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Legal Sidebar

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (July 10, 2023–July 16, 2023)

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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 last week. The Supreme Court's next term is scheduled to begin October 2, 2023.

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.

- **Antitrust:** The Third Circuit affirmed a district court's denial of the government's motion to permanently enjoin the acquisition of one sugar refiner by another. The district court found that the government failed to identify the proper relevant product market and therefore could not establish a prima facie case that the merger was likely to be anticompetitive under Section 7 of the Clayton Act, 15 U.S.C. § 18. The court rejected the government's argument that, in defining the relevant product market, the district court

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clearly erred by treating sugar distributors as separate sources of refined sugar capable of undercutting efforts by a hypothetical refiner monopolist to restrict output and increase price (*United States v. U.S. Sugar Corp.*).

- **Banking:** The Tenth Circuit held that the Board of Governors of the Federal Reserve System (Board) had the statutory authority to remove two bank executives for misconduct that occurred years before, when the executives worked at a different bank and were supervised by another federal entity, the Federal Deposit Insurance Corporation. The court explained that the plain language of 12 U.S.C. § 1818(e)(1) gives the Board authority to remove bank executives for any misconduct against any federally insured depository institution, no matter when and where the misconduct took place. The court also reasoned that the statute does not limit the removal authority to only the agency supervising the financial institution where the misconduct took place (*Smith v. Bd. of Governors of the Fed. Rsrv. Sys.*).
- **Civil Rights:** The Ninth Circuit affirmed a decision ordering a pro se, non-prisoner plaintiff to pay a partial filing fee in a civil action. The district court had granted, in part, the plaintiff's motion to proceed under the federal *in forma pauperis* (IFP) statute, 28 U.S.C. § 1915(a) and ordered him to pay a partial filing fee. On appeal, the plaintiff challenged the court's authority to impose a partial filing fee. The Ninth Circuit ruled that district courts have discretion under § 1915 to impose partial filing fees on non-prisoners. The court also ruled that the Prison Litigation Reform Act (PLRA) does not do away with a court's discretion under the IFP statute, reasoning that, while the PLRA requires prisoners proceeding IFP in a civil action to pay the full filing fee, the statute does not impose such a requirement on non-prisoners (*Hymas v. U.S. Dep't of the Interior*).
- **Communications:** The Third Circuit ruled that a local zoning board's denial of a zoning variance to a wireless provider seeking to build a cell tower violated the Telecommunications Act's prohibition on state or local measures that have "the effect of prohibiting personal wireless services." The court held that the ordinance would violate a judicially created test previously used in the circuit and by some out-of-circuit courts. The court also held that the denial of a zoning variance would violate a newer test adopted by the Federal Communications Commission (FCC), which examines whether state or local action would "materially inhibit" wireless providers' right to compete in a fair marketplace. The panel concluded that the FCC standard was preferable to the judicially created test previously employed by the circuit, and held that the zoning board materially inhibited the ability of a wireless provider to compete in a fair and balanced legal and regulatory market (*CellCo Partnership v. White Deer Twp. Zoning*).
- **Consumer Protection:** The Third Circuit affirmed a remand to state court of a putative class-action complaint alleging that defendants violated the Magnuson-Moss Warranty Act (MMWA). Plaintiffs claimed that the defendants violated the MMWA by either concealing written warranties or providing warranties that prohibit third-party repair. The court held that the case did not meet the MMWA's federal jurisdictional requirements—the only path for federal courts to hear an MMWA claim. The court, in agreement with a previous decision by the Ninth Circuit, also held that the Class Action Fairness Act does not provide an alternative path for federal jurisdiction over MMWA claims when the MMWA's federal jurisdictional requirements are not met. The Third Circuit further held that the federal diversity jurisdiction statute does not provide an independent basis for federal jurisdiction over MMWA claims because both statutes can be reconciled (*Rowland v. Bissell Homecare*).

- ***Consumer Protection:** The Ninth Circuit joined other circuits in holding that every claim made under the Fair Debt Collection Practices Act (FDCPA) has its own one-year statute of limitations, and that certain acts taken in a meritless debt-collection lawsuit can give rise to distinct FDCPA claims. In an FDCPA suit challenging a debt-collection lawsuit, the controlling opinion held that service and filing may give rise to distinct FDCPA claims when service occurs before filing. The majority expressed disagreement with a Tenth Circuit decision characterized as treating service and filing as components of a single actionable wrong (*Brown v. Transworld Sys., Inc.*).
- **Criminal Law & Procedure:** The Second Circuit held that the Double Jeopardy Clause did not bar the criminal punishment of a defendant, who had been sentenced to imprisonment and ordered to pay restitution, after he had been subject to a disgorgement order in a civil action brought by the Securities and Exchange Commission. Joining eight other circuits, the court held that disgorgement—a civil remedy requiring a person to relinquish ill-gotten gains—does not implicate the Double Jeopardy Clause because it is not a criminal penalty (*United States v. Jumper*).
- **Criminal Law & Procedure:** The Second Circuit held that prosecution under the Maritime Drug Law Enforcement Act (MDLEA) does not violate the Fifth Amendment right to due process where the international maritime drug-trafficking conspiracy lacked connection to the United States. The court explained that the general threat to the United States' societal well-being from such conspiracies was an adequate jurisdictional nexus so that extraterritorial application of the MDLEA would not be arbitrary or fundamentally unfair. The court also held that such extraterritorial application of the MDLEA did not exceed Congress's power under Article I because Congress has the power to "define and punish Piracies and Felonies committed on the high Seas" (*United States v. Antonius*).
- **Criminal Law & Procedure:** The Fifth Circuit held that a conviction for the production or distribution of child pornography, on its own, is enough to qualify the defendant as a tier II sex offender. Under the Sex Offender Registration and Notification Act, a tier II sex offender must register as a sex offender for 25 years and is not allowed a reduction for a clean record. In reaching its conclusion, the court held that the three conditions for tier II status in subparts (A), (B), and (C) of 34 U.S.C. § 20911(3) are to be read disjunctively so that satisfaction of *any* of the three subparts is enough for tier II status. (*United States v. Nazerzadeh*).
- **Criminal Law & Procedure:** The Sixth Circuit held that, under the Economic Espionage Act (EEA), a defendant may be convicted of economic espionage (18 U.S.C. § 1831) or theft of trade secrets (18 U.S.C. § 1832) even though she did not know that the trade secrets she misappropriated met the statutory definition of a "trade secret." The court held that the word "knowingly" in §§ 1831 and 1832 is satisfied so long as the defendant knew she was taking confidential information without authorization, reasoning that a stricter knowledge requirement would exclude conduct that Congress intended to prohibit under the EEA (*United States v. You*).
- **Criminal Law & Procedure:** The Eighth Circuit joined other federal courts of appeals in holding that the federal offense of second-degree murder, 18 U.S.C. § 1111, is a "crime of violence" potentially subject to further penalties. The court applied the Supreme Court's plurality ruling in *Borden v. United States*, which recognized that an element of a crime of violence is the "targeting" of violent conduct at someone or something. The panel held that § 1111's requirement that an unlawful killing involve "malice afterthought" satisfied this standard. The Eighth Circuit interpreted "malice afterthought" to involve a higher

degree of culpability than required under other statutes that provide for guilt when there is a willful disregard of the likelihood of harm (*Janis v. United States*).

- **Firearms:** The Eleventh Circuit vacated and agreed to rehear en banc a panel decision that upheld a Florida law barring individuals under the age of 21 from buying firearms. As discussed in a prior edition of the *Congressional Court Watcher*, the earlier panel, relying on the framework set forth in the Supreme Court's 2022 decision in *New York State Rifle & Pistol Assoc., Inc. v. Bruen*, ruled that the Florida law did not violate the Second Amendment (*Nat'l Rifle Ass'n v. Bondi*).
- **Immigration**: The Fourth Circuit held that a corporation's hiring policy requiring permanent work authorization for employment was not discrimination against aliens prohibited by 42 U.S.C. § 1981. The plaintiff, a Deferred Action for Childhood Arrivals recipient who was granted temporary work authorization, sued on behalf of others similarly situated alleging discrimination. The court explained that § 1981 only protects against intentional discrimination. While a policy requiring permanent work authorization will only exclude aliens, the court held that discriminatory impact is not enough for a § 1981 discrimination claim (*Resendiz v. Exxon Mobil*).
- ***Immigration:** A divided Fourth Circuit held that an alien may move to rescind a removal order issued in absentia if the original notice to appear (NTA) for removal proceedings lacked the date and time of the proceedings required under 8 U.S.C. § 1229(a)(1), even if a supplemental notice ultimately supplied the missing information. The majority also disagreed with circuits that have held that the government's failure to include the time and place of a removal hearing in an NTA is remedied if the alien later fails to update the Department of Homeland Security on a change of address. The Supreme Court granted certiorari to consider this issue in June 2023 in another case (*Lazo-Gavidia v. Garland*).
- **Immigration:** The Fifth Circuit vacated a permanent injunction by a district court that had blocked a Texas university from charging out-of-state tuition as provided for under Texas law. The Fifth Circuit held that the university did not violate a provision of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), 8 U.S.C. § 1623(a) by charging out-of-state U.S. citizens a higher nonresident tuition than unlawfully present aliens who are eligible for resident tuition. The court rejected the argument that § 1623 preempts the state law in question and imposes an affirmative duty on states to provide U.S. citizens (whether or not they are state residents) all higher education benefits offered to unlawfully present aliens residing in that state. Rather, as the court explained, § 1623 permits unlawfully present aliens to receive a higher education benefit only if some U.S. citizens are eligible to receive the same benefit, as occurred under the Texas tuition scheme (*Young Conservatives of Texas Foundation v. Smatresk*).
- **Immigration:** The Eighth Circuit held an alien convicted under a state shoplifting statute had not committed an aggravated felony under the Immigration and Nationality Act (INA), which would have rendered him removable. Although the INA lists theft as an aggravated felony, the court held that the state shoplifting statute did not qualify because it criminalized a broader range of conduct. The court agreed with two other circuits that the generic offense of theft requires an intent to deprive the owner of the benefit of stolen goods and that the state shoplifting law could encompass conduct not having that specific intent because it criminalizes the broader intent of appropriating property for one's "own use" (*Thok v. Garland*).

- **Privacy:** In a class-action lawsuit, the plaintiff sued a university, its affiliated medical center, and Google for breach of privacy and contract after the medical center shared anonymized patient records with Google to help develop artificial intelligence software that can anticipate patients' future health care needs. The Seventh Circuit held that the plaintiff lacked Article III standing, depriving federal courts of jurisdiction. For the privacy claims, the court determined that the plaintiff failed to allege that past harm from the dissemination of anonymized patient records was concrete and that future harm from the dissemination was certainly impending. The court held that the contract claims failed because any financial gain or loss from the dissemination was implausible and a breach of contract, by itself without a resulting harm, is not a concrete injury (*Dinerstein v. Google*).

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