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Legal Sidebar

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (August 1–August 7, 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 begins 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.

- **Arbitration:** The Ninth Circuit became the latest circuit court to interpret broadly the jurisdictional provision of Section 203 of the Federal Arbitration Act (FAA). The court ruled that petitions to enforce arbitral summonses are proceedings "falling under" the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, even if such proceedings are not explicitly listed in the Convention. The court found

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support for its decision in dictionary definitions of "falling under" at the time Congress enacted Section 203, as well as the structure and purpose of both the Convention and the FAA (*Jones Day v. Orrick, Herrington & Sutcliffe, LLP*).

- **Bankruptcy:** The Ninth Circuit held that a disbarred attorney-debtor's obligation to reimburse the California State Bar for payments made by the Client Security Fund to his wronged clients was not dischargeable under 11 U.S.C. § 523(a)(7). The court reasoned that § 523(a)(7) provides for the discharge of fines, penalties, or forfeitures payable to and for the benefit of a governmental unit; the section does not permit discharge where a debt constitutes compensation for actual pecuniary costs. Under California law, the court further reasoned, the purpose of the Client Security Fund is to relieve or mitigate pecuniary losses caused by attorneys; an attorney must reimburse the fund for moneys paid out; and the state bar has a right of subrogation, meaning that it steps into the shoes of the aggrieved party (*Kassas v. State Bar of California*).
- **Civil Procedure:** In a "mass action" case brought by more than 400 pharmacies against a pharmaceutical benefits company under state law, the Third Circuit found the federal district court had jurisdiction and remanded the case for further proceedings. Class action lawsuits alleging violations of state law generally must be brought first in state court, though such suits may be removable to federal district court if certain criteria are met. The Third Circuit considered whether the Class Action Fairness Act of 2005 (CAFA) has an exception for mass actions, allowing them to be initially filed in federal district court. The Third Circuit agreed with other circuit courts that criticized CAFA as opaquely drafted, particularly in the statute's use of internal cross-references. Still, it held that the best reading of CAFA gave federal district courts original jurisdiction over mass actions that have characteristics set forth in 28 U.S.C. § 1332(d)(2)–(10), which describe class actions removable to federal court. In the present case, the circuit court ruled that the factors set forth in § 1332(d)(2)–(10) had been satisfied and that the federal district court could permit discovery regarding an issue in dispute (*Robert D. Mabe, Inc. v. OptumRx*).
- ***Civil Rights:** A Fifth Circuit panel affirmed a district court's dismissal of employees' challenge to a gender-based scheduling policy, reluctantly concluding the employees failed to state a viable claim under Title VII of the Civil Rights Act. The panel said it was bound by circuit precedent requiring that employees allege an adverse employment action, which had not happened here. The panel suggested that this precedent was not the best reading of Title VII, and noted that it conflicted with other circuits that recognized Title VII claims challenging discrimination in the terms and conditions of employment, including shift assignments. Still, the panel ruled it was bound by circuit precedent until it is superseded by statute or overruled by either the en banc Fifth Circuit or the Supreme Court (*Hamilton v. Dallas Cnty.*).
- **Consumer Protection:** The D.C. Circuit ruled that the Consumer Product Safety Commission (CPSC) had statutory authority to issue a final rule setting mandatory safety standards for all infant sleep products, including those that had been unregulated under Section 104(b) of the Consumer Product Safety Improvement Act. The court held the Act authorized the CPSC to extend a safety standard to previously unregulated products (*Finbinn, LLC v. Consumer Product Safety Comm'n*).
- **Criminal Law & Procedure:** The Second Circuit allowed a petitioner's extradition to South Korea to proceed after he invoked the extradition treaty's "lapse of time" provision, which permits extradition to be denied where the statute of limitations in the requested state had run. The court joined other circuits in ruling that lapse of time provisions in extradition treaties set forth a discretionary factor for the Secretary of State

to consider in deciding whether to extradite, not a mandatory determination for a court to make before certifying extradition (*Yoo v. United States*).

- **Criminal Law & Procedure:** Joining other circuits, the Seventh Circuit rejected a Commerce Clause challenge to a criminal conviction under the federal arson statute, 18 U.S.C. § 844(i). Applying the Supreme Court's four-factor framework from *United States v. Morrison*, the court ruled that the arson statute falls within Congress's authority to regulate interstate commerce (*United States v. Johnson*).
- **Criminal Law & Procedure:** In a divided opinion, the D.C. Circuit reversed a district court holding that a member of the Fleet Marine Corps Reserve was not subject to court-martial jurisdiction. The court held that Congress's statutory grant of military jurisdiction over Fleet Marine Reservists comports with the Constitution's Make Rules Clause because those reservists have a formal relationship with the armed forces that includes a duty to obey military orders. The court further ruled that the Fifth Amendment's Grand Jury Clause did not separately bar the court-martial because that Clause contains an exception for cases arising in the land or naval forces, which is coextensive with the Make Rules Clause (*Larrabee v. Del Toro*).
- **Education:** The Eleventh Circuit held that it lacked appellate jurisdiction over a federal district court's remand of an Individuals with Disabilities Education Act claim to a state administrative agency because the remand order was not a "final" decision appealable under 28 U.S.C. § 1291 (*S.S. v. Cobb Cnty. Sch. Dist.*).
- **Election Law:** The Seventh Circuit ruled that a county election board did not violate a political candidate's First or Fourteenth Amendment rights when it struck his name from a Republican primary ballot following a county Republican Party's challenge to his candidacy. The court reasoned that political parties have First Amendment interests of association that would be infringed upon by including an unwanted person in the group (*Hero v. Lake Cnty. Election Bd.*).
- ***Environmental Law:** A divided Seventh Circuit reversed a district court's decision to deny attorney's fees and costs under the Endangered Species Act's citizen suit provision, 16 U.S.C. § 1540(g). The provision allows a court to award fees and costs when "appropriate." The Seventh Circuit ruled that reasonable fees are presumptively appropriate when a citizen-litigant has some success under the Act, unless special circumstances make the award unjust. In doing so, the court disagreed with the Eighth Circuit in ruling that a losing party's lack of resources is not a special circumstance (*Animal Legal Defense Fund v. Special Memories Zoo*).
- **Freedom of Information Act (FOIA):** The Second Circuit upheld a district court's ruling that the Food & Drug Administration properly withheld certain information from a FOIA requestor regarding its approval of a pharmaceutical corporation's application for accelerated drug approval. The court concluded that the information was lawfully withheld under FOIA Exemption 4 and the FOIA Improvement Act of 2016, which requires an agency to withhold records if it "reasonably foresees that disclosure would harm an interest protected by" a FOIA Exemption. The court held that FOIA Exemption 4, which generally covers "trade secrets and commercial or financial information obtained from a person and privileged or confidential," protects the submitter's commercial or financial interests in information of a type held in confidence and not disclosed to any member of the public by the person to whom it belongs. The panel held that the denial of plaintiff's FOIA request was warranted because the information fell under FOIA Exemption 4 and its release would foreseeably harm the pharmaceutical corporation's commercial interests (*Seife v. Food & Drug Admin.*).

- **Health:** The Ninth Circuit upheld sequestration as an appropriate method to determine limits on Medicare spending for hospice care. The court addressed intertwining statutory limits on Medicare spending for hospice care: (1) Medicare's annual limit on the total amount the Centers for Medicare and Medicaid Services (CMS) may reimburse hospices; and (2) the Budget Control Act (BCA), which separately requires the government to make comprehensive cuts, also known as sequestration, to direct spending programs when certain statutory conditions are met. Multiple hospices challenged CMS's sequestration method under the statutes. The Ninth Circuit decision ruling that CMS acted in accordance with the text of the Medicare statute and the BCA aligns with a ruling by the D.C. Circuit earlier this year (*Silverado Hospice, Inc. v. Becerra*).
- ***Immigration:** The Eleventh Circuit affirmed a Board of Immigration Appeals (BIA) decision holding that the petitioner was removable because he was convicted of a "crime of child abuse, child neglect, or child abandonment" under 8 U.S.C. § 1227(a)(2)(E)(i). The court added to a circuit split over the BIA's interpretation of that statute, deeming the interpretation reasonable and entitled to deference. The BIA interpreted the statute to cover criminally negligent conduct with no resulting physical injury, so long as there was a reasonable probability of harm (*Bastias v. Attorney Gen.*).
- **Intellectual Property:** The Federal Circuit held, after concluding that the definition of "inventor" in the Patent Act unambiguously refers to natural persons, that an artificial intelligence software system cannot be listed as the inventor on a patent application (*Thaler v. Vidal*).
- **Labor & Employment:** The D.C. Circuit set aside guidance from the Federal Labor Relations Authority (FLRA) interpreting two provisions of the Federal Service Labor-Management Relations Statute. The guidance provided that agency heads could review a collective bargaining agreement (CBA) extended under a continuance clause and enforce regulations that conflicted with the CBA and became effective after the agreement's original effective date. Applying the *Chevron U.S.A. Inc. v. Natural Resources Defense Council* framework, the court found no statutory basis for either part of the FLRA guidance. The court reasoned that invoking a continuance clause does not execute a new agreement, so there is no basis for a second round of agency-head review, and agencies may not enforce subsequently enacted regulations that conflict with an agreement that remains in effect (*Nat'l Treasury Employees Union v. FLRA*).
- ***Securities:** The Second Circuit added to a circuit split over the elements of 18 U.S.C. § 1514A, which bars publicly traded companies from taking adverse employment actions against workers "because of" lawful whistleblowing acts. Courts have disagreed on whether § 1514A requires plaintiffs to show that the adverse employment action was motivated by the whistleblowing. The Second Circuit agreed with courts that have held that a plaintiff must show a retaliatory intent for the adverse employment action, and not merely that the whistleblowing was a contributing factor to the employer's decision (*Murray v. UBS Securities*).
- **Tax:** The Fifth Circuit upheld a district court's decision that rejected Exxon's efforts to obtain more than $1 billion in tax refunds from the Internal Revenue Service. While the court considered several issues, a key consideration concerned the meaning of 26 U.S.C. § 6426(a), which allows taxpayers that produce renewable fuel to claim a "credit against" any excise tax they pay for nonrenewable fuels. The court held that Exxon could not deduct the full amount of excise taxes imposed on nonrenewable fuel without taking into account offsetting credits received for the production of renewable fuels. Joining two other circuits, the panel held that the renewable fuel tax credit reduces the recipient's

- excise tax burden, and also reduces the amount of the excise tax that the taxpayer may deduct from its gross income (*Exxon Mobil Corp. v. United States*).

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