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Legal Sidebar

Congressional Court Watcher: Recent Appellate Decisions of Interest to Lawmakers (Jan. 30–Feb. 5, 2023)

February 7, 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

Last week, the Supreme Court did not issue any opinions or agree to hear any new cases.

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.

- **Bankruptcy:** The Third Circuit ordered the dismissal of a bankruptcy petition that it found was not filed in good faith, overturning the findings of the bankruptcy court. After tens of thousands of lawsuits were filed against Johnson & Johnson Consumer Inc. for the alleged presence of asbestos in its popular baby powder product, the company, through a series of transactions primarily carried out under Texas law, split into two new entities: LTL Management and Johnson & Johnson Consumer Inc. The companies then

Congressional Research Service
https://crsreports.congress.gov
LSB10913

transferred all productive assets to Consumer Inc. and the liabilities for the baby powder litigation to LTL Management. The two new entities also entered an agreement that Consumer Inc. would fund up to $61.5 billion in LTL's litigation costs. LTL then filed for Chapter 11 bankruptcy. The Third Circuit found that LTL lacked good faith when it filed for bankruptcy because Congress did not design the Bankruptcy Code to help troubled but well-funded businesses evade liability (*In re LTL Management, LLC*).

- **Commerce:** The Sixth Circuit reversed a district court's order denying a preliminary injunction against a Kentucky coal tax statute, concluding that the plaintiff would likely succeed in showing that the law violates the "dormant" Commerce Clause. Kentucky is one of a few states that levies a severance tax on coal extracted within its borders, but also encourages utilities to maintain reasonable rates by purchasing coal at cheaper prices. In an attempt to level the playing field and ensure that Kentucky coal producers were not disadvantaged relative to producers from states without severance taxes, the state required its public service commission to subtract such taxes when considering the reasonableness of contracts and bids for coal. The Sixth Circuit determined that the statute likely would be found to impermissibly discriminate against interstate commerce (*Foresight Coal Sales, LLC. v. Chandler*).
- **Communications:** The Ninth Circuit affirmed a district court's order dismissing a plaintiff's federal and state law claims against GoDaddy, a domain name registrar, over the loss of a domain name. The plaintiff alleged that a payment glitch caused him to miss a payment to renew the registration of his organization's domain name, after which a third party registered the domain name and used it for a gambling information site. The Ninth Circuit held that the plaintiff's Lanham Act claim failed because he did not adequately plead that GoDaddy used his mark in commerce or fell afoul of the Anticybersquatting Consumer Protection Act. The Ninth Circuit further held that Section 230 of the Communications Decency Act applied to GoDaddy and shielded it from any liability for the plaintiff's state-law claims (*Rigsby v. GoDaddy Inc.*).
- **Consumer Protection:** The D.C. Circuit reversed a district court order vacating part of the Consumer Finance Protection Bureau's (CFPB's) Prepaid Rule and held that the Rule does not mandate a "model clause" in violation of the Electronic Fund Transfer Act (EFTA). The district court determined, and the CFPB did not dispute for the purposes of the case, that EFTA gives the CFPB authority only to issue model clauses for optional use by financial institutions, not to mandate specific clauses. CFPB argued that its Prepaid Rule, regulating prepaid digital accounts, included content and formatting requirements but did not require a specific clause. The D.C. Circuit agreed and held that "model clause" under EFTA means specific copiable language (*PayPal, Inc. v. CFPB*).
- **Contracts:** The D.C. Circuit reversed a district court's order finding that a subcontractor was not entitled to recover supervisory on-site labor costs under the Miller Act. Although the act does not define "labor," the D.C. Circuit agreed with several other circuit courts that the nature of a supervisor's responsibilities falls within the purview of compensable "labor" under the Miller Act if, in the regular course of their job, the supervisor performs or would have been expected to perform some physical labor on the job site (*United States v. Hirani Engineering & Land*).
- **Criminal Law & Procedure:** The Fourth Circuit vacated and remanded a district court's order denying a criminal defendant's motion for a reduced sentence under Section 404(b) of the First Step Act of 2018, which gives retroactive effect to the Fair Sentencing Act (FSA) by allowing defendants to move for a sentence reduction. The FSA established a new, lower maximum sentence for a conviction involving 50 or more grams of crack

cocaine, which would have applied to the defendant had he been sentenced after implementation of the FSA. The Fourth Circuit cited the Supreme Court's recent decision in *Concepcion v. United States*, which held that district courts have discretion to reduce sentences under the First Step Act but are not compelled to do so, even though they must first consider all non-frivolous arguments made by defendants. While *Concepcion* involved a sentencing enhancement rather than a statutory maximum sentence, the Fourth Circuit held that the same principle applied, rejected the defendant's argument that reduction was mandatory, and remanded the case for the district court to consider all non-frivolous arguments made by the defendant (*United States v. Larry Reed*).

- **Criminal Law & Procedure:** The Ninth Circuit held that the personal identification number (PIN) associated with a debit-type card is an "authentication feature" under 18 U.S.C. § 1028(d)(1) and a related provision of the United States Sentencing Guidelines. The defendant was convicted of misusing others' federal food stamp benefits and the district court applied a sentencing enhancement based on the use of an "authenticating feature" as defined in Section 1028(d)(1). The Ninth Circuit affirmed, holding that an Electronic Benefits Transfer card is an "access device" under Section 1029(e)(1) and therefore a "means of identification" under Section 1028(d)(7), making a PIN used in combination with such a card an "authentication feature" under Section 1028(d)(1) (*United States v. Barrogo*).
- **Criminal Law & Procedure:** The Eleventh Circuit held that a dismissal for failure to exhaust administrative remedies is an automatic "strike" under the Prison Litigation Reform Act's three-strikes rule—which limits prisoners' ability to proceed without payment of court fees—only if the failure to exhaust appears on the face of the prisoner's complaint. A prisoner's prior lawsuit is generally a strike if it was dismissed on the grounds that it was frivolous, malicious, or failed to state a claim upon which relief may be granted. The court held that a grant of summary judgment due to a failure to exhaust administrative remedies that became apparent only after the submission of evidence does not represent a failure to state a claim upon which relief may be granted and so is not necessarily a strike under the rule (*Wells v. Brown*).
- **Criminal Law & Procedure:** The Eleventh Circuit held that the First Step Act does not entitle a defendant to revisit the specific drug quantity finding in a case. The district judge sentenced the defendant based on the judge's determination of the specific drug quantity involved in his crime. Given this quantity, retroactive application of the Fair Sentencing Act would not affect the defendant's sentence. In a 2020 ruling, the Eleventh Circuit acknowledged that later Supreme Court decisions would have required a jury, rather than a judge, to make the drug quantity finding, but held that these decisions were not retroactive and could not support a reduction motion under the First Step Act. The defendant petitioned for certiorari and the Supreme Court remanded for further consideration in light of its decision in *Concepcion v. United States*. The Eleventh Circuit held that, under *Concepcion*, district courts may consider intervening factual and legal developments on a First Step Act motion, but may not revisit binding factual findings that preceded the determination of a sentence, such as drug quantity (*United States v. Jackson*).
- **Environmental Law:** The Tenth Circuit concluded that the Bureau of Land Management acted arbitrarily and capriciously in its consideration of potential environmental impacts posed by permit applications for oil and gas drilling in New Mexico. The court agreed with the Bureau that it did not improperly predetermine the approval of the permits or inadequately consider the environmental impact on water resources. The court held, however, that the Bureau failed to take the hard look required by the National

Environmental Policy Act at the environmental impacts from greenhouse gas emissions and hazardous air pollutant emissions. The court enjoined any further approvals pursuant to the deficient assessments pending the district court's determination of a remedy on remand (*Diné Citizens Against Ruining Our Env't v. Haaland*).

- **Firearms:** The Fifth Circuit held that 18 U.S.C. § 922(g)(8), which prohibits the possession of firearms by someone subject to a domestic violence restraining order, is unconstitutional under the Second Amendment. The court first rejected the government's argument that the Second Amendment's applicability is restricted to ordinary, responsible, and law-abiding citizens. Applying the Supreme Court's decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, the Fifth Circuit further held that the government failed to identify a relevantly similar historical analog for the prohibition (*United States v. Rahimi*).
- **Freedom of Information Act (FOIA):** The D.C. Circuit reversed a district court decision finding that certain records sought under a FOIA request fell under a FOIA exemption. The plaintiff group filed a FOIA request related to the Bureau of Prisons' procurement of the drug pentobarbital to resume federal executions. The Bureau supplied some records, but withheld others that could identify companies in the government's pentobarbital supply chain under FOIA exemption four, which protects trade secrets and confidential commercial information. The D.C. Circuit held that the Bureau did not meet its burden to justify withholding documents, because it did not provide a detailed explanation of how the information sought was "commercial" or "confidential" under the statute (*Citizens for Responsibility and Ethics in Washington v. DOJ*).

- **Health Care:** A divided Third Circuit held that Section 340B of the Public Health Service Act does not authorize the U.S. Department of Health and Human Services (HHS) to prohibit drug manufacturers from placing conditions on safety net providers' use of contract pharmacies to distribute drugs to patients. Section 340B provides that manufacturers who participate in Medicare and Medicaid must sign an agreement with HHS to "offer" drugs at a statutorily calculated price to be "purchased by" providers, but the statute does not mention contract pharmacies. The Third Circuit held that the manufacturers' limitations did not violate either the "shall offer" or the "purchased by" requirements of the statute, and thus HHS could not prohibit them. Separately, the court also held that HHS did not violate the Administrative Procedure Act (APA) when the agency finalized a rule establishing the 340B program's alternative dispute resolution proceedings after purporting to withdraw the rule years earlier. The court reasoned that neither the APA nor the Supreme Court have provided guidance on the withdrawal of proposed rules (*Sanofi Aventis US LLC v. HHS*).
- **Labor & Employment:** The Third Circuit held that an employee may not bring an action against the Secretary of Labor under a provision of the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. § 662(d), to seek relief for dangerous working conditions after the Occupational Safety and Health Administration (OSHA) had completed enforcement proceedings. Section 662 gives a district court jurisdiction, upon the Secretary's petition, to restrain workplace hazards that could cause immediate death or physical harm. The section also authorizes a limited private right of action if the Secretary arbitrarily or capriciously fails to seek relief. The court held that the OSH Act mandates the dismissal of a Section 662(d) claim once OSHA has completed its enforcement proceedings and that no private right of action would therefore exist. The court reasoned that Section 662(d) is framed around the restraint of conditions *before* danger can be eliminated through the agency's enforcement procedures (*Jane Doe I v. Eugene Scalia*).
- **Labor & Employment:** The Ninth Circuit reversed a district court's judgment for defendant airlines in a class action brought under the Uniformed Services Employment and Reemployment Rights Act (USERRA). Regulations implementing USERRA require that employers treat employees who take military leave as favorably as those who take comparable non-military leave. The Ninth Circuit held that the district court erred by considering military leave categorically, rather than by comparing only the short-term military leaves identified by the lead plaintiff in his claim. The Ninth Circuit further held that the district court improperly resolved factual disputes in the comparability analysis, in part by considering the frequency of leave contrary to the purpose of USERRA, and remanded on the ground that a reasonable jury might rule for the class (*Clarkson v. Alaska Airlines*).

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