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Legal Sidebar

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (November 27–December 3, 2023)

December 4, 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 did not issue any opinions or agree to hear any new cases last week.

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.

- **Abortion:** A divided Sixth Circuit affirmed in part and reversed in part a district court's decision not to issue a preliminary injunction halting enforcement of a 2021 Department of Health and Human Services (HHS) rule for the Title X family-planning grant program. The lawsuit challenging the rule, brought by Ohio and other states, turns on whether the rule comports with Section 1008 of Title X, which bars funds appropriated for Title X from being used "in programs where abortion is a method of family planning." In *Rust v.*

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LSB11085

Sullivan, the Supreme Court held that Section 1008's scope was ambiguous, entitling a reasonable construction of the provision by HHS to *Chevron* deference. Applying *Rust*, the Sixth Circuit held that one of the 2021 rule's components, which required Title X grant recipients make abortion referrals upon request, was based on a permissible interpretation of Section 1008 as not barring this practice. The circuit panel majority held that another component of the 2021 rule, which rescinded an earlier HHS requirement that grant recipients keep family planning services physically and financially separate from any abortion-related services, conflicted with Section 1008. The majority held that a preliminary injunction halting enforcement of the rule was warranted but only as applied to Ohio-based Title X grant recipients (*Ohio v. Becerra*).

- **Bankruptcy:** A divided Second Circuit held that, for purposes of determining whether the safe harbor provision in 11 U.S.C. § 546(e) prevents a trustee in a Chapter 11 bankruptcy from avoiding certain types of transfers, a "financial institution" includes bank customers only in transactions where a bank acted as the customer's agent. Section 546(e) precludes bankruptcy trustees from avoiding transfers made by or to (or for the benefit of) a financial institution in connection with a securities contract. A separate provision defines financial institutions to include bank customers when a bank acts as an agent of the customer in connection with a securities contract. The majority held that analysis of whether a transfer is protected by the safe harbor must be analyzed on a "transfer-by-transfer" basis, rejecting the district court's and the dissent's "contract-by-contract" approach. The majority reasoned that the latter approach would absurdly result in insulating every transfer made in connection with a leveraged buyout contract so long as a bank acted as an agent for at least one transfer (*In re: Nine West LBO Securities Lit.*).
- **Civil Procedure:** The Second Circuit reversed a district court's dismissal of a *qui tam* complaint. The district court dismissed the complaint for failing to provide timely service. The circuit court held that the unsealing of the complaint, without any further order, did not start the service of process period under Federal Rule of Civil Procedure 4(m) because 31 U.S.C. § 3730(b)(2) of the False Claims Act does not permit a relator to effectuate service of the complaint until the court issues an order permitting service (*United States ex rel. Weiner v. Siemens AG*).
- **Criminal Law & Procedure**: The Second Circuit affirmed convictions for financial institution bribery in violation of 18 U.S.C. § 215(a)(2) and conspiracy to commit financial institution bribery in violation of 18 U.S.C. § 371. Financial institution bribery occurs when an officer, director, employee, agent, or attorney of a financial institution corruptly solicits or demands for the benefit of any person, or corruptly accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business or transaction of such institution. Construing the elements necessary for such a conviction, the court held that (1) "corrupt" conduct describes actions motivated by an improper purpose, even if such actions did not entail a breach of duty and were also motivated, in part, by a neutral or proper purpose; (2) a "thing of value" includes subjectively valuable intangibles, such as political assistance, including endorsements, guidance, and referrals; and (3) a "thing of value" may be measured by its value to the parties, by its exchange value, or by its market value (*United States v. Calk*).
- **Criminal Law & Procedure:** The Fourth Circuit held that a conviction under 18 U.S.C. § 1959(a)(3) for a violent crime in aid of racketeering (VICAR) activity that involves assault with a dangerous weapon may support a subsequent conviction for use of a firearm while committing a "crime of violence" under 18 U.S.C. § 924(c). Although the Supreme Court has narrowed the scope of criminal conduct considered a "crime of violence" under Section 924(c) in the years following the criminal defendant's VICAR

conviction, the circuit court held that the VICAR offense remains a valid predicate offense to sustain a subsequent firearm conviction involving a crime of violence (*United States v. Thomas*).

- **Employee Benefits:** The Ninth Circuit concluded that the fees deducted from the monetary credit that plaintiff employees received when they opted out of their union and employer-sponsored health plans were not part of those employees' "regular rate" of pay when calculating overtime compensation under the Fair Labor Standards Act (FLSA). The court held that the fees fell under the FLSA exemption for "contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing" health benefits (*Sanders v. Cnty. of Ventura*).
- **Environmental Law:** A divided Fifth Circuit affirmed a preliminary injunction directing the State of Texas to halt the installation of a floating barrier in the Rio Grande intended to deter unauthorized migration and to reposition the barrier onto the Texas-side riverbank. The majority decided that the United States was likely to succeed in its argument that the installation violated the Rivers and Harbors Appropriation Act of 1899 (RHA). The RHA bars obstructions to the "navigable" capacity of waters of the United States unless authorized by Congress, and the law further bars the installation of any "structure" in such waters without a U.S. Army Corps of Engineers (USACE) permit. The majority affirmed the lower court's factual finding that the portion of the Rio Grande where the barrier was installed was "navigable," and the majority also agreed that the barrier was a "structure" requiring USACE approval (*United States v. Abbott*).
- ***Immigration:** The Sixth Circuit joined the Third, Fifth, and Eighth Circuits in holding that "harboring" aliens in violation of 8 U.S.C. § 1324(a)(1)(A)(iii) encompasses conduct that tends to substantially facilitate those persons remaining in the country illegally and prevent authorities from detecting their presence. The controlling opinion characterized the court's approach as differing from that taken by the Second, Seventh, and Ninth Circuits, which have held that a defendant must act intentionally or purposefully for liability to attach, and the Eleventh Circuit, which requires a "knowing" mens rea (*United States v. Zheng*).
- **Religion:** The Second Circuit held that a prisoner alleging a violation of his right to the free exercise of religion under the First Amendment need not show that his religious beliefs were "substantially burdened." The court recognized that this requirement differed from claims under the Religious Freedom Restoration Act because that statute expressly requires a substantial burden inquiry. For a free exercise claim, the court held that a plaintiff only need show that a government entity has burdened his sincere religious practice pursuant to a policy that is not neutral or generally applicable (*Kravitz v. Purcell*).
- **Securities:** The Second Circuit held that a company violated the Investment Company Act of 1940 (ICA) when it restricted shareholders in certain closed-end investment funds from voting additional shares acquired after reaching specified levels of ownership. The ICA generally directs that all shares of common stock from registered investment companies be voting stock with equal voting rights as other shares. The court held that the defendant company's restrictions violated the ICA's plain text. The court rejected the defendant's claim that the ICA's prohibition on *share* restrictions did not apply because the company's restrictions were directed at individual shareholders rather than shares (*Saba Cap. CEF Opportunities 1, Ltd. v. Nuveen Floating Rate Income Fund*).
- **Separation of Powers:** The D.C. Circuit rejected former President Donald Trump's effort to dismiss consolidated civil suits against him by 2 U.S. Capitol Police officers and 11

Members of Congress arising from the events at the U.S. Capitol on January 6, 2021. The plaintiffs alleged that the former President tried to obtain a second term despite losing the 2020 presidential election, and that his postelection activities resulted in the January 6 riot at the U.S. Capitol. The court held that, at this stage in the case, the former President had not shown that he was entitled to official-act immunity. The court held that a campaign to retain the presidential office is not an official act of the office but a personal act of an office-seeker. The court observed that its ruling did not go to the ultimate merits of the plaintiffs' claims, did not address the former President's argument (not raised in this appeal) that his actions were protected under the First Amendment, and did not resolve whether other privileges may limit the use of certain evidence in the civil suit (*Blassingame v. Trump*).

- ***Torts:** A divided Seventh Circuit held that a federal prisoner could not bring a *Bivens* action alleging an Eighth Amendment failure-to-protect claim. The majority affirmed the dismissal of the plaintiff's complaint, which alleged that prison officials retaliated against him for making complaints against a prison official by housing him with violent inmates. Agreeing with the Fourth Circuit, and disagreeing with the Third, the majority explained that a failure-to-protect claim is not one of the recognized *Bivens* causes of action, and thus it is for Congress to determine whether to create a remedy for such a claim (*Sargeant v. Barfield*).

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