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Kozinski Strikes Back

By Alex Kozinski

Last week in this space, Cyrus Sanai took up what was headlined as the "Kozinski Challenge" by purporting to show that the Ninth Circuit routinely ignores circuit and Supreme Court precedent in its published and unpublished opinions. According to Mr. Sanai, Ninth Circuit panels "silently dustbinned" inconvenient opinions, paid "lip service" to Supreme Court case law, vaulted "somersaults" in creating three lines of authority "none of which agree with each other," and adopted a rule that has "the 'absolute simplicity' of Joseph Heller's 'Catch-22.'"

Were this criticism justified, it would be an embarrassing illustration of judicial lawlessness. Fortunately, it isn't.

For reasons of his own, Mr. Sanai chose as the centerpiece of his article an arcane area of federal jurisdiction known as the *Rooker-Feldman* doctrine. This doctrine holds that district courts may not entertain lawsuits challenging the validity of state court judgments. Were it otherwise, district courts would effectively become appellate tribunals for state court decisions — a role reserved to the U.S. Supreme Court.

This much is clear. The closer question is what happens where the state courts conclusively resolve a federal issue in an interlocutory order. May the losing party challenge that order by bringing a federal action, or must it await review by writ of *certiorari* after final judgment? According to Mr. Sanai, we held in *H.C. ex rel. Gordon* v. *Koppel*, 203 F.3d 610 (9th Cir. 2000), that "*Rooker-Feldman* did not apply to ongoing state proceedings."

Not so. *H.C.* arose out of a state court order transferring temporary custody from mother to father. The mother then brought a federal lawsuit seeking to enjoin the state judge from enforcing his order. The district court dismissed on *Rooker-Feldman* grounds and the mother appealed.

Our opinion considered both *Rooker-Feldman* and *Younger* abstention, and affirmed on the basis of *Younger*. As to *Rooker-Feldman*, the opinion did not hold (as Mr. Sanai imagines) that the doctrine never applies to orders entered in the course of ongoing state litigation. *H.C.* merely found that, because temporary custody could change during the course of the litigation, "there is no final state judgment *or order* to which the *Rooker-Feldman* doctrine might relate and *we need not reach the question of the doctrine's applicability to this action.*" *Id.* at 613 (emphasis added). *H.C.* expressly left open whether *Rooker-Feldman* applies to an interlocutory order that finally resolves the federal issue: "Nor are we asked to review a final state judgment of an order of an interlocutory nature." *Id.*

Doe & Associates Law Offices v. *Napolitano*, 252 F.3d 1026 (9th Cir. 2001), reached this question. At issue in *Napolitano* was a grand jury subpoena seeking client records from a law firm. The firm unsuccessfully petitioned the state court to quash the subpoena, then brought a federal lawsuit seeking to enjoin its enforcement. The district court eventually dismissed on *Rooker-Feldman* grounds.

Napolitano thus confronted the question left open in *H.C.*: Does *Rooker-Feldman* bar a federal lawsuit challenging a state-court order that conclusively resolves an issue, even though the litigation continues as to other issues? *Napolitano* held that such a federal lawsuit is barred by *Rooker-Feldman*. One might disagree, as Mr. Sanai clearly does, but his claim that *Napolitano* "dustbinned" *H.C.* is unsupported.

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***Alex Kozinski** is a judge on the Ninth Circuit U.S. Court of Appeals.*

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Mr. Sanai next claims that *Napolitano* was overruled by *Exxon Mobil Corp.* v. *Saudi Basic Industries Corp.*, 125 S. Ct. 1517 (2005), yet we stubbornly refused to acknowledge this in *Mothershed* v. *Justices of the Supreme Court*, 410 F.3d 602 (9th Cir. 2005). But *Exxon Mobil* did not address the issue resolved by *Napolitano* — whether *Rooker-Feldman* applies to interlocutory but final state court orders. The question in *Exxon Mobil* was whether *Rooker-Feldman* bars federal lawsuits brought before the state courts have adjudicated the federal question.

Mothershed did not rely on *Napolitano* and so had no reason to decide whether *Napolitano* was affected by *Exxon Mobil*. Rather, *Mothershed* found *Exxon Mobil* inapplicable because the state courts in *Mothershed* had conclusively resolved the federal issues before the federal lawsuit was brought. Is this the only plausible reading of *Exxon Mobil*? Perhaps not — though I believe it's a fair reading. Certainly, however, Mr. Sanai's claim that *Mothershed* paid mere "lip service" to *Exxon Mobil* is seriously overstated. All that can fairly be said about *Mothershed* is that it selected one permissible interpretation of a Supreme Court opinion that was not directly on point.

Mr. Sanai's claim that our *Rooker-Feldman* jurisprudence is in hopeless disarray is especially off the mark because this is an area where we have been vigilant in maintaining consistency. This is due in no small part to the fact that our colleague, Judge William Fletcher, is not merely one of the great minds of the federal judiciary, but a federal courts professor and a recognized authority on *Rooker-Feldman*. Judge Fletcher can be a bit of a nudge in prodding us to interpret *Rooker-Feldman* correctly, and so three years before the Supreme Court decided *Exxon Mobil*, our court took *en banc* *Ahmed* v. *Washington*, 276 F.3d 464 (9th Cir. 2001), where a panel had committed the very error the Supreme Court eventually corrected in *Exxon Mobil*. Though the parties settled, rendering the appeal moot, the *en banc* panel vacated the incorrect panel opinion, keeping our case law out of harm's way when the Supreme Court unanimously reversed other circuits in *Exxon Mobil*.

Despite his colorful language, Mr. Sanai's article raises no legitimate question about whether the Ninth Circuit has been derelict in following circuit or Supreme Court precedent. But the article does raise serious issues of a different sort. Mr. Sanai's article urges us to "grant *en banc* rehearing of the next decision, published or unpublished, which asks the court to resolve the split among *H.C.*, *Napolitano* and *Mothershed*." A petition for *en banc* rehearing raising this very issue crossed my desk just as Mr. Sanai's article appeared in print. The name of the case? *Sanai* v. *Sanai*. A mere coincidence of names? Not hardly. The petition, signed by Mr. Sanai, cites the same cases and makes the same arguments as his article — including the reference to "Catch-22."

Mr. Sanai's byline modestly lists him as "an attorney with Buchalter Nemer in Los Angeles." The firm's Web site identifies him as "a Senior Counsel and English solicitor ... [whose] practice focuses on project finance, corporate finance and business transactions, with a particular expertise in international finance transactions." The careful reader would therefore have no cause to doubt that Mr. Sanai is a disinterested observer of this court's *Rooker-Feldman* jurisprudence. Nothing alerts the reader to the fact that Mr. Sanai has been trying for years to get the federal courts to intervene in his family's state-court dispute, an effort referred to by a highly respected district judge as "an indescribable abuse of the legal process, ... the most abusive and obstructive litigation tactics this court has ever encountered. ..." Nor would the reader — unless he happened to enter Mr. Sanai's name in the Westlaw CTA9-ALL database — realize that, as part of the same imbroglio, he and certain members of his family have hounded a state trial judge off their case (see http://tinyurl.com/dqh4q); been held in contempt and sanctioned under 28 U.S.C. §1927; and had their *ninth* sortie to our court in the same case designated as "frivolous" and "an improper dilatory tactic" by the district court. A detached observer, Mr. Sanai is not.

By failing to disclose his long-standing, active and abiding interest in the legal issue he discusses in his article, Mr. Sanai has done the reading public a disservice, cloaking his analysis with a varnish of objectivity. Worse, by publishing the article while he had a case raising this precise issue, Mr. Sanai used *The Recorder* to call unfair attention to his petition for rehearing, to the detriment of opposing parties who limited their advocacy to the briefs. And, by gratuitously drawing my name repeatedly into the controversy, he has also managed to disqualify me from participation in his case, skewing the *en banc* voting process.

Whether our court is diligent in applying circuit law and faithful to Supreme Court precedent are issues that deserve public attention. Contrary to Mr. Sanai's bold assertion, I have never claimed that intra-circuit conflicts never arise, and my colleagues and I welcome legitimate efforts to tell us when our circuit law needs mending. It is important, however, to draw a clear line between case advocacy and objective public debate. This Mr. Sanai has neglected to do.