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Legal Sidebar

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (Jan. 22–Jan. 29, 2023)

January 31, 2023

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 issued one opinion in a case in which it heard oral argument:

- **Veterans:** The Supreme Court unanimously held that 38 U.S.C. § 5110, which governs the effective date of an award of disability benefits to a veteran of the U.S. military, is not subject to equitable tolling. According to § 5110(a)(1), unless an exception applies, the effective date of an award based on an initial claim of benefits is the date the claim was filed. The Court held that the text and structure of § 5110 provide detailed instructions for when a veteran's claim for benefits may enjoy an effective date earlier than the default rule and thus indicates that Congress did not want the equitable tolling doctrine to apply (*Arellano v. McDonough*).

The Supreme Court also dismissed an earlier grant of certiorari after oral argument:

- **Federal Courts:** The Supreme Court dismissed certiorari as improvidently granted in a case from the Ninth Circuit involving a contempt order issued against a law firm that did

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LSB10908

not fully comply with a grand jury subpoena for documents related to the firm's preparation of a client's tax return. The firm contended that the documents were shielded from disclosure by attorney-client privilege, as they allegedly had the dual purpose of communicating information related to preparation of the client's tax returns and providing legal advice to the client. The Supreme Court's dismissal leaves in place a Ninth Circuit ruling concluding that a primary-purpose test governs when assessing attorney-client privilege for dual-purpose communications (*In re Grand Jury*).

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.

- **Administrative Law**: The Fifth Circuit set aside a 2020 Federal Aviation Administration (FAA) rule governing the issuance of (1) airline transport pilot (ATP) certificates, which enable pilots to fly for airlines, and (2) type ratings, which authorize pilots to fly "type-rated" aircraft. The FAA's rule required flight schools to issue both an ATP and a type rating concurrently to pilots who pass a practical test for an ATP in a type-rated plane. A flight school challenged the rule on the basis that the FAA implemented it without the notice-and-comment process generally required for "legislative rules" under the Administrative Procedure Act (APA). The FAA asserted that its rule merely clarified existing regulations and was therefore an "interpretive rule" not requiring a notice-and-comment period, but the court disagreed and held that it was a legislative rule because it effectively amended the existing regulations (*Flight Training Int'l v. FAA*).
- **Agriculture**: The Tenth Circuit held that a plaintiff could not sue a local police department under the Agriculture Improvement Act of 2018 (generally known as the 2018 farm bill) for preventing him from transporting hemp plants on a domestic flight. Although the 2018 farm bill generally precludes states from interfering with the interstate transportation of hemp, the district court dismissed the plaintiff's claim, concluding that the farm bill does not create a private cause of action. The Tenth Circuit agreed, holding that the language of the statute does not suggest that Congress intended to grant hemp farmers a right to transport freely products without interference from state officials (*Serna v. Denver Police Dep't, et al.*).
- **Civil Rights**: A divided Ninth Circuit panel held that a plaintiff's status as a "serial litigant" or tester plaintiff did not, on its own, affect his standing to sue under Title III of the Americans with Disabilities Act (ADA), which prohibits disability discrimination in places of public accommodation. The majority held that courts should consider the specific facts at issue when determining whether a facility is open to the public and covered by Title III. The court held that ADA testers can have standing and that filing multiple ADA suits does not, in and of itself, damage a plaintiff's credibility for standing purposes. On the merits, the court held that the actual usage of a facility, or if that is not in evidence, the nature of the entity and the public's reasonable expectations, determine whether a facility is open to the public and therefore covered by Title III. Because customers used the parking lot, even though the terms of the commercial lease restricted its use to the business operators, the court held that Title III applied (*Langer v. Kiser*).
- **Consumer Protection:** The Eleventh Circuit denied a defendant's effort to dissolve a preliminary injunction freezing his assets under the Federal Trade Commission Act (FTC Act). The FTC alleged that the defendant orchestrated a telemarketing scheme in violation of the FTC Act and the Telemarketing Sales Rule. The FTC obtained the

preliminary injunction, relying on Section 13(b) of the FTC Act, but the Supreme Court's later decision in *AMG Capital Management, LLC v. FTC* narrowed the scope of relief available under Section 13(b), excluding monetary relief. The Eleventh Circuit agreed with the district court that, while Section 13(b) could no longer support the injunction on its own, the FTC had properly amended its complaint to rely alternatively on Section 19 of the FTC Act and that Section 19 authorized the remedies provided for in the preliminary injunction (*FTC v. Simple Health Plans, LLC*).

- **Employee Benefits:** The Ninth Circuit largely reversed a district court's judgment in favor of several classes of plaintiffs against a managed healthcare organization under the Employee Retirement Income Security Act of 1974 (ERISA). The plaintiffs alleged that the defendant denied claims based on internal guidelines that conflicted with plan terms and state-mandated criteria. The district court certified several classes of plaintiffs to determine not the individualized question of whether each plaintiff was in fact entitled to benefits, but the question of whether each class was entitled to reprocessing of their claims based on the alleged flaws in the internal guidelines. The Ninth Circuit agreed with the district court that the plaintiffs had Article III standing to pursue their claims, but held that class certification was improper because ERISA does not provide for reprocessing as a standalone remedy. The Ninth Circuit also reversed the district court's judgment on the merits of the guidelines issue and failure to require all plaintiffs to comply with administrative exhaustion requirements (*Wit v. United Behavioral Health)*.
- **Freedom of Information Act (FOIA):** The Second Circuit reversed a district court's judgment in favor of United States Immigration and Customs Enforcement (ICE) and held that ICE must provide access to certain immigration records in a person-centric manner, so that the FOIA plaintiffs may track individual (but anonymized) aliens across ICE records. ICE stores information in several event-centric databases from which an individual's records can be retrieved via an Alien Identification Number (A-number). ICE produced database records to the plaintiffs but redacted A-numbers as exempt records and refused the plaintiffs' request to substitute anonymized identification numbers to permit person-centric access. The Second Circuit concluded that FOIA's broad disclosure policy and strictly construed exceptions require ICE to provide such a substitution or otherwise facilitate person-centric access (*American Civil Liberties Union Immigrants' Rights Project v. ICE*).
- ***Intellectual Property**: The Fourth Circuit affirmed a district court ruling that Shenzhen Stone, a Chinese internet company, violated the Anticybersquatting Consumer Protection Act (ACPA) by registering a domain name, PRU.COM, identical to Prudential's distinctive mark. The Fourth Circuit determined that Shenzhen Stone was not entitled to the benefit of the ACPA's safe harbor provision, as it could not have had a "reasonable belief" that its use of the domain name was lawful. Under the ACPA, an entity that "registers" a domain identical or confusingly similar to a distinctive trademark with a "bad faith intent to profit" is liable to the owner of the trademark. Although Shenzhen Stone was not the initial registrant of the domain name at issue, the Fourth Circuit employed reasoning endorsed by the Third and Eleventh Circuits—but not the Ninth Circuit—in holding that the term "registration" applies not only to the initial registration of the mark but also to subsequent re-registrations (*The Prudential Insurance Co. of America v. Shenzhen Stone Network Information Ltd.*).
- ***Labor & Employment:** The Sixth Circuit reversed a district court's dismissal of a plaintiff's claim for retaliation under the Family and Medical Leave Act (FMLA). The plaintiff alleged that her employer fired her after she made a request for FMLA leave, but did not allege that she was entitled to or took the requested leave. The Sixth Circuit,

acknowledging inconsistent precedent within the Sixth Circuit and among other circuits, held that FMLA retaliation claims can be brought under 29 U.S.C. § 2615(a)(1), rather than only under § 2615(a)(2). The court further held that inquiring about and requesting FMLA leave may be protected activity under the FMLA, and thus provide the basis of a retaliation claim, even if an employee is not entitled to such leave (*Milman v. Fieger & Fieger, P.C.*).

- **Labor & Employment:** The Ninth Circuit granted a petition for enforcement by the National Labor Relations Board (NLRB), rejecting the respondent's argument that the NLRB's General Counsel lacked proper authority to prosecute the petition for violations of the National Labor Relations Act because her predecessor was unlawfully removed. President Biden removed the prior General Counsel upon taking office, cutting short a four-year term, and appointed a replacement confirmed by the Senate. The respondent argued that the existence of the four-year term in 29 U.S.C. § 153(d) implied a prohibition on removal without cause during that period. The Ninth Circuit disagreed and held that the text of the statute, informed by precedent, did not restrict removal (*NLRB v. Aakash, Inc.*).
- **Tax**: The Ninth Circuit affirmed a Tax Court decision that it lacked jurisdiction to return an offer in compromise (OIC) payment to a taxpayer. The Tax Increase Prevention and Reconciliation Act (TIPRA) requires a taxpayer who makes an OIC to submit a payment for twenty percent of the total value of the OIC. In executing an OIC, the taxpayer must also acknowledge that the payment will not be refunded if the OIC is not accepted. When plaintiff's OIC fell through, he requested a refund of the TIPRA payment. The Ninth Circuit agreed that the Tax Court did not have jurisdiction to refund the payment, because Congress had not given it that power via statute (*Michael Brown v. CIR*).
- **Torts:** The Eleventh Circuit held that plaintiffs stated a claim under the Computer Fraud and Abuse Act (CFAA) by alleging that their business partner refused to grant access to software rightfully owned by the plaintiffs absent additional payment. A provision of the CFAA prohibits transmitting a threat to cause damage to a protected computer with intent to extort. The Eleventh Circuit rejected the defendant's arguments that the communications at issue could only be construed as negotiations rather than threats and that withholding passwords did not result in damage because the software continued to function. The Eleventh Circuit therefore reversed the district court's dismissal of the plaintiffs' claims for lack of personal jurisdiction, which had relied on a contrary evaluation of the CFAA claim (*SkyHop Technologies, Inc. v. Narra*).
- **Veterans**: The Federal Circuit affirmed a Court of Appeals for Veterans Claims (Veterans Court) decision regarding the interpretation of 38 U.S.C. §§ 1724, 1725, and 1728. A disabled veteran living abroad sought payment from the Department of Veterans Affairs (VA) for emergency treatment he received at a non-VA facility for a medical condition unrelated to his service-connected disability. The VA denied the veteran's claim and the Veterans Court affirmed because § 1724 prohibits the VA, absent exigent circumstances, from "furnish[ing] hospital ... care or medical services" abroad. The Federal Circuit agreed with the Veterans Court that "furnishing" includes payment for hospital care abroad, and also agreed that §§ 1725 and 1728, which provide payments for emergency treatment in certain circumstances, do not override this prohibition (*Van Dermark v. McDonough*).
- **Veterans**: The Federal Circuit affirmed a Veterans Court decision denying petitioner's request to exclude state unemployment compensation payments from his annual income for purposes of calculating his non-service-connected pension. The Veterans Court held

- that unemployment compensation payments cannot be excluded from annual income under 38 U.S.C. § 1503(a)(1), which excepts "donations from public or private relief or welfare organizations." The Federal Circuit affirmed on the basis that, under the plain meaning of the statute, state unemployment compensation payments cannot be considered "donations" (*Cooper v. McDonough*).
- **Veterans:** The Federal Circuit held that a veteran was entitled to liberal consideration of his petition to correct his military service record to reflect post-traumatic stress disorder (PTSD) as the reason for his discharge. The government argued that 10 U.S.C. § 1552(h) and a Department of Defense memorandum only require "liberal consideration" of PTSD-related petitions where a veteran seeks to upgrade or modify the characterization of service. The Court of Federal Claims disagreed, but concluded that the petitioner was not entitled to liberal consideration because his true objective was to obtain a determination of his fitness at discharge for disability retirement purposes, rather than to amend the narrative reason for his discharge. The Federal Circuit disagreed with both the government and the Court of Federal Claims, and held that the petitioner's disability-related goals did not affect his entitlement to liberal consideration, and remanded the case for such consideration (*Doyon v. United States*).

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