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Legal Sidebar

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (Nov. 15–Nov. 21, 2021)

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The federal courts issue hundreds of decisions every week in cases involving diverse legal disputes. This Sidebar series selects decisions from the past week that may be of particular interest to federal lawmakers, focusing on the orders and decisions of the Supreme Court and precedential decisions of the courts of appeals for the thirteen federal circuits. Selected cases typically involve the interpretation or validity of federal statutes and regulations, or constitutional issues relevant to Congress's lawmaking and oversight functions.

Some of the cases identified in this Sidebar, or the legal questions they address, are examined in other CRS general distribution products. Members of Congress and congressional staff may contact the authors to subscribe to the *CRS Legal Update* newsletter and receive regular notifications of new products published by CRS attorneys.

Decisions of the Supreme Court

Last week, the Supreme Court added one case to its docket:

- **Arbitration:** The Supreme Court granted certiorari in a case from the Eighth Circuit, in which the Court may consider differences in the courts of appeals' approach to the question of when a party waives the right to compel arbitration. The Court may consider whether the standard for determining if a litigating party has waived its arbitration rights is the same as used to assess waivers of other contractual rights, or whether a court may also consider whether the party opposing arbitration will be prejudiced if forced to arbitrate *(Morgan v. Sundance, Inc.*).

Decisions of the U.S. Courts of Appeals

- **Bankruptcy:** The Bankruptcy Code's "automatic stay" provision, 11 U.S.C. § 362(a), prevents an entity from commencing or continuing judicial or other proceedings that

could have been filed prior to the debtor's bankruptcy petition, except in specified cases or unless the bankruptcy court lifts the stay. The Eleventh Circuit held that this provision may preclude a party from intervening in a wrongful death civil suit maintained against the debtor unless the stay is lifted by the bankruptcy court (*State Farm Florida Insurance Co. v. Carapella*).

- **Civil Procedure:** The McCarran-Ferguson Act generally provides that federal laws should not "be construed to invalidate, impair, or supersede" state laws regulating the insurance industry. In an insurance dispute arising under state law, the Sixth Circuit joined several other circuits in holding that the Act does not "reverse preempt" the federal diversity jurisdiction statute, which confers jurisdiction on federal courts over state law disputes where the amount in controversy exceeds $75,000 and no plaintiff shares the same state of citizenship as a defendant. The court also held that the Act does not preclude federal appellate courts' ability to hear interlocutory appeals in insurance-related lawsuits (*William Powell Co. v. National Indemnity Co.*).
- **Civil Rights:** The Age Discrimination in Employment Act (ADEA) bars age-based discrimination against workers more than 40 years of age, with slightly different rules for federal and nonfederal workers. Affirming the lower court's dismissal of the plaintiff's ADEA challenge to her federal employer's physical fitness requirements, a divided Fourth Circuit broke with at least two other circuits and held that the ADEA's federal-sector provision, 29 U.S.C. § 633a(a), requires a worker to establish a discriminatory intent behind a challenged employment practice, regardless of any disparate impact the practice may have on workers older than 40. The panel majority distinguished the text, structure, and context of § 633a(a) from the ADEA's provision for nonfederal workers, which sometimes allows disparate impact claims. The circuit remanded the case to the lower court to consider plaintiff's other, non-ADEA claims (*DiCocco v. Garland*).
- **Civil Rights:** The Ninth Circuit affirmed a district court's judgment dismissing various claims brought by the plaintiff against the Secretary of the Army, including a claim for payment of a sanctions award imposed by the Equal Employment Opportunity Commission (EEOC) because of the Army's violation of discovery obligations during administrative proceedings. The circuit court held, among other things, that the only statute plaintiff relied upon to enforce the monetary litigation sanctions award, Section 15 of the ADEA, 29 U.S.C. § 633a, did not provide a necessarily clear waiver of the government's sovereign immunity against monetary litigation sanctions (*Plaskett v. Wormuth*).
- **Education:** A divided Ninth Circuit, sitting en banc, upheld the district court's dismissal of plaintiff's action under the Americans with Disabilities Act. The action was premised on plaintiff's school's failure to provide him with certain services and resources under the Individuals with Disabilities Education Act (IDEA). The circuit court held that dismissal was proper because the plaintiff failed to exhaust his administrative remedies under IDEA. In so doing, the en banc majority reaffirmed its earlier decision that a plaintiff is not freed from IDEA's exhaustion requirements simply because the plaintiff's complaint seeks money damages not available under IDEA (*D.D. v. Los Angeles Unified School District*).
- **Election Law:** The Fourth Circuit affirmed a district court's rejection of constitutional challenges to a Maryland statute, which authorized a list of Maryland registered voters to be provided to an applicant upon attestation that the list would only be used for purposes "related to the electoral process." The circuit court held that the attestation requirement withstood plaintiff's as-applied and facial challenge under the First Amendment's Free

Speech Clause. Employing a balancing test, the court decided that the modest, viewpoint-neutral burden imposed on those required to attest they would use the list only for electoral purposes was outweighed by Maryland's interest in safeguarding the list, protecting the election system, and shielding registered voters from harassment. The court also concluded the list's use limitations were not unconstitutionally vague (*Fusaro v. Howard*).

- **Environmental Law:** The National Marine Fisheries Service issued a rule, pursuant to the Endangered Species Act (ESA) and the Marine Mammal Protection Act (MMPA), imposing a seasonal bar on the use of certain lobstering techniques off the Maine coast to reduce the risk posed to the endangered North Atlantic right whale. The First Circuit stayed a district court's preliminary injunction of the rule, allowing it to go into effect while the circuit court considered the merits of plaintiff's challenge. The circuit court concluded that the Service would likely succeed in its argument that the whale distribution model used in the formulation of the rule was not arbitrary and capricious. The court also held that leaving the injunction in effect during the litigation would cause irreparable harm by preventing the Service from undertaking its congressionally prescribed task of assuring that endangered marine mammals are protected (*District 4 Lodge of the Int'l Ass'n v. Raimondo*).
- **Environmental Law:** The First Circuit upheld a district court's summary judgment in favor of the United States in a suit under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The United States had sought to recoup cleanup costs associated with hazardous substances found in groundwater from the defendant's facility. The circuit court reaffirmed that, as the owner of the facility, the defendant was strictly liable for the release of hazardous substances from that facility under CERCLA § 107(a). The court also held that a covered release of hazardous substances may include the passive migration of contaminated groundwater into the surrounding environment. Finally, the Court upheld the remedial action that the United States chose for the site (*United States v. Puerto Rico Indus. Dev. Co.*).
- **Environmental Law:** The Forest Service issued the "Roadless Rule" in 2001 generally prohibiting road construction and timber harvesting in inventoried roadless areas of the national forest system. After protracted litigation, the Forest Service issued a final rule exempting the Tongass National Forest, which covers vast portions of Alaska, from the Roadless Rule in 2020. The D.C. Circuit concluded that Alaska's challenge to the Roadless Rule, which focused entirely on the Rule's application to the Tongass National Forest, was rendered moot by the 2020 exemption, notwithstanding Alaska's arguments that a live dispute remained (*Alaska v. U.S. Dep't of Agriculture*).
- **Health:** On remand from the Supreme Court, the Eighth Circuit considered a challenge to provisions in North Dakota law regulating pharmacy benefits managers (PBMs) who manage prescription-drug benefits on behalf of health insurance plans. The circuit court largely affirmed the district court's judgment that several of the challenged provisions were not preempted by either the Employee Retirement Income Security Act (ERISA) or Medicare Part D. While much of the court's analysis turned on the specific provisions at issue, the court also made broader pronouncements on the preemptive effect of these federal laws. Among other things, the circuit court decided (1) recent Supreme Court jurisprudence counseled not invoking a presumption against preemption when interpreting the express preemption provisions of ERISA and Medicare Part D; and (2) state laws are preempted as applied to Medicare Part D plans only if they either (a) are expressly preempted by the federal Medicare Part D statute or regulation on account of regulating the same subject matter or (b) despite not regulating the same

subject matter, are impliedly preempted because they frustrate the purpose of a federal Medicare Part D standard (*Pharmaceutical Care Management Ass'n v. Wehbi*).

- **Labor and Employment:** A collective bargaining agreement (CBA) between an employer and union to arbitrate disputes over the terms and conditions of employment is enforceable in federal court under the Labor Management Relations Act (LMRA). The Third Circuit held that the LMRA permits a district court to compel joint arbitration between an employer and two separate labor unions that have their own CBA with the employer. Siding with the majority of courts in a circuit split, a divided panel further held that joint arbitration is generally available either before or after a bipartite arbitration award at issue becomes final. Still, the panel concluded that in the present case, the district court did not abuse its discretion by denying a motion to compel joint arbitration made by two, nominally separate companies, because they had not demonstrated a sufficient nexus between each company's CBA with the respective union (*P&A Construction Inc. v. Int'l Union of Operating Engineers*).
- **Maritime Law:** In a suit arising from the extended detention of plaintiff's shipping vessel at a U.S. port, the Third Circuit reversed the district court's ruling that it lacked subject-matter jurisdiction over the case. The circuit court joined another circuit in concluding that Congress explicitly waived the government's sovereign immunity for monetary damage suits arising under the Act to Prevent Pollution from Ships (APPS), providing the lower court with jurisdiction over the plaintiff's APPS-based claims. Jurisdiction also existed over the plaintiff's breach of contract claim against the government, because the surety agreement the government allegedly breached in detaining the vessel was a maritime contract over which the federal courts could exercise admiralty jurisdiction (*Nederland Shipping Corp. v. United States*).
- **Procurement:** The Federal Acquisition Regulation (FAR) generally applies to acquisitions by executive branch agencies. Part 52.212-4, allows for a termination for convenience clause in certain government contracts. The Federal Circuit held, among other things, that FAR 52.212-4 governs the termination of commercial item contracts for the government's convenience, but not service contracts like the one at issue in the case before the court (*JKB Solutions & Services, LLC, v. United States*).

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