There'll Always Be Posner: Thumbs Up on Preemption

Monday, October 24, 2011

The New Yorker's current issue has a fine article on Pauline Kael. The weekend **Wall Street Journal** had a similar piece. Why the wall-to-Wall Street coverage of a film critic who wrote reviews from 1953 to 1991 and died in 2001? Two reasons: (1) the Library of America is coming out with a collection of Kael's reviews -- it's called "The Age of Movies," and that title says something about Kael's preeminence; and (2) there's a new biography by Brian Kellow -- "Pauline Kael: A Life in the Dark."

All of this reminded us of how excited we were back in the 70's and 80's every week to pull a copy of **The New Yorker** out of the mailbox and flip to Kael's latest review. Her opinions mattered and she made movies matter. She dismantled silly critical systems (her attack on Andrew Sarris's auteur theory spills as much blood as ink on the page) and demolished fatuous high-culture/low culture distinctions (Kael and John Simon had some nasty exchanges). There's no doubt that Kael could be inconsistent and overwrought. Her famous review of the Italian neo-realist classic "Shoeshine" was as much about her personal romantic travails as about the movie. Kael wrote some incendiary, almost nutty things, comparing the premiere of "Last Tango in Paris" to the first perfomance of Stravinsky's "Rites of Spring," denigrating "Chinatown" for celebrating nostalgia "openly turned to rot," and praising Brian DePalma incessantly, even for possessing a "gassy, original comic temperament."

If one goes back and reads Kael's reviews, they can come across as artifacts of a culture war that ended long ago, where nobody won. Her prose was incandescent -- illuminating, politically incorrect, and done. **The New Yorker** article says that Kael's followers (critics like Edelstein and Denby have been called "Paulettes") and fans simply had faith that Kael's judgment was right. Think of Aristotle's "Rhetoric" and its tripartite analysis of what makes someone persuasive: Kael won us over not as much by *logos* (logic), or *pathos* (emotional appeal), as by *ethos* (the audience's sense of the inherent excellence of the speaker). Few readers knew Kael personally, so it was the power of her prose itself that convinced us of Kael's superiority. In fact, Kael is one of the very few writers whose every fresh word would reliably command our attention, change our minds, and make us want to fling our pens or keyboards in despair because somebody else out there wrote miles better than we ever could.

Another such writer, as you have likely guessed from the title of this post, is Judge Posner. His writing matters rather more to us than that of a film critic. We merely watch movies; we *practice* law. Thinking about Kael's opinions prompted us to think some more on why Posner's opinions are compelling. He, too, is bigger than any single system or theory. His writing is concrete and confident. (We read recently that interviews with jurors showed that the single attribute that made them credit witnesses was conspicuous confidence. It's easy to trust someone when it's clear that they trust themselves.) It's also true that Posner's opinions persuade on a level beyond pure logic. Indeed, we espy as much *ethos* as *logos* or *pathos* working on behalf of a Posner opinion.

The recent opinion in *Turek v. General Mills, Inc*., No. 10-3267 (7th Cir. October 17, 2011), is an example. There is no doubt it's a Posner opinion. It begins with an observation that both the parties and the lower court flubbed important matters of jurisdiction and class action procedure. It ends with a refusal even to address some of the plaintiff's arguments because they are so frivolous or unintelligible. We see this again and again in Posner's opinions. It may be that he does this just because these sorts of mistakes are more common than we'd like to admit, and because it's important that they be addressed. Maybe advocates will do a better job for fear of a judicial skewering. After all, if you had a case in front of Posner, wouldn't you prepare extra hard? But we can't help but think that Posner is also marking territory with these rhetorical maneuvers. It's as if he's saying, before the argument and at its close, something like, 'Now, you all understand who I am, right? And that I'm much. much smarter than anyone else in the room, right?' Yes. Yes, we understand that.

Turek is a food case, not a drug or device case. But Posner's treatment of the preemption issue has relevance for us. He discusses preemption in clear, concrete terms, and it makes us forget for a moment how tortuous the issue can seem in so many cases. And when it's Posner doing it, it convinces us that the issue really is simple. And, oh, by the way, the defendant wins.

The plaintiff in *Turek* complained that advertisements for chewy bars misleadingly claimed that the bars supplied "35% of your daily fiber." That claim was allegedly misleading because the principal fiber, by weight, was inulin extracted from chicory root. According to the plaintiff, inulin extracted from chicory root is less beneficial and less "natural" than fiber one gets from eating bananas, onions, and other vegetables. Hmmm. Isn't chicory root also natural? As Posner reasons, the complaint attempts to state a "garden variety consumer protection claim." Slip op.

at 5. That garden variety claim is preempted by the Food, Drug, and Cosmetic Act, which forbids states from imposing any requirement in food labeling that is not "identical" to the federal act. Thus, the only way for the plaintiff's claim to survive is if state law (here, Illinois) imposes a requirement identical to federal law. It has to be state law, because the FDCA provides no private right of action.

This is all familiar stuff for drug-and-device-law fanboys and fangirls, isn't it? It sounds like the parallel violation exception discussed by some courts analyzing federal preemption issues. We used the word "discussed" but too often the correct word is "butchered." We can think of no worse mangling of preemption and parallel violations than the misbegotten opinion in *Bausch*, which we wept over here and many other places. *Bausch* is a Seventh Circuit opinion. Posner was not on the panel. We cannot believe that the *Bausch* opinion, which is bereft of *logos*, *ethos*, *pathos*, or common sense, could have survived Posner's scrutiny. *Bausch* is *bathos*.

Turek shows why. Rather than mooning over whether some clause or comma in the FDCA might support the plaintiff's argument that consumers shouldn't suffer the inferiority of chicory fiber (assuming any such inferiority exists -- and we don't even if the court must), Posner concludes that the issue is quite simple: are any of the plaintiff's proposed disclaimers about chicory fiber found in "identical" form in the federal law? They are not. "[C]onsistency is not the test; identity is." Slip op. at 7-8. Simplicity itself. Why is such simplicity, to say nothing of clarity, almost never found in preemption opinions?

And then Posner adds "icing on the cake." *Id*. at 8. The Illinois Consumer Fraud and Deceptive Business Practices Act does not apply to "actions or transactions specifically authorized by laws administered by any regulatory body or officer acting under statutory authority of this State or the United States." 815 ILCS 505/10b(1). The labeling of the chewy bars was all specifically authorized by federal law. The plaintiff bit off more than she could chew. (And courts like *Bausch*, which strain to find a parallel action, chew more than they bite off.) Will we surprise you when we say that some courts purporting to do a preemption and parallel violation analysis, where the issue supposedly is whether state law parallels federal law, end up so exhausted teasing some sort of requirement out of federal law that they actually forget to see whether state law supports the claim?

We don't insist in happy endings in movies, but we do in judicial opinions. For some reason,

we are reminded of Kael's review of "Funny Girl," and how she described the end of the movie as a "gorgeous piece of showing off, that makes one intensely, brilliantly aware of the star as performer" and of the star's "pride in performance: The pride is justified."

We're not comparing the Seventh Circuit to Ziegfeld's Follies. Reading a judicial opinion on a computer monitor isn't quite like sitting in the dark and watching a performance. But, yeah, we like Posner's opinion.