

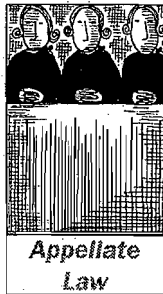
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Splits Involve Issues Affecting Business, Government, Workers

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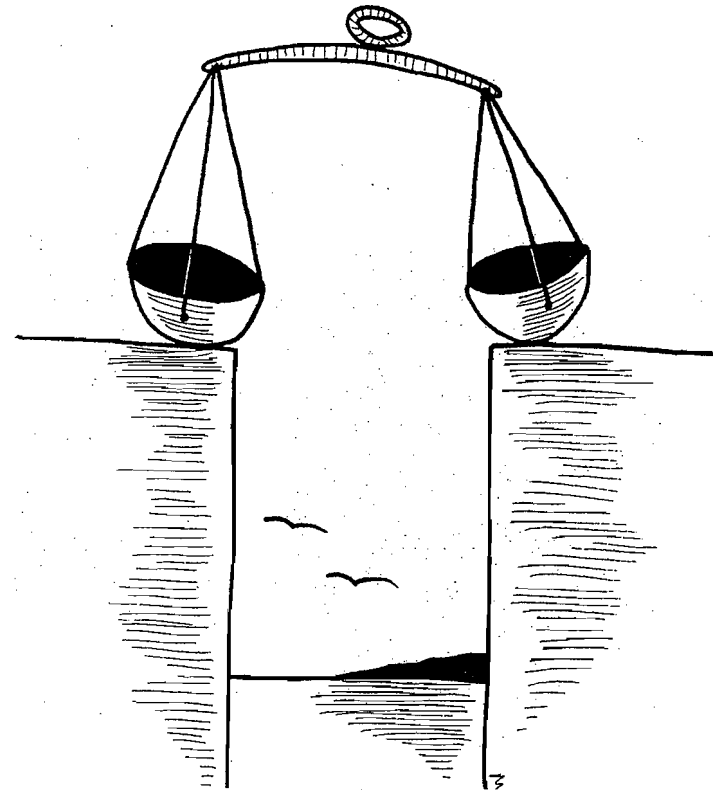
Federal Court rulings from March 2006 created conflicts of authority on important issues affecting businesses and government officials. The issues include: whether unauthorized faxes violate a recipient's privacy rights, whether a company bringing an action regarding federal crop insurance must exhaust all administrative remedies as a prerequisite to bringing suit, and the extent to which state employees are protected from discrimination based on political affiliation.



Insurance / Telecommunications Law

In *Park University Enterprises Inc. v. American Casualty Company of Reading, Penn.*, 2006 WL 766750 (10th Cir. 2006), the 10th U.S. Circuit Court of Appeals considered whether a person's interest in avoiding fax spam is properly thought of as a "right to privacy." The case involves the Telephone Consumer Protection Act (TCPA), which prohibits the sending of unsolicited advertisements by fax. When a TCPA class action was filed against the plaintiff, the action made a claim for coverage under a clause covering injuries "arising out of oral or written publication of material that violates a person's right of privacy."

The insurer argued that the only "right of privacy" implicated by the TCPA is one of "seclusion," while the policy was intended to cover only injuries arising from publications that violated someone's "secrecy." The 4th and 7th Circuits had ruled accordingly in similar cases, but the 10th Circuit joined



the 5th, 8th and 11th Circuits in holding that the TCPA had been understood by Congress as protecting a "privacy" interest.

Until the policy drafters catch up to this line of cases and start defining "right of privacy," the odds appear to be in favor of fax spammers getting liability coverage.

Administrative Remedies

In *Ace Property and Casualty Insurance Co. v. Federal Crop Insurance Corp.*, 440 F.3d 992 (2006), the 8th Circuit deepened an existing circuit split regarding whether exhaustion of administrative remedies in the Department of Agriculture is a jurisdictional prerequisite to a federal court's jurisdiction over a controversy arising under the Federal Crop Insurance Reform and Department of Agriculture Act of 1994, 7 U.S.C. Sections 6901, et seq. The act provides that "a person shall exhaust all administrative appeal procedures

established by the [s]ecretary or required by law before the person may bring an action in a court of competent jurisdiction." 7 U.S.C. Section 6912(e).

As a general matter, there are two types of exhaustion requirements in federal law — jurisdictional and non-jurisdictional exhaustion requirements. Compliance with the latter can be excused in special circumstances; failure to comply with a jurisdictional requirement can never be excused. *Ace Property*. The 8th Circuit noted that "exhaustion is presumed to be non jurisdictional 'unless Congress states in clear, unequivocal terms that the judiciary is barred from hearing an action until the administrative agency has come to a decision.'"

Because the act's exhaustion requirement was directed at a "person" and not directed at the power of the judiciary, the court held that exhaustion was not a jurisdictional prerequisite. In so doing, the 8th

Circuit joined the 9th Circuit, but split with the 2nd Circuit (and several district courts). Compare *McBride Cotton & Cattle Corp. v. Veneman*, 290 F.3d 973 (9th Cir. 2002) (non jurisdictional); with *Bastek v. Federal Crop Insurance Corp.*, 145 F.3d 90 (2d Cir. 1998) (jurisdictional).

This is unlikely to be the case in which the Supreme Court resolves this split, however, as the panel went on to find that the case could not proceed in any event as the plaintiff's failure to exhaust was not excused under the circumstances. *Ace Property*.

Political Discrimination

42 U.S.C. Section 1985(3) creates a remedy for an individual injured by a conspiracy formed "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." It is well-settled that a conspiracy motivated by race discrimination falls within the ambit of Section 1985(3). The federal appeals courts have split, however, on whether Section 1985(3) applies to a conspiracy directed at a class based on its political affiliation. Several circuits have held that animus directed at a political class can trigger a Section 1985(3) claim. See, e.g., *Galloway v. Louisiana*, 817 F.2d 1154 (5th Cir. 1987); *Keating v. Carey*, 706 F.2d 377 (2d Cir. 1983). Other circuits have limited Section 1985(3) to animus based on race. See, e.g., *Grimes v. Smith*, 776 F.2d 1359 (7th Cir. 1985).

In *Farber v. City of Patterson*, 440 F.3d 131 (2006), the 3rd Circuit deepened the split, concluding that Section 1985(3) does not protect against conspiracies to discriminate based on political affiliation. Emphasizing that Section 1985(3) was adopted as part of the Ku Klux Klan Act of 1987, which was passed in response to violent civil resistance during Reconstruction, the 3rd Circuit noted that the Supreme Court has expressed "skepticism that Section 1985(3) was intended to reach any group other than African-Americans and those who championed their cause." *Farber* (citing *United Bhd. of Carpenters & Joiners v. Scott*, 463 U.S. 825 (1983)). The *Scott* court, however, dealt with discrimination based on economic or commercial interests and did not resolve whether conspiracies

to discriminate based on political affiliation is actionable under Section 1985(3).

Employment Law

The 1991 Civil Rights Act provides a cause of action for certain employment practices that create a disparate impact on various classes of employees. A circuit split has arisen regarding the correct allocation of the burden of proof in such cases. In *International Brotherhood of Electrical Workers, AFL-CIO, Local Unions 605 & 805 v. Mississippi Power & Light Co.*, 2006 WL 508327 (5th Cir. Mar. 2, 2006), two employees sued their employer for disparate impact upon African Americans from setting the cutoff passing score on a Clerical Aptitude Battery test for a "storekeeper" position too high.

All of the parties agreed that the cutoff score had a disparate impact on African Americans. At issue, however, was whether the cutoff score was the only acceptable employment practice to achieve the employer's ends. The district court found that the burden of proof on this issue was on the employer and that because the employer had failed to show that the applicable cutoff score was the "only way to achieve" its "desired ends," the plaintiffs were entitled to relief.

The 5th Circuit reversed, finding that the burden should have been on the employees to show an "acceptable alternative employment practices." Because the employees had failed to do so, the panel reversed and ordered that judgment be entered for the employer. The 5th Circuit's allocation of the burdens in this context arguably conflicts with that of the 8th Circuit, which has held that the burden of persuasion regarding business justification is on the defendant employer. *Bradley v. Pizzaco of Nebraska Inc.*, 7 F.3d 795 (1993).

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