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Legal Sidebar

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (July 11–July 17, 2022)

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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 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 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 click here to subscribe to the *CRS Legal Update* and receive regular notifications of new products and upcoming seminars by CRS attorneys.

Decisions of the Supreme Court

No Supreme Court opinions or grants of certiorari were issued this week. The Supreme Court's next term is to begin October 3, 2022.

Decisions of the U.S. Courts of Appeals

Topic headings marked with an asterisk (*) indicate cases in which the appellate court's controlling opinion recognizes a split among the federal appellate courts on a key legal issue resolved in the opinion, contributing to a non-uniform application of the law among the circuits.

- ***Civil Procedure:** The Sixth Circuit added to a circuit split over the application of Racketeer Influenced and Corrupt Organizations (RICO) Act provisions governing service of process on and conferral of personal jurisdiction over out-of-state defendants. Joining the majority view, the Sixth Circuit held that 18 U.S.C. § 1965(b) governs service to out-of-district defendants. The statute requires at least one defendant to have minimum

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contacts with the forum state (i.e., the state where the district court is located) and extends personal jurisdiction to an out-of-district defendant if the ends of justice require it. The circuit court rejected the more expansive, minority view that 18 U.S.C. § 1965(d) allows for service upon, and confers personal jurisdiction over, any out-of-state defendant with aggregate contacts with the United States as a whole rather than with the particular forum state. The court concluded that § 1965(d) is nonjurisdictional in nature, and only allows for the service of process other than a summons or subpoena (e.g., notifying an out-of-state defendant of an injunction or civil contempt order) once jurisdiction over a party has already been established (*Peters Broadcast Engineering, Inc. v. 24 Capital, LLC*).

- **Communications:** In a case pertaining to Section 317 of the Communications Act, which requires radio broadcasters to announce who "paid for or furnished" sponsored programs, the D.C. Circuit vacated a portion of a Federal Communications Commission (FCC) regulation requiring radio broadcasters to check sponsors against Department of Justice and FCC sources of information regarding foreign agents and organizations. The Communications Act requires broadcasters to exercise reasonable diligence to obtain sponsorship information from employees and from other persons with whom it deals directly in connection with the program, and the court ruled that a broadcaster's duty to inquire is limited to the sources specified in the statute (*Nat'l Ass'n of Broads. v. FCC*).
- **Consumer Protection:** In a matter involving the Truth in Lending Act (TILA), which gives borrowers the right to rescind certain transactions in the event that a creditor fails to disclose certain information, the Fourth Circuit held that a creditor's failure to fully comply with its procedural obligations under TILA § 1635(b) following a borrower's rescission notice did not support the lower court's judgment. The circuit court vacated the district court's judgment that the creditor had forfeited its right to loan proceeds already paid and held that the borrower was obligated to return those proceeds to complete the rescission (*Lavis v. Reverse Mortgage Solutions, Inc.*).
- ***Criminal Law & Procedure:** The Eighth Circuit split with another circuit over the meaning of 18 U.S.C. § 3553(f), the "safety valve" exception for mandatory minimum sentences available for certain drug trafficking and unlawful possession offenses. Section 3553(f), as amended by the First Step Act, provides that the exception may apply to persons convicted of covered offenses who do "not have: (A) more than 4 criminal history points . . . ; (B) a prior 3-point offense . . . ; and (C) a prior 2-point offense . . . ." The Eighth Circuit held that the word "and" between subsections (B) and (C) should be read distributively, so that defendants are ineligible if they fail *any* of the three conditions. The court rejected the Ninth Circuit's interpretation under which defendants are eligible so long as they do not meet *all* three conditions (*United States v. Pulsifer*).
- **Environmental Law:** The First Circuit vacated a district court's preliminary injunction that would have halted a National Marine Fisheries Service rule imposing a seasonal bar on certain lobstering techniques off the Maine coast. (The circuit court had already stayed the injunction in 2021 pending this appeal.) The First Circuit held that plaintiffs were unlikely to succeed in their arguments that the Fisheries Service did not adequately consider alternative means of regulation and overestimated the threat that the lobstering techniques posed to the endangered North American right whale (*Dist. 4. Lodge of the Int'l Ass'n of Machinists & Aerospace Workers, Loc. Lodge 207 v. Raimondo*). (In a separate case, a district court recently ruled that the Service did not sufficiently account for the threat to right whales, but has not yet decided the appropriate remedy.)

- **Environmental Law:** Reversing the district court, the Eleventh Circuit held that a plaintiff's state law failure-to-warn claim concerning the alleged carcinogenic effect of the herbicide Roundup was not preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) or Environmental Protection Agency (EPA) actions taken pursuant to FIFRA. The court determined that the state law claim imposed an equal or lesser duty than FIFRA's labeling provisions, and thus was not preempted under FIFRA's uniformity statute (7 U.S.C. § 136v(b)). The court also ruled that neither the EPA's registration of Roundup nor EPA statements that Roundup's primary ingredient is unlikely to cause cancer carried the force of law necessary for preemption (*Carson v. Monsanto Co.*).
- **Immigration:** Sitting en banc, a divided Ninth Circuit held that defects in the Notice to Appear (NTA) used to initiate removal proceedings against an alien did not deprive the immigration court of subject-matter jurisdiction to effectuate the alien's removal, after the NTA's defects were cured by a subsequent notice. Joining other circuits, the en banc majority ruled that a regulation (8 C.F.R. § 1003.14) purporting to condition immigration courts' "jurisdiction" on the filing of an NTA uses "jurisdiction" colloquially. The majority ruled that the regulation sets forth a claim-processing rule, laying out the steps that must be taken in the removal process, but does not implicate immigration courts' adjudicatory authority, which is governed by statute (*United States v. Bastide-Hernandez*).
- **Immigration:** The Tenth Circuit struck down 8 U.S.C. § 1324(a)(1)(A)(iv), which makes it a criminal offense to "encourage or induce" an alien to enter or reside in the United States unlawfully, as overbroad under the First Amendment. (The Ninth Circuit made a similar ruling earlier in 2022.) The Tenth Circuit agreed with the government that certain conduct falling under the provision is not protected speech under the First Amendment, but concluded that the provision also swept in a substantial amount of protected speech, such as expressing a desire for an unlawfully present alien to remain in the country. The court therefore struck the provision down as overbroad, reasoning that the statute reached a substantial amount of constitutionally protected speech (*United States v. Hernandez-Calvillo*).
- **International Law:** The Fifth Circuit considered the specificity of a provision of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1610(d), which allows for the prejudgment attachment of a foreign state's property if the foreign state has "explicitly waived" immunity. The court held that such a waiver must be express, clear, and unambiguous. Here, the court concluded that an explicit waiver was not given for prejudgment attachment when a foreign government agency entered a contract with a private company that included an arbitration clause waiving the agency's immunity from suit, but where the clause did not expressly waive the prejudgment attachment of the agency's property (*Preble-Rish Haiti, S.A. v. Republic of Haiti*).
- **Securities:** The First Circuit held that § 1514A of the Sarbanes-Oxley Act, which provides whistleblower protections to those who report violations of certain statutes and "any rule or regulation of the Securities and Exchange Commission [SEC]," did not cover claims related to the Foreign Corrupt Practices Act (FCPA). The circuit court held that § 1514A did not cover the FCPA because it was not a "rule or regulation" promulgated by the SEC, but a statutory enactment of Congress (*Baker v. Smith & Wesson, Inc.*).
- **Securities:** The Second Circuit held that misstatements and omissions alone cannot form the basis for scheme liability pursuant to SEC Rule 10b-5(a) and (c), 17 C.F.R. § 240.10b-5, or Section 17(a)(1) and (3) of the Securities Act of 1933, 15 U.S.C. § 77q.

- The court rejected the SEC's argument that Second Circuit precedent reaching this conclusion was abrogated by the Supreme Court's ruling in *Lorenzo v. SEC* that an individual who disseminated, but did not make, a false statement could be liable under the scheme provisions. The Second Circuit determined that failing to prevent misleading statements from being disseminated by others remains insufficient to support scheme liability (*SEC v. Rio Tinto PLC*).
- ***Torts:** In a matter addressing a provision of the Equal Access to Justice Act, 28 U.S.C. § 2412(b), which provides that the United States shall be liable for "fees and expenses to the same extent that any other party would be liable . . . under the terms of any statute which specifically provides for such an award," the Tenth Circuit interpreted "any statute" as including state statutes. The circuit ruled that the reference unambiguously applies to both federal *and state* statutes authorizing recovery of such fees and expenses, rather than just a subset of federal statutes as the federal government argued and as had been recognized by other circuits (*Nelson v. United States*).

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