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Legal Sidebar

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (Sept. 12–Sept. 18, 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

Last week, the Supreme Court took action in response to an emergency application:

- **Education:** In an unsigned order over the dissent of four Justices, the Supreme Court denied an application to stay a state trial court order requiring Yeshiva University, a private Jewish educational institution, to recognize a group for gay, lesbian, bisexual, and transgender students. The state court ruled that the University's refusal to recognize the student group violated a New York City ordinance forbidding discrimination on the basis of sexual orientation or gender identity. The University argued that its refusal was grounded in its religious beliefs and is protected by the First Amendment's Religion Clauses. The Supreme Court denied the application for a stay of the state court order pending appeal because the University appeared to have avenues for expedited or interim relief from the state courts. The Court stated that if the University did not obtain such relief, it could seek Supreme Court review (*Yeshiva Univ. v. YU Pride All.*).

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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.

- ***Banking:** The Second Circuit held that a New York law requiring mortgage lenders to pay a 2% minimum interest rate on mortgage escrow, as applied to federally chartered banks, was preempted by the National Bank Act of 1864 (NBA). The court held that the state law impermissibly interfered with the powers conferred on federally chartered banks by the NBA, and that changes made by the Dodd-Frank Wall Street Reform and Consumer Protection Act did not alter the NBA's preemptive effect. The court disagreed with the Ninth Circuit, which came to the opposite conclusion about a similar California state requirement (*Cantero v. Bank of America, N.A.*).
- ***Criminal Law & Procedure:** In affirming a defendant's sentencing enhancement under the Armed Career Criminal Act (ACCA) for committing three or more violent felonies, the Third Circuit added to a circuit split regarding when, during collateral review of a defendant's sentence, a reviewing court may consider offenses committed by the defendant besides those the government originally identified during sentencing. Here, the defendant alleged that his plea agreement included an offense that was not a violent felony under the ACCA, but on collateral review the government argued that a separate offense listed in the presentence report (PSR) adopted by the sentencing court could also be treated as a predicate violent felony under the ACCA for sentencing purposes, rendering any error harmless. Unlike the approaches taken by the Fourth Circuit, which has held that only ACCA crimes specifically designated by the government during sentencing may be considered, and the Eleventh Circuit, which more freely allows the government to substitute new predicates during collateral review, the Third Circuit joined the Seventh Circuit in taking a more fact-specific approach. The Third Circuit held that a prior conviction must have been on the menu of options as an ACCA predicate during the original criminal case, including where the conviction was specifically mentioned as an ACCA predicate in a charging document, a plea memorandum, a pretrial notice, sentencing filings, or (as was the case here) the PSR (*United States v. Bentley*).
- ***Criminal Law & Procedure:** The Ninth Circuit joined a growing circuit split, now involving seven courts of appeals, over whether non-retroactive changes to sentencing laws made by the First Step Act can be considered by a district court when it considers a prisoner's motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A). Joining three other circuits, the Ninth Circuit held that the district court may consider non-retroactive changes the First Step Act made to the law under which the prisoner was sentenced, in combination with other factors particular to that individual, to determine whether "extraordinary and compelling reasons" warrant a sentence reduction (*United States v. Chen*).
- **Foster Care:** The Sixth Circuit affirmed a district court's holding that a plaintiff group of caregivers were not eligible for foster care maintenance payments (FCMPs) from a Kentucky state agency under Title IV-E of the Social Security Act. Title IV-E provides federal reimbursement for foster care maintenance to state agencies with foster care plans if certain criteria are met. These criteria include an approved state plan making FCMPs "on behalf of each child who has been removed from the home . . . into foster care if . . . the child's placement and care are the responsibility of . . . the State agency administering the State plan." The majority construed this requirement to mean that the agency needs to have both placement responsibility and care responsibility over the child for Title IV-E to

apply. Because the majority concluded the agency did not have placement responsibility, it decided that plaintiffs were ineligible for FCMPs (*J.B-K, by E.B. v. Sec'y of Kentucky Cabinet for Health and Fam. Servs.*).

- **Food & Drug:** The Ninth Circuit held that a pharmaceutical company's state suit against the defendant company for selling compound drugs not approved by the Food and Drug Administration (FDA) was impliedly preempted by the Federal Food, Drug and Cosmetic Act (FDCA). The plaintiff's claims were premised on the sale of the compound drugs in violation of 21 U.S.C. § 353b, which bars third parties from bypassing FDA approval for compounded drugs that are "essentially a copy" of an already-approved drug. The Act confers on FDA the exclusive authority to enforce its provisions, including for determining whether a drug is "essentially a copy" under § 353b. The Ninth Circuit held that plaintiff could not circumvent this framework by alleging violation of the FDCA under state law (*Nexus Pharmaceuticals, Inc. v. Central Admixture Pharmacy, Inc.*).
- **Labor & Employment:** The Third Circuit broadly construed the meaning of a Fair Labor Standards Act (FLSA) provision, 29 U.S.C. § 215(a)(3), which forbids an employer from discriminating against an employee for engaging in protected activity, including being "about to testify" in an FLSA-related proceeding. The court reasoned that retaliation against an employee who intends to soon file to join a pending collective action has the same chilling effect as § 215(a)(3)'s "about to testify" language, and thus allowed the claim to proceed under § 215(a)(3). The court rejected a narrower construction of § 215(a)(3) that would require an employee's testimony to have already been scheduled or subpoenaed for protection to attach (*Uronis v. Cabot Oil & Gas Corp.*).
- ***Speech:** The Fifth Circuit allowed a Texas law (H.B. 20) restricting some social media platforms' ability to moderate user content to go into effect, vacating a district court's preliminary injunction blocking its enforcement. (The Supreme Court vacated an earlier stay of the injunction by the Fifth Circuit pending Texas's appeal, allowing it to remain in effect pending the circuit court's ruling on the merits.) The district court had enjoined enforcement of H.B. 20 after deciding that the platforms were likely to succeed on their claim that the law violated their free speech rights under the First Amendment. The circuit court reversed, concluding that plaintiffs were not entitled to pre-enforcement facial relief, and that any First Amendment claims against H.B. 20 were more appropriately raised in as-applied challenges in future enforcement actions. On Section 7 of H.B. 20, which generally bars covered platforms from "censor[ing]" users or content based on viewpoint or the users' geographic location in the state, the majority concluded, among other things, that (1) Section 7 did not regulate the platforms' speech, but their conduct; (2) the section did not chill speech, but protected users from restrictions placed on their speech by platforms; (3) the platforms appropriately could be treated as "common carriers" and be restricted from discriminating in the services provided to Texas users; and (4) even if Section 7 regulated speech, it would withstand constitutional scrutiny. The court also did not believe Section 2 of H.B. 20—which sets forth disclosure requirements relating to the platforms' content and data management and business practices, as well as process requirements for content removal—was susceptible to pre-enforcement challenge. The majority held that on its face, Section 2 was consistent with Supreme Court case law recognizing that a state may require commercial enterprises to disclose purely factual and uncontroversial information, served a legitimate state interest, and was not unduly burdensome. The court acknowledged its conclusions differed in some respects from the Eleventh Circuit, which upheld a preliminary injunction blocking enforcement of a Florida social media law (*NetChoice, L.L.C. v Paxton*).

- **Tax:** The Eleventh Circuit held that an Internal Revenue Service (IRS) employee making a penalty assessment can communicate with a taxpayer about Internal Revenue Code penalties before an immediate supervisor approves the "initial determination of such assessment" required under 26 U.S.C. § 6751(b). While the Tax Court sided with the taxpayer's position that § 6751(b) requires supervisory approval of the assessment prior to communicating about penalties, the Eleventh Circuit reversed and found in favor of the IRS (*Kroner v. Commissioner of Internal Revenue*).
- **Transportation:** The Fifth Circuit upheld the assessment of port fees upon plaintiff energy companies to help finance improvements to the Sabine-Neches Waterway, after concluding that the waterway navigation district acted consistently with the Water Resources Development Act. The court held that following an initial down payment that enabled a portion of the project to be completed, the district could impose port fees as a means to finance their overall contribution to the improvement project, reading the plain text of the Act to permit fee collection after a "usable increment of the project" had been completed. The court also rejected plaintiffs' argument that the Act limited the district's ability to assess fees totaling more than their minimum required funding for 25% of the project costs; the Act gives non-federal interests discretion to pledge more than 25%, and enabled the district to levy fees necessary to meet its commitment (*BG Gulf Coast LNG, LLC v. Sabine-Neches Navigation Dist. of Jefferson County*).
- **Travel:** The Fifth Circuit upheld a district court's dismissal of the petitioner's challenge to serious tax penalties he was assessed and related revocation of his passport under the Fixing America's Surface Transportation (FAST) Act when he failed to pay those penalties. Among other things, the Fifth Circuit rejected plaintiff's constitutional challenge to the FAST Act's passport revocation provisions, which plaintiff alleged to violate the constitutional right to international travel. The court differentiated between the right to domestic versus international travel, holding that government restrictions on international travel were not subject to strict scrutiny and concluding that the FAST Act's passport revocation scheme passed constitutional muster when reviewed under either a rational basis standard or an intermediate standard between rational basis and strict scrutiny (*Franklin v. United States*).

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