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Legal Sidebar

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (November 13–November 19, 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

Last week, the Supreme Court granted certiorari in one case:

- **Criminal Law & Procedure:** The Court agreed to hear an appeal from the Ninth Circuit on whether Federal Rule of Evidence 704(b) permits an expert witness for the government to testify that drug couriers typically know they are carrying drugs when the offense at issue requires the government to prove as an element of the offense that the defendant knew she was carrying illegal drugs (*Diaz v. United States*).

This past week, the Court released a Code of Conduct setting forth ethics rules and principles. A Court statement accompanying the Code describes it as reflecting long-standing principles that have guided the conduct of Members of the Court.

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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.

- **Criminal Law & Procedure:** The Eleventh Circuit held that a sentence imposed under 18 U.S.C. § 3147 for felony offenses committed while on pretrial release may exceed the statutory maximum term prescribed for the underlying offenses, disagreeing with dicta from the D.C. and Fifth Circuits, which suggested that a § 3147 enhancement would not permit a sentence in excess of the statutory maximum. The court noted, however, that whether a person committed the felony offense while on pretrial release must be submitted to a jury and proven beyond a reasonable doubt, as required by the Supreme Court's decision in *Apprendi v. New Jersey* and its progeny (*United States v. Perez*).
- **Education:** A divided Fifth Circuit panel held that a district court erred in dismissing a student's standalone Americans with Disabilities Act (ADA) suit against a school when the "gravamen" of the complaint involved a denial of a right to a free appropriate public education (FAPE) guaranteed by the Individuals with Disabilities Education Act (IDEA). The circuit majority held that plaintiffs who have properly exhausted their IDEA remedies, or who seek relief unavailable under the IDEA (e.g., compensatory damages), may file suit under the ADA asserting claims related to the denial of appropriate educational services (*Lartigue v. Northside Indep. Sch. Dist.*).
- ***Employee Benefits:** The Second Circuit held that, to state a claim under 29 U.S.C. § 1106(a)(1)(C) alleging a prohibited transaction in violation of the Employee Retirement Income Security Act of 1974 (ERISA), a complaint must allege that a plan fiduciary caused an employee benefit plan to compensate a service provider for unnecessary services or to pay unreasonable compensation. The circuit joins the Third, Seventh, and Tenth Circuits in this view, but differs from the position of the Eighth and Ninth Circuits, which hold that a prohibited transaction claim under § 1106(a)(1)(C) may be stated by alleging merely that the plan paid compensation for services. The Second Circuit reasoned that requiring a complaint to allege that compensation was unnecessary or unreasonable would limit plan mismanagement claims under § 1106(a)(1)(C) to the offensive conduct the statute discourages, and avoid encompassing the vast array of routine transactions that are not prohibited (*Cunningham v. Cornell Univ.*).
- ***Immigration:** The Fourth Circuit issued the latest ruling in a growing circuit split over when an alien subject to a reinstated removal order may seek judicial review of a later administrative denial of that alien's eligibility to pursue withholding of removal. Under 8 U.S.C. § 1252(b)(1), a "final" order of removal may be appealed to a U.S. circuit court within 30 days of the date of the order. Joining the Second and Fifth Circuits, but disagreeing with the Sixth, Ninth, and Tenth Circuits, a majority of the Fourth Circuit panel held that the 30-day clock is tied to the earlier reinstatement of removal order, not the later relief proceedings (*Martinez v. Garland*).
- **Labor & Employment**: The Fifth Circuit held that the National Labor Relations Board (NLRB) exceeded its authority in ruling that Tesla's uniform policy violated the National Labor Relations Act (NLRA). The company barred workers from wearing nonapproved company clothing (including in this case, union t-shirts), while allowing workers to affix union-supporting stickers onto their uniforms. The court held the NLRB erred in treating any restriction on an employee's ability to display union insignia as permissible only in "special circumstances." The court held that the ruling conflicted with the NLRB's

statutory obligation to balance employees' right of self-organization with employers' right to maintain discipline. Even if the "special circumstances" test applied, the court found Tesla's uniform policy furthered a legitimate interest, was facially neutral and nondiscriminatory, and did not prevent workers from displaying their union support through stickers adorning their uniforms (*Tesla, Inc. v. NLRB*).

- **Securities:** The Ninth Circuit joined the Second Circuit in recognizing that Securities and Exchange Commission Rule 16b-3, which permits transactions between an issuer and the issuer's director only when approved by the issuer's board, does not require that the board's approval be for the specific purpose of exempting the transaction from liability. The Ninth Circuit noted that the rule contains no mention of the subjective intentions of the approving body. The court therefore reasoned that the only requirements for exemption are that the transaction was between an issuer and an insider, and that the terms and conditions of the transaction received advance approval by the board (*Roth v. Foris Ventures, LLC*).
- **Speech:** A divided Seventh Circuit held that a Wisconsin statute criminalizing interference with or harassment of a hunter violated the First Amendment. Prohibited interference under the statute included photographing or recording a hunter or approaching or confronting a hunter. The majority found that the prohibition on approaching a hunter was vague because it failed to give reasonable notice as to what conduct was prohibited. The court held that the prohibition on photographing or recording a hunter was overbroad because it criminalized a substantial number of protected, expressive activities, such as newsgathering, and therefore had a significant chilling effect on speech. The majority further held that the statute discriminated against expressive activity based on viewpoint (opposition to hunting) and did not survive strict scrutiny because the legislature had other means to protect hunters from physical interference without curtailing First Amendment activities (*Brown v. Kemp*).
- **Tax:** The Eleventh Circuit held that whistleblowers who stood to receive a portion of unpaid taxes or penalties collected by the Internal Revenue Service (IRS) in an enforcement action could not bring suit under the Administrative Procedure Act (APA) to compel the agency to act on the information they provided. The panel held that the IRS's determination not to pursue an enforcement action based on resource considerations was a decision committed to agency discretion and therefore unreviewable under the APA (*Stone v. Commissioner of Internal Revenue*).
- **Trade:** Reversing the Court of International Trade's judgment that set aside a presidential proclamation that increased duties on bifacial solar panels, the Federal Circuit held that presidential authority to modify an existing trade safeguard under 19 U.S.C. § 2254(b)(1)(B) includes not only trade-liberalizing changes, but also trade-restricting changes. Comparing the language about presidential powers available under § 2254(b)(1)(A) (permitting only reduction or termination of a safeguard when domestic industry has not made adequate efforts to adjust to import competition) and § 2254(b)(1)(B) (permitting reduction, *modification*, or termination of a safeguard where such efforts have been made), the Federal Circuit held that the President could construe the broader language in the latter provision as allowing him to proclaim certain increases to safeguard tariffs when domestic industry made adequate efforts to adjust to import competition (*Solar Energy Indus. Assoc. v. United States*).

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