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Legal Sidebar

Congressional Court Watcher: Circuit Splits from July 2024

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The U.S. Courts of Appeals for the thirteen "circuits" issue thousands of precedential decisions each year. Because relatively few of these decisions are ultimately reviewed by the Supreme Court, the U.S. Courts of Appeals are often the last word on consequential legal questions. The federal appellate courts sometimes reach different conclusions on the same issue of federal law, causing a "split" among the circuits that leads to the non-uniform application of federal law among similarly situated litigants.

This Legal Sidebar discusses circuit splits that emerged or widened following decisions from the last month on matters relevant to Congress. The Sidebar does not address every circuit split that developed or widened during this period. Selected cases typically involve judicial disagreement over the interpretation or validity of federal statutes and regulations, or constitutional issues relevant to Congress's lawmaking and oversight functions. The Sidebar only includes cases where an appellate court's controlling opinion recognizes a split among the circuits on a key legal issue resolved in the opinion.

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.

- **Civil Procedure:** A divided Sixth Circuit panel upheld the denial of a company's motion to vacate a default judgment issued years earlier; the lower court had decided the motion to vacate was untimely. Federal Rule of Civil Procedure 60(b)(4) permits a federal court to "relieve a party . . . from a final judgment, order, or proceeding" for enumerated reasons or "any other reason that justifies relief." Applying circuit precedent, the panel majority held that courts retain discretion to deny Rule 60(b)(4) motions—even for judgments that would otherwise be void due to a fundamental jurisdictional error or violation of a party's due process rights— if those motions are not made within a reasonable time after the final decision. While acknowledging that other circuits have held that there is no time limit for Rule 60(b)(4) motions to vacate void judgments, the panel majority described its interpretation as consistent with the text of the rule and principles of equity. The panel suggested that the reasonable-time clock might not begin

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to run until enforcement of the judgment is attempted, but found it unnecessary to resolve that issue (*In re: Vista-Pro Auto, LLC*).

- **Civil Procedure:** The Third Circuit decided a case about the interplay between Sections 1920 and 1921 of Title 28 of the *U.S. Code*, which address the reimbursement of a prevailing party in litigation for service of process costs. Section 1920(1) authorizes reimbursement of fees related to the "clerk and marshal," while Section 1921 addresses which fees U.S. "marshals and deputy marshals shall routinely collect, and a court may tax as costs," including serving subpoenas and summonses. The Third Circuit held that "marshal" refers to a public actor under the statutes. Disagreeing with other courts, including the Seventh and Eleventh Circuits, the Third Circuit panel held that Section 1920 does not permit awarding fees for service by private process servers (*Knowles v. Temple Univ.*).
- **Civil Rights:** A divided Sixth Circuit rejected equal protection and due process challenges to a Tennessee statute barring persons from changing the sex identified on their birth certificate to one consistent with their gender identity. The majority held that the law did not discriminate based on sex because the restriction applies equally to males and females who want to change identification records to match their gender identity. The panel cited circuit precedent in holding that laws that discriminate based on transgender status are not subject to heightened scrutiny because transgender status is not a suspect class for constitutional purposes. Applying the more forgiving rational basis standard of review, the majority upheld the law because it was rationally related to the state's interest in preparing and publishing reports on vital statistics and maintaining a consistent, biologically based definition of sex in government records. The panel majority acknowledged a split with the Tenth Circuit, which recently ruled that a similar Oklahoma law was unconstitutional even under rational basis review (*Gore v. Lee*).
- **Class Actions:** A divided Second Circuit rejected the defendant drug makers' attempt to remove plaintiffs' personal injury suits from state court to federal court under the Class Action Fairness Act (CAFA). CAFA generally confers federal subject-matter jurisdiction over a civil "mass action," which occurs when "monetary relief claims of 100 or more persons are proposed to be tried jointly." CAFA provides that actions consolidated or coordinated solely for pretrial purposes are not "mass actions." Joining three other circuits and splitting with the Sixth Circuit, the Second Circuit panel majority interpreted CAFA to require a reviewing court to determine whether the plaintiffs had intended to have a joint trial. The majority held that the context of the plaintiffs' request that a state court consolidate their cases only showed that they intended pretrial consolidation, and that the action therefore did not qualify as a "mass action" removable to federal court (*Bacher for Bacher v. Boehringer Ingelheim Pharms., Inc.*)
- **Class Actions:** In a per curiam, reissued decision, the Eleventh Circuit decided what constitutes a "coupon" for purposes of the CAFA attorney fee provisions that apply when a class action settlement awards class members coupons in lieu of monetary relief. The panel held that a coupon can be a voucher, certificate, or form that may be exchanged either for a good or service or for a discount on a good or service. The panel described its position as aligning with the approach of the Second and Fourth Circuits, but observed that other circuit courts had taken different views on when or whether a voucher may constitute a coupon. Splitting with the Ninth Circuit but joining most other reviewing courts, the Eleventh Circuit panel also held that CAFA does not require that attorney fees for coupon settlements be based solely on the value of redeemed coupons. Instead, the circuit court concluded that a court may also employ the lodestar method, calculating the

time the attorney could reasonably have been expected to work and multiplying that amount by a reasonable hourly rate (*Drazen v. Pinto*).

- **Communications:** A divided en banc panel of the Fifth Circuit held that the Federal Communications Commission's (FCC's) funding mechanism for the Universal Service Fund (USF) under Section 254 of the Telecommunications Act of 1996 violates constitutional nondelegation principles. The FCC promotes universal access to telecommunications service via the USF, which is funded by required contributions from covered telecommunications carriers. A private entity, the Universal Service Administrative Company, is charged by the FCC with tasks that include calculating the USF contribution factor. The en banc majority held that the power to levy USF contributions is quintessentially the legislative power to tax. The majority declined to squarely decide whether Congress improperly delegated its taxing power to the FCC without providing the agency with an intelligible principle to guide its discretion, or whether the FCC impermissibly delegated this taxing power to a private entity. Instead, the majority concluded that the *combination* of Congress's broad delegation to the FCC and the agency's subdelegation to a private entity amounted to a constitutional violation. The majority's decision breaks from rulings of the Sixth and Eleventh Circuits rejecting similar nondelegation challenges (*Consumers Research v. FCC*).
- **Criminal Law and Procedure:** The Second Circuit held that the Mandatory Victims Restitution Act (MVRA), which extended the enforcement period for criminal restitution obligations under 18 U.S.C. § 3613(b), applies to defendants whose offenses were committed before the MVRA's enactment and for whom the restitution period would have expired if not for the MVRA. Disagreeing with the Third Circuit, the panel held that retroactive application of the MVRA would not violate the Constitution's Ex Post Facto Clause (*United States v. Weinlein*).
- **Criminal Law & Procedure:** The Fourth Circuit affirmed a defendant's convictions and sentences for various child pornography offenses under 18 U.S.C. §§ 2251 and 2252. The panel rejected, among other things, the defendant's challenge to jury instructions on when the "lascivious exhibition" of a child's intimate areas qualifies as "sexually explicit conduct" for purposes of Sections 2251 and 2552. In so doing, the panel joined nine other circuits that have adopted or endorsed the *Dost* factors to determine what constitutes a "lascivious exhibition," disagreeing with the Seventh Circuit and D.C. Circuit, which have either discouraged the use of, or declined to adopt, the *Dost* factors (*United States v. Sanders*).
- **Criminal Law & Procedure:** A divided Eleventh Circuit deepened a circuit split as to when Section 403 of the First Step Act—which generally provides for reduced sentencing for multiple "crime of violence" violations under 18 U.S.C. § 924(c)—applies to "pending" cases—that is, cases in which the offense occurred pre-enactment but the sentence had not been "imposed" by the date of enactment. The Eleventh Circuit joined the Fifth and Sixth Circuits in holding that post-enactment vacatur of a pre-enactment sentence counts as an "imposed" sentence, disqualifying a defendant from Section 403(b) resentencing. The panel split with the Third and Ninth Circuits, which have held that a defendant is eligible for Section 403(b) resentencing in those situations. The Supreme Court recently agreed to review this issue in its upcoming October 2024 term (*United States v. Hernandez*).
- **Immigration:** The Second Circuit upheld immigration adjudicatory authorities' determination that an alien petitioner was ineligible for asylum and related forms of relief from removal. The court held that the petitioner had not shown that immigration

authorities erred in deciding that he had not established past persecution or a well-founded fear of persecution if returned to his home country. In so doing, the circuit panel joined most reviewing courts, but split with the Fourth Circuit, in holding that the receipt of death threats is not a form of persecution per se (*KC v. Garland*).

- **Securities:** The Third Circuit affirmed a preliminary injunction issued by a lower court to freeze the assets of a defendant in a civil enforcement action brought by the Securities and Exchange Commission (SEC), but the circuit panel held that the lower court did not apply the proper test when issuing the injunction. The appeals court held that the lower court should not have employed a test used by the Second Circuit in cases involving injunctions sought by the SEC. The Second Circuit's test considers only whether the SEC makes a substantial showing of likelihood to succeed in proving a securities law violation and a risk of repetition. For injunctions involving asset freezes, the Second Circuit also reduces the level of proof needed to satisfy the likelihood-of-success prong, allowing the SEC to satisfy its burden by showing only that an inference can be drawn that a defendant violated the securities laws. Instead of adopting the Second Circuit's test, the Third Circuit held that the lower court should have employed the traditional four-factor test for deciding whether a preliminary injunction should be issued. Because the defendant sought an immediate answer on whether a preliminary injunction would be proper, the Third Circuit applied the traditional four-factor test and upheld the injunction using that approach (*SEC v. Chappell*).
- **Separation of Powers:** Splitting with the Sixth Circuit, the Fifth Circuit held that the enforcement provisions of the 2020 Horseracing Integrity and Safety Act (HISA) are facially unconstitutional because Congress impermissibly delegated government power to a private entity not accountable to the people. HISA established a private Horseracing Integrity and Safety Authority with the power to issue regulatory rules, subject to oversight by the Federal Trade Commission (FTC). In 2022, the Fifth Circuit held that the HISA violated the private nondelegation doctrine because HISA gave the FTC only limited review powers over the Authority's proposed rules. Congress responded by amending the law to provide the FTC greater oversight authority. The Fifth Circuit here held that, although the HISA amendments cured some constitutional defects, the statute still impermissibly permitted the Authority to engage in enforcement actions—including conducting searches, issuing subpoenas, levying fines, and seeking injunctions—without FTC supervision (*Nat'l Horseman's Benevolent & Protective Ass'n v. Black*).
- **Transportation:** A divided Fifth Circuit panel agreed to stay a Department of Transportation (DOT) rule on when and how airlines must disclose certain fees to consumers, including baggage and change fees, during the booking process. The panel held that the plaintiffs made a strong showing that the rule exceeds the agency's authority under 49 U.S.C. § 41712(a), which authorizes the DOT Secretary to "investigate and decide whether an air carrier ... has been or is engaged in an unfair or deceptive practice or an unfair method of competition in ... the sale of air transportation." The panel decided Section 4712(a) does not provide the DOT with the power to prescribe regulations governing the airline industry, but instead authorizes the DOT to adjudicate on a case-by-case basis whether a particular airline's practices are "unfair or deceptive" and, if so, direct the carrier to end those practices. The panel held that the DOT Secretary's general authority under 49 U.S.C. § 40113(a) to take action that the Secretary considers necessary to carry out his or her duties, including through the prescribing of regulations, cannot overcome the plain language of Section 41712(a). The panel disagreed with the Seventh Circuit, which had held that Sections 40113(a) and 41712(a)'s precursors authorized the

DOT to engage in legislative rulemaking to address unfair or deceptive practices (*Airlines for Am. v. DOT*).

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