritikin pointed out that Bohm asked questions about possible instances of AutoZone gender discrimination inflicted on other employees, though Gallo had not permitted such evidence in the trial.

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Litigation/Government

Reading and Writing
Los Angeles County Judge Ralph W. Dau takes meticulous notes and checks citations during arguments.
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Court reluctantly denies vet's request
A man's military record in Iraq and Kuwait should be enough to seal past crimes committed as a teenager, the 6th District Court of Appeal has ruled. But current law prevents it.
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Transactions

Wide Range
Before joining TaylorMade Golf, William Reimus went to medical school and practiced patent law.
Page 5

Dealmakers
Gibson, Dunn & Crutcher LLP represented Hewlett-Packard Co. in its $3 billion acquisition of Wi-Fi equipment maker Aruba Networks Inc. Aruba received counsel from Wilson Sonsini Goodrich & Rosati PC.
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Transactions/Perspective

Merging with the competition
A rare opinion addressing a merger challenge acknowledged the potential efficiencies created when competitors combine. By Howard Morse and David Burns
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Dodging CEQA
Several cities have sought to avoid or streamline the CEQA process to get stadiums built, and other projects could follow suit. By Amrit Kulkarni and Tim Cremin
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The most beneficent force... or the worst

By Robert G. Marasco

A colleague of mine recently left the private practice of law to be a prosecutor. I could not have been happier for him, because I worked as a prosecutor for five years and loved it for many reasons. It will likely end up being the best job I will ever have. My colleague's departure prompted me to think about the advice I would convey to newly minted prosecutors.

An Internet search provides a litany of tips and instruction regarding trial advocacy and techniques, but that is not the advice that's important. What matters is advice concerning the most critical aspect of being a prosecutor: How to handle the authority given to you.

I was surprised there is little to no discussion of that topic on the Internet given its significance, which makes it all the more important that it be broached. As said by Robert H. Jackson while he served as U.S. attorney general in an address to a U.S. attorneys conference in 1940, and who later served as an associate justice of the U.S. Supreme Court, "[t]he prosecutor has more control over life, liberty, and reputation than any other person in America. … While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst."

This encapsulates why it is imperative we provide guidance to our prosecutors about the manner in which they pursue justice.

To that end, I humbly offer some guidelines for prosecutors to keep in mind regarding the responsible employment of their authority, some of which are good life lessons as well.

(1) As a prosecutor, our society has entrusted you with the responsibility of upholding our system of justice and has given you enormous power with which to carry that out, only use that power to accomplish good.

(2) You are there to seek justice, not to win at all costs, not even to convict people. You are there to ensure justice is accomplished, in the right way for the right reasons. This includes always standing up for the right thing, even if the tide of sentiment rises against you (whether in the form of colleagues, law enforcement officers, a judge or public outcry).

(3) When faced with any decision, remember your touchstone principles — whatever it may be that emboldens you to do the right thing — whether being able to look yourself in the mirror, your parents in the face, or something similar, so you can proceed honorably.

(4) Correct any mistake openly and honestly. The cover up always makes the matter worse.

(5) Your decisions in each case will directly affect the lives of many people; never forget the significance of that.

These guidelines should be applied and instilled by all prosecutors to ensure the next generation of prosecutors continues the honest pursuit of justice. Mentorship is important in all lines of work, but it is especially critical to prosecutors because of the enormous authority they are given.

Some readers contrarily may wonder why these guidelines are not already practiced or in the minds of prosecutors. Sentiments like that miss the point. We should articulate and repeat the guidelines to ensure they are followed. Life experience certainly teaches that well-intentioned lessons can be forgotten — or worse, deliberately avoided — when not reinforced.

During my time as a prosecutor, I and many of my colleagues took great pride in our responsibilities and lived up to the idealistic standards we set for ourselves and each other. Nonetheless, while blessed to have worked alongside principled colleagues, I am not so naïve to think that good people cannot do bad things or let ambition get the better of them. In short, it is our responsibility to guide our prosecutors and continually remind them of the ideals we expect them to uphold in order to guard against such failings.

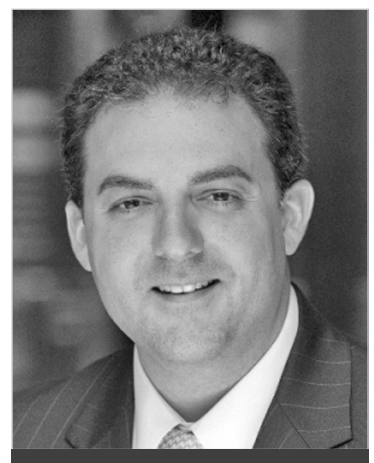
Perhaps it was Jackson who in his address best summarized the balancing necessary to ensure that justice, and not injustice, is accomplished: "A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility."

So, to all prosecutors, go forth in your pursuit of justice with these guidelines in the forefront of your minds. We will be making sure you live up to our expectations.

Robert G. Marasco *is former assistant U.S. attorney and is now an attorney with Procopio, Cory, Hargreaves & Savitch LLP.*

Associated Press

Robert H. Jackson, takes his oath from Associate Justice Stanley F. Reed, right, to be Attorney General, Jan. 18, 1940.



ROBERT MARASCO
Procopio

Justices should block backdoor natural gas regulation

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Emphasizing the states' strong interest in policing antitrust violations, the plaintiffs insist that FERC has no jurisdiction over antitrust claims tied to retail prices, which the NGA expressly excludes from federal regulation. But even though the alleged conduct affected both retail and wholesale rates, it still constitutes a practice that affects wholesale rates for preemption purposes. Under the Supreme Court's field-preemption precedents, the only relevant question is whether plaintiffs' state law claims are directed at conduct in the field that the NGA occupies — and they are. That is why the United States, representing FERC's regulatory interests, weighed in with a brief supporting ONEOK's preemption argument.

A finding of preemption would not deprive aggrieved purchasers of any remedy whatsoever. They are perfectly free to bring federal antitrust claims under the Clayton Act, albeit not for the windfall recovery amounts being sought here under state law. Such purchasers may also resort to FERC administrative proceedings to petition for refunds. In 2005, for example, FERC facilitated over $6.3 billion in settlements arising from claims of market manipulation during the California electricity crisis.

Of course, the plaintiffs' state law claims in *ONEOK* are chiefly motivated by a desire to take advantage of certain states' more generous antitrust damages remedies and their less well-developed and more plaintiff-friendly state court antitrust jurisprudence. While such state laws may rake in much higher jury awards, and thus higher fees for plaintiffs' attorneys, Congress has already determined that such laws are unnecessary to ensure a competitive market for interstate natural gas.

By permitting private plaintiffs to second guess FERC under the guise of state law civil suits, the 9th Circuit's rule would allow juries to reach judgments that differ from FERC's as to how to regulate the conduct of natural gas companies that affects wholesale rates. But if federal regulatory agencies are to perform the important expert functions assigned to them by Congress, they must have the ability to decide, free from hindrances imposed by state law, how best to regulate conduct in their given field of expertise. Allowing juries to award damages under potentially conflicting state laws would interfere with Congress' delicate balance of statutory objectives via a uniform federal regulatory scheme, including enforcement under federal antitrust law.

Otherwise, whether a state is permitted (under the supremacy clause) to regulate any given wholesale-market practice in the natural gas field would hinge on whether that practice can also plausibly be said to affect prices in the state's retail market. Because this approach turns primarily on the semantics of how broadly the issue is framed, a creative plaintiff's lawyer will easily be able to make the argument and find a suitable retail plaintiff in a wide range of cases. In other words, the 9th Circuit's preemption analysis turns not on any underlying legal principle, but merely on the amply demonstrated ability of the plaintiffs' bar to identify a suitable party plaintiff.

Natural gas is a fungible commodity widely distributed through a variety of distribution channels, and the interstate markets for natural gas are closely interrelated. It only takes a modicum of imagination to argue that virtually *anything* that happens in the wholesale market ultimately affects retail, end-use buyers. Plaintiffs' attorneys will have no trouble finding an economist who, for a fee, will gladly testify that the alleged industry practice in question — whether it be an accounting practice, shipping practice, or a price-reporting practice — impacts wholesale and retail rates alike.

> It only takes a modicum of imagination to argue that virtually *anything* that happens in the wholesale market ultimately affects retail, end-use buyers.

As here, a ready supply of potential plaintiffs will not prove difficult to find. Many large end-users of natural gas — including the respondents in this case — purchase their gas directly from the interstate market, so as to eliminate the costs that accompany a middleman distributor. Once an entrepreneurial plaintiff's attorney is successful in signing up direct retail purchasers as clients, suddenly a state law claim that would have been preempted for a wholesale purchaser becomes *not* preempted under the 9th Circuit's rule.

Armed with a suitable plaintiff and a plausible argument for affecting retail rates, the plaintiffs' bar will be able to use the 9th Circuit's rule to wrest regulatory control away from FERC on matters as technical as how a natural gas wholesaler accounts for depreciation, how it allocates costs of capital expenditures, or how it hedges against financial risk. If a plaintiff can plausibly argue that any of these practices affect retail rates, even by merely affecting a natural gas company's cost structure, then the 9th Circuit's rule will pave the way for the plaintiff to avoid preemption and impose state law duties on a federally regulated industry.

That cannot possibly be the result that Congress intended. Such technical regulatory issues are squarely within FERC's ambit, and only FERC has the necessary expertise and broad view of the market to regulate natural gas wholesalers intelligently and consistently. But if the 9th Circuit's approach to preemption stands, juries in state courts throughout the country will be empowered to decide whether any given practice — no matter how technical — is inappropriate and subject to liability.

Natural gas companies should not face further uncertainty because they cannot dependably rely on FERC's guidance about what they may and may not do. Nor should a single plaintiff's lawyer be permitted to trump FERC by deciding whether nationwide practices affecting the wholesale market — practices routinely engaged in by all or most of the natural gas industry — are permissible. Such uncertainty is the antithesis of the rule of law. Unless reversed by the Supreme Court, the 9th Circuit's decision will disrupt FERC's uniform regime by allowing attorneys motivated by outsized jury awards to create their own new, binding rules for the natural gas industry.

The Supreme Court probably will decide *ONEOK v. Learjet* within the next few weeks. The stakes for the natural gas industry are high. The NGA promotes uniformity, not random regulation by jury verdicts in 50 states. Permitting private plaintiffs to pursue state law antitrust remedies that second-guess FERC would create industry-wide chaos and an unnecessary drag on investment in a vibrant and growing sector of the economy.

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