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Case Law Update:
Opinions Issued After August 2017

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Digital Realty Trust, Inc. v. Somers, 138 S. Ct. 767 (2018)

- Provision in Dodd-Frank Act protects "whistleblower" from experiencing certain forms of retaliation.
- Act defines "whistleblower" as person who provides "information relating to a violation of the securities laws to the [Securities and Exchange] Commission."
- Issue: Does the anti-retaliation provision cover person who reported to employer, but has *not* reported violation of securities laws to SEC?
- Answer: No.

Digital Realty Trust, Inc. (cont'd)

- SEC issued regulation under Dodd-Frank Act that, contrary to statute, defined "whistleblower" to include people who did not report violation of securities laws to SEC.
- Adhering to "plain meaning rule," Court (per Justice Ginsburg) concluded that, nevertheless, the statutory definition was controlling: "The definition section of the statute supplies an unequivocal answer: A 'whistleblower' is 'any individual who provides…information relating to a violation of the securities laws *to the Commission*.'" (Emphasis in original).
- "Leaving no doubt as to the definition's reach," Court explained, "the statute instructs that the 'definitio[n] shall apply' 'in this section,'" *i.e.*, throughout the Act's anti-retaliation provision.

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Digital Realty Trust, Inc. (cont'd)

- Court went on to "corroborate" its plain-meaning construction by discussing a Senate committee report.
- Court then refused to afford *Chevron* deference to SEC's regulation that contradicted plain language of the statute.
- In concurrence, Justice Thomas agreed with majority as to the plain-meaning construction, but criticized it for invoking committee report that was unnecessary to the analysis and, in any event, unreliable as evidence of congressional intent.
- In separate concurrence, Justice Sotomayor stated that "even when, as here, a statute's meaning can clearly be discerned from its text, consulting reliable legislative history can still be useful, as it enables us to corroborate and fortify our understanding of the text."

Marinello v. United States, 138 S. Ct. 1101 (2018)

- Section 7212(a) of Internal Revenue Code makes it a felony "corruptly or by force" to "endeavo[r] to obstruct or imped[e] the due administration of this title."
- Issue: Does this language cover virtually all U.S. government efforts to collect taxes, or does it have a narrower scope?
- Court concluded that "due administration of [the Tax Code]" does not cover routine administrative procedures (*e.g.*, processing of income tax returns), but instead "the clause as a whole refers to specific interference with targeted governmental tax-related proceedings, such as a particular investigation or audit."

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Marinello (cont'd)

- Majority (per Justice Breyer) acknowledged that Section 7212(a) refers broadly to "obstruct[ing] or imped[ing]" the "due administration of justice," the latter of which "can be read literally to refer to every '[a]ct or process of administering' including every act of 'managing' or 'conduct[ing]' any 'office,' or 'performing the executive duties of' any 'institution, business, or the like.'"
- But, majority invoked precedent (*United States v. Aguilar*), which construed obstruction of "the due administration of justice" to mean interfering with judicial or grand jury proceedings only.

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Marinello (cont'd)

- Majority then turned to legislative history, for "[t]hose who find legislative history helpful."
- "We have found nothing in the statute's history suggesting that Congress intended the Omnibus Clause as a catchall applicable to the entire Code including the routine processing of tax returns, receipt of tax payments, and issuance of tax refunds."
- Majority next said that viewing Section 7212(a) "in the broader statutory context of the full Internal Revenue Code also counsels against adopting" a broad reading of it.
- And, a "broad interpretation would also risk the lack of fair warning and related kinds of unfairness that led this Court in *Aguilar* to 'exercise' interpretive 'restraint.'"

Marinello (cont'd)

- Thomas in dissent: In Section 7212(a), "'[t]his title' refers to Title 26, which contains the entire Tax Code and authorizes the Internal Revenue Service (IRS) to calculate, assess, and collect taxes. I would hold that the Omnibus Clause does what it says: forbid corrupt efforts to impede the IRS from performing any of these activities."
- "The Court may well prefer a statute written" more narrowly, but "that is not what Congress enacted."

Encino Motorcars, LLC v. Navarro, 138 S. Ct. 1134 (2018)

- Fair Labor Standards Act requires employers to pay overtime compensation to employees, but exempts them from paying overtime to "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles" at a dealership.
- Issue: Does the exemption cover "service advisors," *i.e.*, car dealership employees who consult with customers about their car servicing needs and sell them car services?
- Court said "yes." Thomas for the majority, joined by Roberts, Alito, Kennedy, Gorsuch.
- Department of Labor issued guidance that, for purposes of FLSA overtime exemption, defined "salesman" to *exclude* service advisors.

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Encino Motorcars (cont'd)

- This approach triggered question of whether service advisors are "salesm[e]n…primarily engaged in…servicing automobiles" and therefore covered by the exemption.
- In answering "yes," Court noted that service advisor is obviously a "salesman," because he sells services for vehicles and "[t]he ordinary meaning of 'salesman' is someone who sells goods or services."
- Court said that service advisors are also "primarily engaged in…servicing automobiles" for purposes of exemption.
- "Service advisors," court explained, are "integral to the servicing process."

Encino Motorcars (cont'd)

- Court said that exemption's reference to "partsmen" shows that phrase "primarily engaged in…servicing automobiles" must include "some individuals who do not physically repair automobiles themselves but who are integrally involved in the servicing process. That description applies to partsmen and service advisors alike."
- Court rejected notion that, for purposes of exemption, the distributive canon controls, so that "salesman" should be matched only with "selling" and "partsma[n] [and] mechanic" should be matched only with "servicing."

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Encino Motorcars (cont'd)

- "[H]ere, the distributive canon would mix and match some of the three nouns – 'salesman, partsman, or mechanic' – with one of two gerunds – 'selling or servicing.' We doubt that a legislative drafter would leave it to the reader to figure out the precise combinations."
- Instead, Court said, ordinary disjunctive meaning of "or" was controlling and "the use of 'or' to join 'selling' and 'servicing' suggests that the exemption covers a salesman primarily engaged in either activity."
- Court also rejected the Ninth Circuit's reliance on a 1966-67 DOL Occupational Outlook Handbook and the FLSA legislative history, both of which it found unpersuasive.

Encino Motorcars (cont'd)

- Ginsburg in dissent: "Service advisors…neither sell automobiles nor service (*i.e.*, repair or maintain) vehicles….Because service advisors neither sell nor repair automobiles, they should remain outside the exemption and within the Act's coverage."
- "[E]ven if the exemption were read to reach 'salesmen' 'primarily engaged in *servicing* automobiles,' not just selling them," dissent said, "service advisors would not be exempt. The ordinary meaning of 'servicing' is 'the action of maintaining or repairing a motor vehicle.'….[S]ervice advisors neither maintain nor repair automobiles."

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Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018)

- Federal Alien Tort Statute provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."
- Questions: Under Alien Tort Statute, (i) whether court may determine whether foreign corporation is liable for its human agents having used it to commit crimes under international laws that protect human rights and (ii) if court determines that foreign corporation is, in fact, liable for such behavior, whether it may enforce that liability against the corporation.
- Answer: "Absent further action from Congress it would be inappropriate for courts to extend ATS liability to foreign corporations."

Jesner (cont'd)

- Court said that "the logical place to look for a statutory analogy to an ATS common-law action is the TVPA [Torture Victim Protection Act of 1991] – the only cause of action under the ATS created by Congress rather than the courts."
- According to the Court, the TVPA's approach to the issue at hand essentially resolved the issue:

  > "Congress' decision to exclude liability for corporations in actions brought under the TVPA is all but dispositive of the present case. That decision illustrates that significant foreign-policy implications require the courts to draw a careful balance in defining the scope of actions under the ATS. It would be inconsistent with that balance to create a remedy broader than the one created by Congress."

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Jesner (cont'd)

- Court also noted that "[i]t has not been shown that corporate liability under the ATS is essential to serve the goals of the statute….plaintiffs still can sue the individual corporate employees responsible for a violation of international law under the ATS."
- And, Court explained that, if it were to conclude that federal courts may hold foreign corporations liable under ATS, especially corporations with minimal U.S. contacts, it would not serve the statute's purpose of promoting "harmony in international-law relations by ensuring foreign plaintiffs a remedy for international-law violations in circumstances where the absence of such a remedy might provoke foreign nations to hold the United States accountable."

Husted v. A. Philip Randolph Institute, 138 S. Ct. 1833 (2018)

- Under Ohio statute, if registered voter has failed to vote for two consecutive years, state sends him a preaddressed, postage prepaid card for him to use in verifying that he still resides at the registered address.
- If voter fails to mail back the card and fails to vote in any election for ensuing four years, state presumes that he has moved from the registered address and removes him from voter rolls.
- Question: Whether this process runs afoul of National Voter Registration Act.
- Answer: No.

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Husted (cont'd)

- Provision of NVRA at 52 U.S.C. § 20507(d) ("subsection (d)") says that state may remove from its voter rolls a registrant who "(i) has failed to respond to a notice" and "(ii) has not voted or appeared to vote…during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice."
- Court said that Ohio's process "follows subsection (d) to the letter."
- "It is undisputed that Ohio does not remove a registrant on change-of-residence grounds unless the registrant is sent and fails to mail back a return card and then fails to vote for an additional four years."

Husted (cont'd)

- Court said that Ohio's process likewise complies with NVRA's "Failure-to-Vote-Clause," 52 U.S.C. § 20507(b)(2), which provides that state may not remove someone from its voting rolls "by reason of [a] person's failure to vote."
- On this point, Court examined NVRA as a whole, highlighting provision at 52 U.S.C. § 21083(a)(4)(A). That provision was added to the statute after its enactment, in part, to clarify the functionality of Failure-to-Vote-Clause and provides that "no registrant may be removed solely by reason of a failure to vote."
- Court explained that, therefore, "the Failure-to-Vote Clause…simply forbids the use of nonvoting as *the sole criterion* for removing a registrant, and Ohio does not use it that way." (Emphasis in original).

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Husted (cont'd)

- Court then harmonized subsection (d) with Failure-to-Vote-Clause by concluding that latter involves "sole causation" and former does not conflict with that concept because it does not "authorize removal solely by reason of a person's failure to vote. Instead, subsection (d) authorizes removal only if a registrant also fails to mail back a return card."
- Justice Thomas in concurrence: "Respondents would interpret the NVRA to prevent States from using failure to vote as evidence when deciding whether their voting qualifications have been satisfied….[This] reading of the NVRA would seriously interfere with the States' constitutional authority to set and enforce voter qualifications."

Collins v. Virginia, 138 S. Ct. 1663 (2018)

- Fourth Amendment provides, in relevant part, that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."
- Automobile exception to Fourth Amendment warrant requirement permits police officer to conduct warrantless search of vehicle if he has probable cause to believe that it contains contraband.
- Police officer conducted probable-cause-based, warrantless search of motorcycle that was parked in driveway of home.
- Issue: Did automobile exception justify this search?
- Answer: No.

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Collins (cont'd)

- Court said that "the scope of the automobile exception extends no further than the automobile itself."
- The exception therefore does not "permit police to invade any space outside an automobile" if the "Fourth Amendment protects that space."
- And, Court explained, because "the driveway enclosure where [the officer] searched the motorcycle constitutes an area adjacent to the home and to which the activity of home life extends," it was part of the home's "curtilage," meaning that the officer needed an appropriate warrant in order to search the motorcycle there.

Murphy v. NCAA, 138 S. Ct. 1461 (2018)

- Provision of Professional and Amateur Sports Protection Act ("PASPA") bans states from sponsoring, authorizing, operating, or regulating sports wagering.
- In 2014, New Jersey enacted statute that repealed state-law provisions that prohibited sports wagering at horseracing tracks and casinos in Atlantic City but left the prohibitions in place elsewhere. Statute did not expressly authorize sports wagering to occur anywhere.
- NCAA and professional sports leagues brought action in federal court seeking to enjoin statute on grounds that it violates PASPA.
- Third Circuit concluded that, in violation of PASPA, statute "authorize[s]" sports wagering "by law" because it "selectively grants permission to certain entities to engage in sports gambling."
- On appeal, SCOTUS concluded that, by forcing states to maintain state-law bans on sports wagering, PASPA "commandeers the regulatory power of states," in violation of the Tenth Amendment to the U.S. Constitution.

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Murphy (cont'd)

- Under Tenth Amendment, all power that U.S. Constitution does not confer on Congress is reserved for the states.
- Congress's enumerated powers do not include power to issue direct orders to state governments regarding the enactment of laws, including laws that authorize or prohibit sports wagering.
- Court therefore held that PASPA's provision that prohibits states from authorizing sports wagering (including by selectively repealing prohibitions on sports wagering) violates the anti-commandeering rule.
- Court also concluded that "no provision of PASPA is severable from the provision directly at issue in these cases."

Murphy (cont'd)

- Concurring, Justice Thomas noted that, under Court's severability precedents, "[t]he Court must make [the] severability determination by asking a counterfactual question: Would Congress still have passed the valid sections had it known about the constitutional invalidity of the other portions of the statute?" Justice Thomas questioned this doctrine:
  - "Without any actual evidence of [congressional] intent, the severability doctrine invites courts to rely on their own views about what the best statute would be."
  - "[W]e are governed by 'legislated text,' not 'legislators' intentions' – and especially not legislators' *hypothetical* intentions."
  - "If one provision of a statute is deemed unconstitutional, the severability doctrine places every other provision at risk of being declared nonseverable and thus inoperative," *regardless* of "whether the plaintiff has standing to challenge those other provisions."
- Breyer, Ginsburg, and Sotomayor dissented; would have severed the unconstitutional provision.

Sveen v. Melin, 138 S. Ct. 1815 (2018)

- Contracts Clause in U.S. Constitution provides that "[n]o state shall…pass any…Law impairing the Obligation of Contracts."
- Issue: For purposes of life insurance contract, Minnesota statute automatically revokes designation of insured's spouse as beneficiary if and when they divorce. Does statute violate Contracts Clause?
- Answer: Statute does not "substantially impair" a contract and therefore does not violate Contracts Clause.
- Kagan writes for an 8-1 majority.

Sveen (cont'd)

- In its precedents, Court developed two-part test for determining if state law violates Contracts Clause: (1) does the law "substantially impair" a contract, and (2) if so, is it "drawn in an 'appropriate' and 'reasonable' way to advance 'a significant and legitimate public purpose?'"
- Court said that, here, Minnesota statute does not "substantially impair" a contract because:
  - It is consistent with policyholder intent: Most decedents would probably have wanted to change the designation of their ex-spouse as the beneficiary in their life insurance contract, if they had only thought about it.
  - Policyholder can reverse the statute's effect: While the insured is still alive, he can, after a divorce, immediately re-designate his ex-spouse as the beneficiary in the contract, if he wishes to do so.
  - It does not upset policyholder expectations: The statute does nothing more than what a divorce court might do in a divorce proceeding.

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Sveen (cont'd)

- Justice Gorsuch in dissent:
  - Contracts Clause does not prohibit state laws from "substantially impairing" contracts, but instead forbids them from impairing contracts *at all*.
  - Modern case law that allows state laws to "reasonably impair" contracts for "significant" public purposes cannot be squared with the original meaning of the Contracts Clause.
  - And, in any event, the Minnesota statute at issue "substantially impairs life insurance contracts by retroactively revising their key term [*i.e.*, the one that determines who gets paid]. No one can offer any reasonable justification for this impairment in light of readily available alternatives."

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 138 S. Ct. 1815 (2018)

- Colorado bakery owner refused to create cake for same-sex wedding because of his religious opposition to same-sex marriages.
- Colorado Civil Rights Commission ruled that bakery owner violated Colorado Anti-Discrimination Act. It therefore entered enforcement order against him.
- Issue: whether the enforcement order violated Free Exercise Clause in First Amendment. Answer: Yes.
- Under Court's precedents, neutral law of general applicability does not infringe on person's rights under Free Exercise Clause, even if the person's adherence to the law would interfere with his religious beliefs.

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Masterpiece Cakeshop (cont'd)

- But bakery owner argued that, here, those precedents did not control because enforcement order forced him to "use his artistic skills to make an expressive statement, a wedding endorsement in his own voice and of his own creation."
- Record indicated that Commission, in essence, had treated "other bakers' conscience-based objections as legitimate, but treated [bakery owner's] as illegitimate – thus sitting in judgment of his religious beliefs themselves."
- Court therefore concluded that Commission had been hostile in its approach to bakery owner's religious beliefs.
- Court said that, given its hostility towards bakery owner's religious beliefs, "the Commission's treatment of [the bakery owner's] case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint."

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Masterpiece Cakeshop (cont'd)

- "The official expressions of hostility to religion in some of the commissioners' comments – comments that were not disavowed at the Commission or by the State at any point in the proceedings that led to affirmance of the order – were inconsistent with what the Free Exercise Clause requires."
- Justice Thomas in concurrence: "Forcing [the bakery owner] to make custom wedding cakes for same-sex marriages requires him to, at the very least, acknowledge that same-sex weddings are 'weddings' and suggest that they should be celebrated" and therefore violates his First Amendment free speech rights.
- Ginsburg and Sotomayor dissent.

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Epic Systems Corporation v. Lewis, 138 S. Ct. 1612 (2018)

- Court framed the issue as follows: "Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?"
- Court said that, as a matter of law, the answer is clear:
  - "In the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms – including terms providing for individualized proceedings."
  - And the National Labor Relations Act does not conflict with the FAA on this point: "The NLRA secures to employees rights to organize unions and bargain collectively, but it says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum."

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Epic Systems Corporation (cont'd)

- Court observed that, while NLRA provides that employees may "engage in other concerted activities for the purpose of…other mutual aid or protection," that broad phrase appears at end of detailed list of activities regarding "self-organization," "form[ing], join[ing] or assist[ing] labor organizations," and "bargain[ing] collectively."
- Court explained, in this regard, that "where, as here, a more general term follows more specific terms in a list, the general term is usually understood to embrace only objects similar in nature to those objects enumerated by the preceding specific words" – and therefore not, in this case, the right to participate in class action litigation.
- Examining the NLRA as a whole, moreover, Court noted that "[a]fter speaking of various 'concerted activities' in Section 7, Congress proceeded to establish a regulatory regime applicable to each of them" – and none of those regimes involved requirements for class action litigation.
- Court also observed that, in 2012, the National Labor Relations Board – "for the first time in the 77 years since the NLRA's adoption – asserted that the NLRA effectively nullifies the Arbitration Act in cases like ours."

Epic Systems Corporation (cont'd)

- But Court refused to give *Chevron* deference to this interpretation because, among other reasons, "the *Chevron* Court explained that deference is not due unless a 'court, employing traditional tools of statutory construction,' is left with an unresolved ambiguity….[And] [w]here, as here, the canons supply an answer, '*Chevron* leaves the stage.'"
- Majority: Gorsuch, joined by Roberts, Alito, Kennedy, and Thomas.
- Dissent: Ginsburg, joined by Breyer, Kagan, and Sotomayor.

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Epic Systems Corporation (cont'd)

- Dissent believed that, in protecting the right of employees to "engage in other concerted activities for the purpose of…other mutual aid or protection," NLRA provided them with guaranteed right to participate in class action litigation with their co-employees and that any employment agreement to the contrary was therefore illegal and unenforceable – notwithstanding the Arbitration Act's general rule that arbitration agreements are enforceable according to their terms.
- Dissent said that, to the extent there was conflict between NLRA and Arbitration Act, NLRA controlled over Arbitration Act because it was the more recent and subject matter-specific statute.

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Wisconsin Central Ltd. et al. v. U.S., 138 S. Ct. 2067 (2018)

- Under Railroad Retirement Tax Act, 26 U.S.C. § 3231(e)(1), any form of "money remuneration" paid to railway employees is subject to an excise tax "equal to a specified percentage of its employees' wages…." In return, federal government provides pensions. However, railroad retirement tax rates are much higher than social security tax rates.
- When employees exercise their stock options when the market price exceeds the price at which the employee has a right to buy the stock, the employee can benefit from a windfall. The Internal Revenue Service argued that this windfall is taxable, just as employees' wages are taxable.
- In a 5-4 opinion authored by Justice Gorsuch, the Court explained that, as a matter of textual interpretation, stock options did not fall within the definition of "money" as it was understood at the time the Act was adopted.

Wisconsin Central Ltd. (cont'd)

- Court also stated that the broader statutory context of the time supported its reading. A provision of the 1939 Internal Revenue Code treated "money" and "stock" as two different things, and a companion statute to the Act taxed "all remuneration" instead of just "money remuneration," reflecting a difference in meaning between the two.
- Breyer dissents, joined by Ginsburg, Sotomayor, Kagan:
  - "Let us look to purpose. What could Congress' purpose have been when it used the word 'money?' The most obvious purpose would be to exclude certain in-kind benefits that are nonmonetary—either because they are non-transferrable or otherwise difficult to value."
  - "When Congress enacted the statute, it was common for railroad workers to receive free transportation for life. Taxation of Interstate Carriers and Employees: Hearings on H. R.8652 before the House Committee on Ways and Means, 74th Cong., 1st Sess., 6 (1935)."

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Wisconsin Central Ltd. (cont'd)

- Dissent (cont'd)
  - "Unlike stock options, it would have been difficult to value this benefit. And even very broad definitions of "money" would seem to exclude it. *E.g.,* 6 Oxford English Dictionary, at 603."
  - "Nor is it easy to see what purpose the majority's interpretation would serve. Congress designed the Act to-provide a financially stable, self-sustaining system of retirement benefits for railroad employees."
  - "Here, in respect to stock options, the Act's language has a degree of ambiguity. But the statute's purpose, along with its amendments, argues in favor of including stock options."
- N.B. that the Seventh Circuit was reversed. Posner, for the majority, adopted the government's expansive view of "money." He also said it "makes good practical sense" by avoiding the creation of a tax incentive "that might distort" the structure of compensation packages. The dissent espoused the Gorsuch position.

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Vanderklok v. United States, 868 F.3d 189 (3d Cir. 2017)

- Air traveler asserted that, at airport, TSA agent was disrespectful and aggressive towards him while screening his luggage.
- Traveler asserted that, after stating an intent to file a claim against TSA agent, the agent falsely reported to police that he'd threatened to bring bomb to the airport, which led to his arrest and the filing of criminal charges against him.
- Traveler was later acquitted of the criminal charges because airport surveillance footage did not match TSA agent's testimony about his behavior.
- Based on these events, traveler sued TSA agent, asserting First and Fourth Amendment claims and tort claims.

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Vanderklok (cont'd)

- District court concluded that TSA agent lacked qualified immunity on First Amendment claim.
- But Third Circuit reversed the decision on grounds that "a First Amendment claim against a TSA employee for retaliatory prosecution" does not "even exist[]" in the "context of airport security screenings."
- "Today we hold that *Bivens* does not afford a remedy against airport security screeners who allegedly retaliate against a traveler who exercises First Amendment rights."

Vanderklok (cont'd)

- Court acknowledged the possibility that, absent a *Bivens* remedy, traveler would not have a meaningful way to vindicate his First Amendment rights under circumstances at hand.
- Court reasoned that, nevertheless, "the reluctance of the Supreme Court to weigh in on issues of national security strongly suggests that we too should hesitate to create a remedy when those issues are in play."
- According to court, "the threat of damages liability could indeed increase the probability that a TSA agent would hesitate in making split-second decisions about suspicious passengers."
- And, court explained, Congress "is in a far better position…to evaluate the impact of a new species of litigation against those who act on the public's behalf."

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Tepper v. Amos Financial, LLC, 898 F.3d 364 (3d Cir. 2018)

- Fair Debt Collection Practices Act prohibits debt collectors from engaging in deceptive, abusive, or otherwise unfair practices to collect debts.
- In 2000, Third Circuit interpreted Act's primary definition of "debt collector" as covering assignee of debt that was "already in default when assigned."
- This interpretation became known as "default rule," which applied to collection agencies as assignees of debts.
- In 2017, SCOTUS, applying plain language of definition at issue, which covers only people who collect debts "owed…another," ruled otherwise.
- SCOTUS concluded that, in taking assignments of debts and collecting those debts, debt collection agencies are acting on their *own* behalf, not collecting debts "owed…another."
- In this case, Third Circuit considered whether Act's alternative definition of "debt collector" covers collection agencies as assignees of debts.
- Answer: Yes.

Tepper (cont'd)

- Alternative definition of debt collector: any person "who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts."
- Court concluded that, although, as assignee of debt, collection agency does not collect a debt "owed…another," it is nevertheless in the "business the principal purpose of which is the collection of any debts."
- Court said that, therefore, alternative definition applies.
- In sum:
  - In first instance, Third Circuit created "default test," which is not in the Act.
  - In this case, it bowed to SCOTUS's later ruling.
  - It then found another way, this time in accordance with the statute, to reach the same result.

PHH Corporation v. CFPB, 881 F.3d 75 (D.C. Cir. 2018)

- Issue: whether federal statute that provided Director of Consumer Financial Protection Bureau with five-year term of office, subject to President removing him from office only for "inefficiency, neglect of duty, or malfeasance in office," is consistent with Article II of U.S. Constitution, which provides that executive power is vested "in a President of the United States of America," who must "take Care that the Laws be faithfully executed."
- Court's answer: "We follow precedent here to hold that the [federal statute] shielding the Director of the CFPB from removal without cause is consistent with Article II."

PHH Corporation (cont'd)

- Court said that statute did not unconstitutionally intrude upon President's Article II power because, for one, it included "the very same language [*i.e.*, removal from office only for 'inefficiency, neglect of duty, or malfeasance in office'] the Supreme Court approved for the Federal Trade Commission (FTC) back in 1935" in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).
- "The Supreme Court has never struck down a statute conferring the standard for-cause protection at issue here."

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PHH Corporation (cont'd)

- Court also emphasized that statute helped to ensure CFPB's *independence*, which "shields the nation's economy from manipulation or self-dealing by political incumbents and enables" the agency to "pursue the general public interest in the nation's longer-term economic stability and success, even where doing so might require action that is politically unpopular in the short term."
- Court said that, under Article II, a "for-cause-only" approach to removal of heads of independent agencies leaves "the President ample tools to ensure faithful execution of the laws" that those agencies administer.
- By contrast, court said, there are some executive officials, like Secretary of State, who are "purely executive" and therefore "must be removable by the President at will if he is to be able to accomplish his constitutional role."

PHH Corporation (cont'd)

- Challengers argued that, under Article II, "removal restrictions" are permissible for "the multi-member FTC but not the sole-headed CFPB" because "multi-member commissions contain their own internal checks to avoid arbitrary decisionmaking."
- Court rejected this argument, stating that this "distinction finds no footing in precedent, historical practice, constitutional principle, or the logic of presidential removal power."
- The removal-power doctrine, court said, "focuses on executive control and accountability to the public, not the competing virtues of various internal agency design choices."

PHH Corporation (cont'd)

- "Fundamentally, Congress's choice – whether an agency should be led by an individual or a group – is not constitutionally scripted and has not played any role in the [Supreme] Court's removal-power doctrine."
- "If anything," court said, "the President's for-cause removal prerogative may allow more efficient control over a solo head than a multi-member directorate."
- Court noted, in this regard, that the President's removal of "just one [FTC] commissioner" might not "have had any substantial effect on the multi-member body's direction[.]"

PHH Corporation (cont'd)

- Dissent: Under Article II, in order to carry out executive power and be accountable for doing so, President "must be able to supervise and direct…subordinate [executive] officers."
- Independent agencies are an "exception" to Article II.
- To mitigate risk to individual liberty, independent agencies, historically, "do not concentrate all power in one unaccountable individual, but instead divide and disperse power across multiple commissioners or board members."
- With CFPB, by contrast, there is "power that is massive in scope, concentrated in a single person, and unaccountable to the President[.]"
- This structure "violates Article II of the Constitution."

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Chamber of Commerce v. U.S. DOL, 885 F.3d 360 (5th Cir. 2018)

- In 2016, Department of Labor abandoned interpretation of "investment advice fiduciary" that, for 41 years, it had used in connection with Employee Retirement Income Security Act of 1974 ("ERISA").
- In its place, DOL promulgated new "Fiduciary Rule," which made more types of people (including stockbrokers and insurance agents) into "investment advice fiduciaries" (and therefore subject to stringent regulatory restrictions).
- No longer was "investment advice fiduciary" limited to someone who did "regular" work on behalf of client who relied on his advice as "primary basis" for investment decisions.
- Instead, it covered anyone who was compensated in connection with a "recommendation as to the advisability of" buying, selling, or managing "investment property."
- Fifth Circuit majority vacated the rule.

Chamber of Commerce (cont'd)

- In vacating Fiduciary Rule, majority relied heavily on definition of "fiduciary" under "common law" of trusts.
  - (Is there a federal common law of trusts?)
- Majority also considered the plain language of ERISA, determining that "[t]he DOL interpretation…attempts to rewrite the law that is the sole source of its authority. This it cannot do."
- Majority then looked at the "language, structure and purposes" of ERISA.
- And, majority said that, even if phrase "investment advice fiduciary" is ambiguous within context of ERISA, the Fiduciary Rule embodied an unreasonable interpretation of that phrase and therefore faltered under Chevron step 2.
- "Given that the text here does not compel departing from the common law (but actually embraces it), and given that the Fiduciary Rule suffers from its own conflicts with the statutory text, the Rule is unreasonable."

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Chamber of Commerce (cont'd)

- Dissent dove straight into Chevron analysis:
  - Step one: examined the statutory text and found it to be ambiguous
  - Step two: looked at ERISA's purpose and found the Fiduciary Rule to be well within it
- Dissent: ERISA was enacted with "broadly protective purposes" and "[i]n light of changes in the retirement investment market since 1975…the DOL reasonably concluded that limiting fiduciary status to those who render investment advice to a plan or IRA 'on a regular basis' risked leaving retirement investors inadequately protected."

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City of Chicago v. Sessions, 888 F.3d 272 (7th Cir. 2018)

- Chicago sued U.S. Attorney General, seeking an order that would enjoin him from enforcing several conditions that he imposed on its receipt of federal funds for law enforcement purposes.
- Two of the conditions required Chicago to (1) give notice to federal authorities of when it would release from its custody persons who it believed to be aliens, and (2) ensure that federal immigration agents had access to the facilities where those persons were being detained in order to meet with them.
- Trial court issued "nationwide" preliminary injunction, preventing AG from enforcing those two conditions.
- Seventh Circuit affirmed trial court's decision.

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City of Chicago (cont'd)

- Seventh Circuit concluded that the two conditions violated separation of powers principles.
- "[T]he power of the purse rests with Congress, which authorized the federal funds at issue and did not impose any immigration enforcement conditions on the receipt of such funds."
- And, court said, under controlling statute, Congress did not "authorize the Attorney General to impose such conditions."
- Statute, in this regard, authorized AG to "exercise such other powers and functions as may be vested in the Assistant Attorney General ***pursuant to this chapter or by delegation*** of the Attorney General, including placing special conditions on all grants, and determining priority purposes for formula grants." (Emphasis added).
- And, court said, AG did not "even claim that the power exercised here is authorized anywhere in the chapter, nor that the Attorney General possesses that authority and therefore can delegate it to the Assistant Attorney General."

City of Chicago (cont'd)

- Court then upheld nationwide scope of trial court's injunction, determining that "[t]he case presents essentially a facial challenge to a policy applied nationwide, the balance of equities favors nationwide relief, and the format of the…grant itself renders individual relief ineffective to provide full relief."
- On the equities, court said that (1) with nationwide injunction in place, AG could distribute the federal funds "without mandating the conditions" and, for their part, state and local governments could choose whether to comply with the conditions while, on the other hand, (2) "the impact on localities forced to comply with these provisions could be devastating" because it could undermine "a relationship of trust with the undocumented persons and lawful immigrants residing therein."
- As for format of the grant, court stressed that "funding under the statute is allocated among states and localities from one pool based on a strict formula," meaning that funds that one grant recipient lost (*e.g.*, for non-compliance with the two conditions) would be reallocated to other recipients.

City of Chicago (cont'd)

- Dissent explained that nationwide scope of trial court's injunction was "similar in effect to" doctrine of non-mutual offensive collateral estoppel.
- Dissent then highlighted case law in which SCOTUS said that "allowing non-mutual collateral estoppel against the Government…would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue."

Pennsylvania v. Trump, 281 F.Supp.3d 553 (E.D. Pa. 2017)

- Departments of Health and Human Services, Treasury, and Labor ("Agencies") issued Interim Final Rules ("IFRs"), which provided that, based on strongly held religious beliefs or sincerely held moral convictions, any non-profit or for-profit entity could opt out of providing no-cost contraceptive coverage to its employees.
- Commonwealth of Pennsylvania challenged IFRs on grounds that they violated Affordable Care Act and U.S. Constitution.
- Eastern District of PA issued preliminary injunction that prevented enforcement of the IFRs.
- Court determined that PA had standing to challenge the IFRs and that, in issuing the IFRs, Agencies violated APA in multiple respects.

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Pennsylvania v. Trump (cont'd)

- In determining that PA had standing to prosecute challenge to the IFRs, court stated:
  - "The New IFRs will ***likely*** inflict a direct injury upon the Commonwealth by imposing substantial financial burdens on State coffers. Specifically, the Commonwealth ***will have to*** increase its expenditures for State and local programs providing contraceptive services." (Emphasis added).
  - "As more women residents of the Commonwealth are deprived of contraceptive services through their insurance plans and turn to these State and local programs, the Commonwealth ***will likely*** make greater expenditures to ensure adequate contraceptive care." (Emphasis added).
- Are these injuries speculative in nature?

Pennsylvania v. Trump (cont'd)

- In issuing IFRs, Agencies dispensed with notice-and-comment rulemaking procedures.
- Court determined that this approach violated APA because (i) no other statute (ACA or otherwise) authorized Agencies to dispense with the procedures and (ii) there was not "good cause" for them to do so.
- "Defendants cite no case, and research has not disclosed any, finding that notice and comment is unnecessary where an agency has received ample commentary on its prior interpretations of the same law."

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Pennsylvania v. Trump (cont'd)

- Court also determined that IFRs violated APA because they were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."
- Court, in this regard, said that IFRs "contradict the text of the statute that they purport to interpret."
  - "Given that there is no religious or moral exemption in the explicit text of the statute and there is one for grandfathered health plans, it cannot be assumed that Congress authorized the Agencies to create any additional exemptions."
  - "[T]he mandatory language 'shall' – found in the ACA's requirement that covered health plans 'shall cover…with respect to women, such additional preventive care' as provided for in the HRSA guidelines [including contraceptive care] – indicates quite the opposite: no exemptions created by HHS are permissible (unless they are required by RFRA)."

Pennsylvania v. Trump (cont'd)

- Court said that IFRs were likewise not sustainable under Religious Freedom Restoration Act ("RFRA").
- "One of the reasons the Agencies gave for issuing the New IFRs," court observed, "is that the Accommodation Process imposes a substantial burden on the exercise of religion. The Accommodation Process…allows religious objectors to notify their healthcare administrator of their religious objection, and the administrator would then have to provide the legally required contraceptive services directly to women covered under the employer's plan."
- But, according to court, Third Circuit "has foreclosed the Agencies' legal conclusion that the Accommodation Process imposes a substantial burden" and therefore, under RFRA, IFRs and their unconditional "opt-out" process were not necessary to ensure that government does not "substantially burden" the exercise of religion.

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Pennsylvania v. Trump (cont'd)

- Court concluded that "[t]he Commonwealth's Motion for Preliminary Injunction will be granted and Defendants shall be enjoined from enforcing the New IFRs."
- Is this injunction a "national" one? Or does it apply only in Pennsylvania?
- Can a PA district court enjoin defendants from taking actions outside of the court's territorial jurisdiction? Why or why not?

League of Women Voters v. Commonwealth, 178 A.3d 737 (Pa. 2018)

- Issue: Whether PA Congressional Redistricting Act of 2011 ("2011 Plan") embodied unconstitutional partisan gerrymandering.
- Court stated that, "[w]hile federal courts have, to date, been unable to settle on a workable standard by which to assess such claims under the federal Constitution, we find no such barriers under our great Pennsylvania charter."
- Court concluded that 2011 Plan violated Article I, Section 5 of Pa. Constitution, the "Free and Equal Elections Clause."
- Article I, Section 5 of Pa. Constitution provides that "[e]lections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."

League of Women Voters (cont'd)

- Court said that, in its plain language, this provision "guarantees our citizens an equal right, on par with every other citizen, to elect their representatives. Stated another way…Section 5 mandates that all voters have an equal opportunity to translate their votes into representation."
- Court explained that this interpretation is consistent with "the historical reasons for the inclusion of this provision in our Commonwealth's Constitution" and the "meaning we have ascribed to it through our case law."
- Court: "The Free and Equal Elections Clause was specifically intended to equalize the power of voters in our Commonwealth's election process, and it explicitly confers this guarantee[.]"

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League of Women Voters (cont'd)

- According to the court, the test for determining whether congressional redistricting plan violates Article I, Section 5 is that: "(1) the population of such districts must be equal, to the extent possible; (2) the district that is created must be comprised of compact and contiguous geographical territory; and (3) the district respects the boundaries of existing political subdivisions contained therein, such that the district divides as few of those subdivisions as possible."
- All other considerations (*e.g.*, protection of incumbents) are "wholly subordinate" to these criteria.

League of Women Voters (cont'd)

- Court recognized the possibility "that advances in map drawing technology and analytical software can potentially allow mapmakers, in the future, to engineer congressional districting maps, which, although minimally comporting with these [three] neutral 'floor' criteria, nevertheless operate to unfairly dilute the power of a particular group's vote for a congressional representative."
- Court decided to save this issue for another day.
- Court concluded that "the 2011 Plan subordinates the [three] traditional redistricting criteria in the service of partisan advantage, and thereby deprives Petitioners of their state constitutional right to free and equal elections."

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League of Women Voters (cont'd)

- Court remarked that 2011 Plan "was in service of, and effectively works to, the unfair partisan advantage of Republican candidates in future congressional elections and, conversely, dilutes [Democrats'] power to vote for congressional representatives who represent their views."
- Court then said that, according to numerous federal and state court opinions, the General Assembly is "primarily charged with the task of reapportionment," but a court can fill this role if "the legislature is unable or chooses not to act[.]"
- In this case, court re-drew the 2011 Plan.
- Query: If "packing" Democratic voters into congressional districts denies them of "equal opportunity," won't any redistricting map do the same thing to some people, whether Republican or Democrat?

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EQT Production Co. v. DEP, 181 A.3d 1128 (Pa. 2018)

- At issue: Section 301 of PA's "The Clean Streams Law."
- Section 301 provides that, unless PaDEP authorizes it under a permit, "[n]o person or municipality shall place or permit to be placed, or discharge or permit to flow, or continue to discharge or permit to flow, into any of the waters of the Commonwealth any industrial wastes[.]"
- Commonwealth Court rejected PaDEP's "interpretation of Section 301…as providing that a violation occurs when industrial waste flows from one water of the Commonwealth into another and continues to constitute a violation until remediation is completed[.]"
- PA Supreme Court affirmed Commonwealth Court's decision.
- Court determined that CSL is ambiguous "as it relates to the ongoing migration of previously-released contaminants among the waters of the Commonwealth and their many parts."
- "[H]ad the General Assembly intended differently, it would have been a simple matter to address water-to-water migration in express terms."

EQT Production Co. (cont'd)

- For example, court said, General Assembly could have prohibited movement of contaminants "into or *among*" waters of Commonwealth, instead of merely "into" those waters.
- Under PaDEP's interpretation, court observed, "liability exposure would persist even after all relevant cleanup requirements were met, as long as some microscopic amount of contaminants might remain present to move among waters and parts of waters."
- Most reasonable interpretation, court said, is that General Assembly was "focused on protecting the waters of the Commonwealth with references to the places of initial entry."
- Even though Section 301 of CSL was ambiguous, PaDEP's "expansive" interpretation was "too unreasonable" to receive judicial deference.
- Court concluded that the "*mere* presence of a contaminant in a water of the Commonwealth" does not establish a violation of Section 301 because "*movement* of a contaminant into water is a predicate to violations."

Washington v. DPW, 188 A.3d 1135 (Pa. 2018)

- Act 80 of 2012 made sweeping changes to administration of Pennsylvania's human services programs and re-authorized levy on nursing homes that Commonwealth was imposing in order to obtain matching federal funds for care of nursing home patients.
- Challengers argued that manner in which General Assembly enacted Act 80 violated Article III, Sections 1 (original purpose), 3 (single subject), and 4 (three readings) of the Pennsylvania Constitution.
- Pa. Supreme Court concluded that "the manner in which Act 80 was passed by the General Assembly violated Article III, Section 4 of the Pennsylvania Constitution."
- Court struck Act 80 in its entirety.
- Article III, Section 4 provides, in pertinent part, that "[e]very bill shall be considered on three different days in each House."

Washington (cont'd)

- Court said that, for purposes of Article III, Section 4, "[t]he term 'bill' refers to a piece of legislation which includes, in its entirety, all the language of a proposed law which the General Assembly is being asked to consider and being asked to take official action on."
- "[T]he dispositive constitutional question," therefore, "is whether each House considered on three separate days a version of H.B. 1261 which contained the same substantive provisions enacted into law as Act 80."
- Court observed that the "three versions of H.B. 1261 – P.N. 1385, 3646, and 3884 – each contained significantly dissimilar provisions, and no one version of this bill containing all of the provisions of Act 80 was considered by either the House or the Senate on three separate days."
- Court noted, however, that it had never previously held that Article III, Section 4 requires "absolute conformity" in a bill's language from its first consideration to its third (and final) consideration in a House.
- Court, instead, has examined "the original subject of the bill" to determine whether "the amendments to the bill added during the legislative process are germane to and do not change the general subject of the bill."

Washington (cont'd)

- Court explained that amendments to a bill are germane to its original subject matter "if both the subject of the amendments and the subject of the original contents of the bill have a nexus to a common purpose."
- Court said that, in making the germaneness determination, a court may hypothesize a "reasonably broad" unifying subject, but not one that is so broad that it defeats "the purpose of the constitutional provision."
- Court held that, here, the amendments to H.B. 1261 did not satisfy germaneness test.
- This conclusion stemmed from the fact that all provisions of H.B. 1261 in its original form, P.N. 1385, "were *entirely removed* from the bill by the Senate, inasmuch as they had already been enacted by another piece of legislation, Act 22 of 2011." (Emphasis in original).

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Washington (cont'd)

- Court said that because "the original provisions [of the bill] were gone when the new provisions were added by the Senate, it was factually and legally impossible for the new provisions to work together with the deleted provisions to accomplish a single purpose."
- "Consequently," court explained, "the Senate amendments were not germane to the provisions of H.B. 1261, P.N. 1385, and, accordingly, the three times that H.B. 1261, P.N. 1385 was [read] by the House in 2011 cannot count towards the requirements of Article III, Section 4."
- Senate amendments constituted an "entirely new bill," which, contrary to Article III, Section 4, was not considered on three different days in each House.

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Markham v. Wolf, 190 A.3d 1175 (Pa. 2018)

- Governor Wolf issued executive order that, among other things, (i) established advisory group with regard to people who receive in-home direct care worker ("DCW") services under Attendant Care Services Act, which Department of Human Services ("Department") administers and (ii) allowed DCWs to elect representative organization to meet and confer with Department to discuss home care policy issues.
- Pa. Supreme Court addressed whether executive order violated separation of powers doctrine. Answer: no.
- Court noted that Article IV, Section 2 of Pa. Constitution gives Governor "supreme executive power" and directs him to "take care that the laws be faithfully executed."
- "Executive orders, however, are not mentioned in the Pennsylvania Constitution."

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Markham (cont'd)

- Court explained that, while Governor may issue executive orders, "he or she must not infringe upon the powers of the other two branches of our government, including, of particular focus in this matter, the legislature."
- Court concluded that executive order at issue did not infringe on General Assembly's power to "create the law."
- Court noted that, in broad terms, the executive order at issue "is an instruction from Governor Wolf to subordinate officials regarding a process for obtaining input from non-executive branch parties and/or their representatives about home care policy."
- Court explained that, "[c]ritically, the entire process set forth in the Order is voluntary, non-binding, non-exclusive, and unenforceable." Court said that, therefore, in issuing the order, Governor did not exceed his authority.
- Court also determined that order did not conflict with Act 150, which grants to recipients of in-home DCW services the "right to control the terms and conditions of employment with their DCW."

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Markham (cont'd)

- By its terms, order "protects participants both with respect to their existing relationship with their DCW, and prohibits actions taken by a DCW which negatively impact participants[.]" Court explained that, for example, order says that "'[p]articipants shall retain the rights to select, hire, terminate and supervise'" a DCW (quoting the order).
- Court also said that order did not conflict with existing labor statutes because it was "voluntary, non-exclusive, and does not create any enforceable rights," including any collective bargaining rights in DCWs.
- "Moreover," Court explained, "the Order confers no legal authority on the DCW representative to bind individual DCWs. This is a critical distinction from traditional labor relations statutes."
- "In sum, the Executive Order does not conflict with labor relations statutes because it does not establish a system of collective bargaining, or indeed, create any legal rights at all."
- For these reasons, Court concluded that order did not violate separation of powers principles.

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Briggs v. Southwestern Energy Production Co., 184 A.3d 153 (Pa. Super. Ct. 2018)

- Under oil and gas lease, operator conducted hydraulic fracturing operations on tract.
- The hydraulic fracturing operations extended into subsurface shale formation in adjacent tract, from which operator extracted natural gas.
- Operator did not hold an oil and gas lease on adjacent tract.
- Question: Under these circumstances, did operator commit a common law trespass? PA Superior Court answered "yes."
- Operator argued that, under PA law, "rule of capture" precluded liability for any subsurface trespass that it had accomplished through its hydraulic fracturing operations.
- "Rule of capture" provides that "the property of lands in oil and gas is not absolute until it is actually within his grasp, and brought to the surface."
- Court rejected operator's argument, noting that rule of capture "assumes that oil and gas originate in subsurface reservoirs or pools, and can migrate freely within the reservoir and across property lines, according to changes in pressure."

Briggs (cont'd)

- "Unlike oil and gas originating in a common reservoir," court observed, "natural gas, when trapped in a shale formation, is *non-migratory* in nature." (Emphasis added).
- Court stressed that, in order to recover gas from a shale formation, "the shale must be fractured through the process of hydraulic fracturing; only then may the natural gas contained in the shale move freely through the artificially created channels."
- Court concluded that, therefore, "hydraulic fracturing may constitute an actionable trespass where subsurface fractures, fracturing fluid and proppant cross boundary lines and extend into the subsurface estate of an adjoining property for which the operator does not have a mineral lease, resulting in the extraction of natural gas from beneath the adjoining landowner's property."

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