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Legal Sidebar

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (August 28, 2023–September 4, 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

The Supreme Court did not issue any opinions or grant certiorari in any cases 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.

- ***Criminal Law & Procedure:** The First Circuit held that a sentencing enhancement for the use or attempted use of a minor in the commission of a crime is valid as applied to defendants aged 18 to 21, joining most circuits that have considered the issue. In the Violent Crime Control and Law Enforcement Act of 1994, Congress directed the United States Sentencing Commission to create a minor-use enhancement in the United States Sentencing Guidelines for defendants "21 years of age or older." The Commission's

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broader proposed enhancement—which did not contain the 21-years-of-age threshold—took effect after Congress did not revise or disapprove the proposal during the applicable review period. The First Circuit held that the Commission acted under its general statutory powers in proposing the enhancement and that the enhancement does not conflict with the congressional directive, explaining that the enhancement still applies to defendants aged 21-and-over and that the Commission has the discretion to implement the directive in a broader manner (*United States v. Vaquerano Canas*).

- ***Criminal Law & Procedure:** Widening a circuit split, the Sixth Circuit held that the definition of "controlled substance offense" for purposes of applying a sentencing enhancement to a defendant who commits a firearms offense after a felony conviction for a "controlled substance offense" includes a prior conviction for a state-law controlled substance offense. The Second, Fifth, and Ninth Circuits have limited the definition of "controlled substance offense" by looking only to substances criminalized by the federal Controlled Substances Act. Relying mainly on a textual analysis, however, the Sixth Circuit agreed with the Third, Fourth, Seventh, Eighth, and Tenth Circuits that the enhancement incorporates both state and federal controlled substance offenses (*United States v. Jones*).
- **Criminal Law & Procedure:** The Eleventh Circuit held that a district court did not abuse its discretion by denying the defendant's motion to dismiss an indictment due to the government's admitted violation of 18 U.S.C. § 4241(d), which provides that a defendant who is mentally incompetent to stand trial may be committed to the custody of the Attorney General and hospitalized for "a reasonable period of time, not to exceed four months." The government hospitalized the defendant here beyond this statutory period. The court was not persuaded, however, that dismissal is the proper remedy for a violation of the statute (*United States v. Curtin*).
- **Education:** The D.C. Circuit rejected a challenge from a guaranty agency (GA) under the Federal Family Education Loan Program to a Department of Education rule that prohibits GAs from assessing debt-collection costs against defaulted borrowers who attempt to end their default status within 60 days of receiving certain notice from the GA. The court concluded that the rule aligns with the text, structure, and purpose of the Higher Education Act of 1965, and that the Department acted within its congressionally delegated authority by promulgating it (*Ascendium Educ. Solutions, Inc. v. Cardona*).
- **Environmental Law:** The Ninth Circuit affirmed a district court's dismissal of an action against the United States Forest Service (USFS) in a suit alleging the agency was civilly liable under the Resource Conservation and Recovery Act (RCRA) for failing to restrict hunters' use of lead ammunition in the Kaibab National Forest. Plaintiffs claimed the USFS was liable for contributing to the disposal of solid or hazardous waste that may pose an imminent and substantial danger to the environment. The court decided that Congress had not required USFS to regulate lead ammunition on federal lands. The court further held that the USFS's challenged conduct—namely, its failure to regulate lead shot directly or through its special permitting of commercial hunting on federal lands—was not the kind of active control and involvement in the disposal of hazardous waste giving rise to contributor liability under RCRA (*Ctr. for Biological Diversity v. USFS*).
- **Health:** The D.C. Circuit sided with the government in a dispute over hospitals' reimbursement for the treatment of a subset of the Medicare beneficiary population entitled to supplemental security income benefits (SSI) under the Social Security Act (SSA). The court agreed that this population includes only those receiving monthly SSI payments at the time of hospitalization. The court rejected arguments that the population

also includes patients who do not receive such payments, but receive a subsidy under Medicare Part D or vocational rehabilitation services under different SSA titles (*Advoc. Christ Med. Ctr. v. Becerra*).

- **Health:** The D.C. Circuit vacated part of a Food and Drug Administration (FDA) order that denied applications to market certain *unflavored* vaping products. The court held that FDA failed to undertake a holistic analysis of whether the benefits and risks of individual products have been shown to be appropriate for protecting public health as required by the Tobacco Control Act. However, the court upheld FDA's order as to the *flavored* vaping products at issue, holding that the agency reasonably found a lack of evidence that approval of these products would be appropriate for protecting public health (*Fontem US, LLC v. FDA*).
- **Health:** The Eighth Circuit affirmed the dismissal of a long-term care facility's breach of contract, tort, and fraud claims against a private health plan and its sponsor, which had enrolled a patient covered by the plan in Medicaid while she was receiving treatment at the facility. After Medicaid retroactively covered the patient's care and the facility accepted payment from Medicaid for her treatment, the facility sought payment from the plan and sponsor, which misrepresented the patient's coverage status when applying for Medicaid on her behalf. Among other things, the Eight Circuit held that under 42 C.F.R. § 447.15, a health care provider who accepts payment from Medicaid has received "payment in full" under the regulation, and cannot pursue contractual claims against other entities for the same treatment (*Select Specialty Hosp.-Sioux Falls, Inc. v. Brentwood Hutterian, Brethren, Inc.*).
- **Health:** The Eighth Circuit affirmed an order remanding to state court a tort suit filed on behalf of a former nursing home resident who allegedly contracted COVID-19 at a nursing home operated by defendants. The court rejected defendants' argument that the Public Readiness and Emergency Preparedness Act (PREP Act), 42 U.S.C. §§ 247d-6d, 247d-6e, provides a basis for federal jurisdiction, holding instead that the PREP Act does not completely preempt state causes of action for negligence. The court noted that this holding accords with opinions from six other circuits, and agreed with every circuit that has considered the issue that a contrary January 2021 advisory opinion issued by the General Counsel of the Department of Health and Human Services is not entitled to deference (*Cagle v. NHC Healthcare*).
- **Immigration:** The Ninth Circuit vacated and agreed to rehear en banc a panel decision that held that 8 U.S.C. § 1182(a)(9)(C)(i)(II), which renders permanently inadmissible an alien who illegally reenters the United States after being removed, applies retroactively to those who unlawfully reentered before April 1, 1997, provided they failed to apply for adjustment to legal status before that date (*United States v. Vega*).
- **Immigration:** The Ninth Circuit recognized that the Supreme Court's 2021 decision in *United States v. Palomar-Santiago* abrogated earlier circuit precedent and foreclosed a criminal defendant, convicted of illegally reentering the United States after being removed, from making a collateral attack against the predicate removal order. The defendant sought to challenge the order claiming that the presiding immigration judge misinformed him of his eligibility to voluntarily depart the United States in lieu of removal. While recognizing that earlier circuit caselaw might have permitted this challenge, the panel held it to be barred by the Supreme Court's decision in *Palomar-Santiago*, which recognized that such attacks are barred unless each requisite listed under 8 U.S.C. § 1326(d) is satisfied, including that the defendant exhausted all administrative remedies. Because the defendant had not challenged the validity of the removal order in

the underlying proceedings, the panel held he could not raise a collateral attack here (*United States v. Portillo-Gonzales*).

- **Intellectual Property:** The D.C. Circuit held that the Copyright Office violated the Takings Clause when it demanded that a print-on-demand publisher deposit copies of its books with the Library of Congress or pay a fine. Under Section 407 of the Copyright Act, 17 U.S.C. § 407, a copyright owner "shall" deposit two copies of a published copyrighted work with the Copyright Office for the use of the Library of Congress. (Deposit is separately required under 17 U.S.C. § 408 as part of the optional copyright registration process, a requirement not challenged in the litigation.) At one time, deposit was needed to obtain and maintain copyright protection, making the requirement a voluntary exchange of property for a governmental benefit. The Copyright Act of 1976 and subsequent amendments, however, made copyright protection automatic once an author fixes a work in a tangible medium. According to the court, this change rendered the deposit unnecessary to obtain rights and, consequently, an uncompensated taking of private property (*Valancourt Books, LLC v. Garland*).
- **Intellectual Property:** The obviousness-type double patenting (ODP) doctrine prohibits an inventor from obtaining a second patent for claims that are not patentably distinct from those in an earlier patent. However, patentees may file a "terminal disclaimer" to avoid an ODP rejection by ensuring that their related patents will expire at the same time. Two statutory provisions, meanwhile, can lengthen a patent's term: patent term *adjustments* under 35 U.S.C. § 154 are based on certain delays in patent examination, and patent term *extensions* under 35 U.S.C. § 156 are based on delays in the regulatory review required to market certain products, such as pharmaceutical drugs. The Federal Circuit had previously held that the ODP analysis uses a patent's expiration date *before* an *extension* has been added under § 156. Here, based on differences in the statutory text and framework for adjustments under § 154, the Federal Circuit held that the ODP analysis uses a patent's expiration date *after* an *adjustment* is added (*In re Cellect, LLC*).
- **Public Health:** The Fifth Circuit permitted a suit to proceed against the FDA, the Department of Health and Human Services (HHS), and named officials for statements made on the use of ivermectin to treat COVID-19 symptoms. Ivermectin, which may be formulated for human or animal use, has not been approved by the FDA for COVID-19 treatment. The plaintiffs, three doctors who prescribed the human version of the drug to treat COVID-19 symptoms, alleged that statements made by the defendants following reports of people self-medicating with the animal version of invermectin harmed their medical practices and reputations. The district court dismissed the suit on sovereign immunity grounds, but the Fifth Circuit reversed. The court of appeals held that the plaintiffs plausibly alleged that the defendants' statements were not purely informational but instead medical recommendations that they lacked statutory authority to make, and that the plaintiffs could use the Administrative Procedure Act to bypass sovereign immunity and pursue these *ultra vires* claims (*Apter v. HHS*).
- **Securities:** The D.C. Circuit held that the Securities and Exchange Commission (SEC) acted arbitrarily and capriciously when it denied a rule change seeking to list a proposed bitcoin exchange-traded product on a national exchange. The SEC previously approved two rule changes to list bitcoin futures exchange-traded products, and in the court's view, the proposed bitcoin product is materially similar, across the relevant regulatory factors, to the approved bitcoin futures products (*Grayscale Investments, LLC v. SEC*).
- **Tax:** The Second Circuit held that violation of a Treasury regulation corresponding to Internal Revenue Code (IRC) Section 6331 did not bar the Department of Justice's suit to

collect an unpaid tax liability. In violation of Treasury Regulation Section 301.6331-4(b)(2), the Internal Revenue Service (IRS) referred the defendant's matter to the Department of Justice before the defendants received the IRS's formal rejection of an installment agreement request. After the defendants received and declined to appeal the rejection, the Department of Justice filed suit in compliance with IRC Section 6331. The Second Circuit held that, although the regulation bars the IRS from issuing a referral while an installment agreement request is pending, the statute is silent on referrals and only bars the government from commencing a "proceeding in court" during that period. The court further held that, absent a violation of constitutional or statutory rights or any demonstration of prejudice, the government's failure to follow its own regulations did not bar the collection action (*United States v. Schiller*).

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