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Legal Sidebar

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (August 22–August 28, 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

The Supreme Court did not issue any opinions or grants of certiorari 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.

- **Civil Rights:** The Eighth Circuit upheld a district court's preliminary injunction blocking Arkansas from enforcing a statute banning gender transition procedures, and medical referrals for those procedures, for minors. Reviewing the injunction under an "abuse of discretion" standard, the circuit court ruled that the district court did not clearly err when it held that plaintiffs would likely prevail in their claims that the law violates the Equal

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Protection Clause by discriminating based on sex and gender identity, and that plaintiffs would suffer irreparable harm if the statute were enforced pending the outcome of the litigation. The circuit court declined to reach plaintiffs' Fourteenth Amendment due process and First Amendment claims the lower court considered for the injunction (*Brandt by and through Brandt v. Rutledge*).

- **Communications:** The Ninth Circuit held that Federal Communications Commission regulations setting radio frequency radiation standards for cell phones, which were issued pursuant to the agency's authority under the Communications Act of 1936 and the Telecommunications Act of 1996, preempted plaintiffs' state law tort claims alleging that Apple misrepresented and failed to disclose the amount of radiation emitted by iPhones. (*Cohen v. Apple Inc.*).
- **Consumer Protection:** The Third Circuit held that a provision of the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681g(a), which requires that covered entities disclose specified categories of information to consumers upon request, is triggered only by a direct request from a consumer, and not by third parties who make requests on the consumer's behalf. The court also held that consumers need not specify whether they are seeking access to their "file" or "consumer report"—separately defined terms under the FCRA— for the covered entity's § 1681g(a) disclosure requirements to be triggered; a generalized request for information about her will suffice (*Kelly v. RealPage, Inc.*).
- ***Consumer Protection:** Adding to a circuit split, the Third Circuit held that the United States may be held liable for civil damages under the FCRA if it violates the act's requirements. The court joined two other circuits in holding that the plain text of the FCRA, which defines a "person" subject to the act's substantive requirements as including a "government or governmental subdivision or agency," constituted a waiver of the federal government's sovereign immunity from suit under FCRA. The court disagreed with two other circuits which held that the foregoing definition of "person" applicable to FCRA's substantive requirements did not apply the act's enforcement provisions. Those circuits believed such a reading would lead to absurd and unintended results, including possible criminal sanctions such as imprisonment against government entities if they failed to comply with FCRA's requirements. The Third Circuit disagreed with the reasoning of these cases and, in any event, found that they did not preclude application of the civil liability provisions at issue (*Kirtz v. Trans Union, LLC*).
- ***Consumer Protection:** A divided Eleventh Circuit held that the Food and Drug Administration's (FDA's) marketing denial orders to six tobacco companies were arbitrary and capricious because FDA did not consider relevant factors. Manufacturers may be required by the Tobacco Control Act, 21 U.S.C. § 387j, to receive approval from FDA before marketing new tobacco products by showing, among other things, that the product would be appropriate for protecting the public health. FDA determines whether a new product is appropriate for protecting the public health by evaluating the risks and benefits to the population, including the likelihood that existing tobacco users will quit and the likelihood that those who do not currently use tobacco products will start. Splitting with other circuits, the Eleventh Circuit held that FDA's decision to deny marketing approval to various manufacturers of electronic tobacco products was arbitrary and capricious because it did not consider the companies' plans restricting marketing and sales-access from youth (*Bidi Vapor LLC v. FDA*).
- ***Criminal Law & Procedure**: The Fifth Circuit added to a circuit split in holding that the crime of federal-programs bribery under 18 U.S.C. § 666 requires evidence of a quid pro quo. Section 666 criminalizes bribery for programs receiving federal funds, including

bribes offered to state and local officials. Joining the First Circuit, the Fifth Circuit rejected an interpretation that § 666 criminalizes both bribery and illegal gratuities. The court therefore vacated convictions in a bribery case of city officials because the trial court had instructed the jury that neither a quid-pro-quo exchange nor any official act was needed to convict (*United States v. Hamilton*).

- **Criminal Law & Procedure**: The Seventh Circuit joined several other circuits in holding that the Racketeer Influenced and Corrupt Organizations (RICO) Act did not authorize federal courts to award damages in contravention of exclusive state regulation of retail electricity rates. The plaintiffs sought civil monetary damages for alleged overpayment of electricity bills due to a corrupt "pay-to-play" scheme. Under the "filed rate doctrine," courts cannot adjust rates that have been filed with the appropriate regulator for any reason. The court found that the plaintiffs sought damages that would, in effect, retroactively adjust the legal electricity rates they paid, and since a filed rate cannot be changed, the court affirmed the dismissal of the RICO claim for damages (*S. Branch LLC v. Commonwealth Edison Co.*).
- **Criminal Law & Procedure:** The Seventh Circuit affirmed a criminal defendant's conviction and mandatory-minimum sentence under 21 U.S.C. § 841(b)(1)(A)(vi) for possession with intent to distribute an "analogue to [fentanyl]." Although the defendant's possession of a Schedule I controlled substance, furanylfentanyl, did not constitute a "controlled substance analogue" defined elsewhere in statute, the court held that this did not preclude him from being charged with possessing an "analogue of [fentanyl]" (*United States v. Johnson*).
- **Criminal Law & Procedure:** A divided Ninth Circuit affirmed a criminal defendant's conviction under 18 U.S.C. § 115(a)(1)(B), when the defendant had threatened to kill a private security officer who was contracted to provide security services at a federal location. While acknowledging that § 115(a)(1)(B), which proscribes violent threats against certain persons, including a United States "official," was not a model of clarity, the majority agreed with the Third and Eighth Circuits that § 115(a)(1)(B)'s reference to "official" was intended to cover persons protected under 18 U.S.C. § 1114, which sanctions the actual or attempted killing of an "officer or employee" of the United States, as well as "any person assisting" such persons in the performance of their duties (*United States v. Anderson*).
- **Election Law:** Sitting en banc, a divided Fifth Circuit rejected an Equal Protection Clause challenge to a provision in the Mississippi state constitution denying the right to vote to any person "convicted of murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy." In a per curiam opinion, the en banc majority observed that the initial version of the state provision had been adopted in 1890 with the intent of disenfranchising black voters by specifying disqualifying offenses that proponents perceived to be "black crimes" and omitting disqualifying offenses perceived to be "white crimes." While the majority declared that the 1890 provision would have been constitutionally invalid if it remained in effect given its discriminatory intent, the state's later reenactment of the provision in 1950 and 1968, which involved amending the enumerated offenses resulting in disenfranchisement, cured this constitutional defect (*Harness v. Watson*).
- **Housing**: The Fifth Circuit held that a New Orleans residency requirement to rent out properties violates the dormant Commerce Clause because it discriminates against interstate commerce. The plaintiffs brought several constitutional challenges to a municipal regulation that, among other things, prohibited any person from obtaining a

license to own a short-term rental in a residential neighborhood unless the property was also the owner's primary residence. While the court found that the city's policy sought to advance the legitimate purposes of preventing nuisances, promoting affordable housing, and protecting neighborhoods' residential character, it held that those objectives could be served by reasonable nondiscriminatory alternatives and vacated the district court's summary judgment for the city (*Hignell-Stark v. City of New Orleans*).

- **Housing:** The D.C. Circuit affirmed a district court's ruling for the Department of Housing and Urban Development (HUD) in a suit challenging the agency's 2016 final rule barring lit tobacco products in HUD-subsidized public housing units and their immediate surroundings. The circuit court held that the rule was a valid exercise of HUD's power under the Housing Act of 1937; the agency did not act arbitrarily and capriciously in promulgating the rule; and the conditions the rule placed on federally subsidized public housing agencies were a valid exercise of the federal government's spending power (*NYC C.L.A.S.H., Inc. v. Fudge*).
- **Labor & Employment:** The Second Circuit held that the Mandatory Victims Restitution Act (MVRA), which requires defendants convicted of certain offenses to reimburse victims for specified expenses, enables the garnishment of a defendant's retirement funds. The court held that garnishment was not barred by an Employee Retirement Income Security Act provision, 29 U.S.C. § 1056(d)(1), which requires pension plans to provide that their benefits "may not be assigned or alienated." Though agreeing with the lower court on MVRA's application, the circuit court remanded the case for the lower court to determine whether and how the federal tax on early withdrawal would apply to the garnishment of the defendant's retirement funds (*United States v. Greebel*).
- **Labor & Employment:** The Eighth Circuit reinstated the Department of Labor's flagrant designation and individual liability for violations under the Federal Mine Safety and Health Act, 30 U.S.C. § 820. A violation of the Act is flagrant when it is "a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury." The court decided that the Department of Labor's interpretation of recklessness as applied to the mine operator's conduct was reasonable and entitled to deference (*Northshore Mining Co. v. Sec'y of Lab*).
- **Environment:** The Sixth Circuit reinstated an injunction blocking the Tennessee Valley Authority (TVA) from implementing a tree-clearance practice to remove trees from areas surrounding power lines, previously known as the 15-foot rule. A district court had removed the injunction, holding that TVA had prepared an Environmental Impact Statement (EIS) as required by the National Environmental Policy Act and had also developed a new, alternate plan. The Sixth Circuit reversed, holding that the district court did not properly determine whether TVA had considered the environmental consequences as part of its EIS and that its alternate plan was arguably indistinguishable from the original 15-foot rule with respect to the impact on the trees (*Sherwood v. TVA*).
- **Environmental Law:** The D.C. Circuit agreed to transfer a petition challenging two Environmental Protection Agency (EPA) rules for air quality standards to the Fifth Circuit, after concluding that the D.C. Circuit was the improper venue for the challenge. A Clean Air Act provision, 42 U.S.C. § 7607(b)(1) provides that the D.C. Circuit is the appropriate venue for challenges brought under the statute only if the rules are nationally applicable or the EPA makes and publishes a finding that an otherwise locally or regionally applicable action is based on a determination of nationwide scope and effect.

Here, the challenged rules facially applied only to the Dallas and Houston areas. Agreeing with the Fifth Circuit, the D.C. Circuit held that EPA's decision of whether to make and publish a finding of nationwide scope is committed to agency discretion, and that the agency's failure to publish a finding of nationwide scope meant that the D.C. Circuit was not the appropriate venue for the plaintiffs' case (*Sierra Club v. EPA*).

- **National Security**: In consolidated appeals, the Eleventh Circuit considered attempts to satisfy a civil monetary judgment award against a foreign terrorist organization. Section 201(a) of the Terrorism Risk Insurance Act (TRIA), codified as a note to 28 U.S.C. § 1610, provides that the blocked assets of an agency or instrumentality to a terrorist party shall be subject to execution or attachment to satisfy a judgment for compensatory damages that the terrorist party has been adjudged liable. Among several holdings in a decision returning the case to the trial court, the Eleventh Circuit held that to be an agent of a terrorist party under § 201(a) of the TRIA, the agent must know the identity of the terrorist party; but such knowledge is not necessary to be an instrumentality of the party (*Stansell, et al. v. Revolutionary Armed Forces of Colombia*).
- **Public Health:** The D.C. Circuit rejected a request to compel the Occupational Safety and Health Administration (OSHA) to issue a permanent standard for mitigating risks of COVID-19 transmission in health care settings, and a request that, until the issuance of a standard, the court compel OSHA to retain and enforce the 2021 emergency temporary standard (ETS) that the agency largely intended to withdraw. The circuit court held that (1) it lacked power under the All Writs Act to compel OSHA to promulgate a permanent standard because OSHA did not have a clear duty to promulgate a standard at the end of ongoing rulemaking proceedings; (2) compelling OSHA to retain the ETS until a permanent standard would not preserve or retain the court's jurisdiction to consider the validity of the ETS, as federal statute provided for jurisdiction over such challenges during a 60-day window that had passed; and (3) OSHA's decision on how vigorously to enforce the 2021 ETS was committed to agency discretion (*In re National Nurses United*).
- **Speech:** A divided D.C. Circuit upheld regulations governing filmmaking on government-controlled property after ruling that the filming of a movie is "a noncommunicative step in the production of speech." A filmmaker challenged 54 U.S.C. § 100905(a)(1), a provision requiring a permit and fee for commercial filming activities on land administered by the National Park Service. While acknowledging that other courts have found certain video recording activities to be protected, the court distinguished filmmaking from communicative activities. Although the park qualified as a limited public forum where speech restrictions would ordinarily trigger heightened scrutiny, the court said this regulation of noncommunicative activity only triggered a deferential reasonableness review (*Price v. Garland*).
- **Tax:** The Second Circuit affirmed a Tax Court opinion that held that an Internal Revenue Code provision, 26 U.S.C. § 72(t), which establishes a 10% exaction to discourage early withdrawal from a qualified pension plan, is a tax rather than a penalty, the latter of which requires written supervisory approval. The court based this decision on the unambiguous text of § 72(t) and other provisions of the Code labeling the exaction as a "tax." The court was unpersuaded by petitioner's arguments that the exaction should be deemed a penalty because it is calculated differently than regular income tax, or that the court should look beyond the statute's plain language and consider the punitive function that the exaction provision was alleged to serve (*Grajales v. Commissioner of Internal Revenue*).

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- **Tax:** In reviewing a dispute involving the Internal Revenue Service's (IRS's) cancellation of advance pricing agreements meant to govern a private corporation's tax calculations for a period of years, the Sixth Circuit considered several issues, including which party bore the burden of proof in the breach of contract dispute. The circuit court held that standard contract-law principles applied, meaning that the IRS bore the burden of showing that a breach justifying cancellation had occurred. The panel decided that neither caselaw nor the IRS's internal procedures supported the agency's claim that administrative deference shifted the burden to the other party to show that cancellation was plainly arbitrary. The panel also held for the corporation in all other issues in dispute (*Eaton Corp. & Subsidiaries v. Commissioner of Internal Revenue*).
- **Transportation:** Joining other circuits, the Tenth Circuit held that personal-injury claims arising out of an airline employee's failure to exercise due care are not "related to" a deregulated price, route, or service preempted under the Airline Deregulation Act (ADA), 49 U.S.C. § 41713(b)(1). In interpreting the phrase "related to," the court reasoned that the preemption provision can only apply to state laws that refer to or are impermissibly connected with airline prices, routes, and services. The Tenth Circuit ruled that the district court erred in dismissing the plaintiff's claims that were premised on Utah's negligence and breach of contract causes of action, which are laws of general applicability that are not connected with airline prices, routes, or services (*Day v. SkyWest Airlines*).

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