

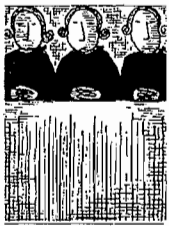
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3rd Circuit Splits From Other Courts on Fair Opportunity Doctrine

By Laura W. Brill, Alana B. Hoffman, Christopher M. Newman, Ted Sichelman and Jon P. Steinsapir

Cases implicating federal conflicts of authority in May 2006 centered around two distinct and unrelated themes: federal pre-emption in cases addressing health issues, and 3rd U.S. Circuit Court of Appeals departures from holdings of the vast majority of other circuits. The 10th Circuit also made rulings in two important decisions implicating circuit splits, one on First Amendment issues relating to the use of supermajorities in the initiative process and the other relating to class actions.



APPELLATE
LAW

Federal Preemption

The pre-emption provision of the 1976 Medical Device Amendments to the Food, Drug, and Cosmetic Act, 21 U.S.C. Section 360k(a), precludes states from imposing on devices intended for human use requirements "different from, or in addition to, any requirement applicable under this Act ... and which relates to the safety or effectiveness of the device." The Supreme Court held in *Medtronic v. Lohr*, 518 U.S. 470 (1996), that Section 360k(a) did not pre-empt state common-law tort claims regarding products that enter the market pursuant to the Food and Drug Administration's pre-market notification process because that process does not involve any federal "requirements." The Supreme Court left open, however, the question whether Section 360k(a) pre-empts state common-law claims regarding products that enter the market through the more rigorous FDA pre-market approval process, which may impose design requirements on devices.

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In the wake of *Lohr*, the 11th Circuit concluded that Section 360k(a) does not pre-empt state common-law tort claims relating to a pre-market-approved device. See *Goodlin v. Medtronic*, 167 F.3d 1367 (1999). Every other circuit to consider the issue, including the 3rd, 5th, 6th, 7th and 8th, has held at least some such claims are pre-empted by Section 360k(a). These courts have reasoned that the pre-market approval process, unlike the pre-market notification process, includes federal device-specific requirements and that common-law tort claims alleging liability to a pre-market-approved device despite its compliance with pre-market approval standards would conflict with the federal device-specific requirement. The 2nd Circuit recently reached the same conclusion in *Riegel v. Medtronic Inc.*, 451 F.3d 104 (May 16, 2006). The 2nd Circuit explicitly carved out from its holding tort claims alleging that a product subject to Section 360k(a) pre-market approval had been negligently manufactured in a way that caused a particular device not to comply with FDA requirements.

The second pre-emption case from the month relates to the Protection and Advocacy for Mentally Ill Individuals Act, which allows certain organizations to monitor the status of mentally ill patients. Under the act, these organizations may gain access to the reports of the staff of medical facilities for the mentally ill or from agencies investigating abuse or injury at these facilities. At issue in *Missouri Protection & Advocacy Services v. Missouri Department of Mental Health*, 447 F.3d 1021 (8th Cir. May 10, 2006), was whether a Missouri state law providing that peer review committee reports of mental facilities were privileged from "discovery, subpoena, or other means of legal compulsion" was pre-empted by the act's disclosure requirements.

In 1998, the Department of Health and Human Services promulgated a regulation stating that "nothing in ... [the act] is intended to preempt state law protecting records produced by ... peer review committees." Additionally, congressional legislative history from 1991 states that "[i]t is the committee's intent that the PAMII Act does not pre-empt state law regarding disclosure of peer review/medical review records." On this basis, the New Hampshire Supreme Court held that the act did not pre-empt state laws providing for peer review record privilege. See *Disabilities Rights Ctr. Inc. v. Comm'r N.H. Dep't of Corr.*, 143 N.H. 674 (1999). Disagreeing with the New Hampshire

that the act pre-empted the Missouri statute, joining similar decisions from other federal courts, including the 3rd and 10th circuits.

The 3rd Circuit's decision on the issue, *Pennsylvania Protection & Advocacy Inc. v. Houstoun*, 228 F.3d 423 (2000), which began the split, was written by Judge Samuel Alito. It adopted a plain-meaning approach to statutory construction, reaching a result that con-

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licted with the agency interpretation, the legislative history and the New Hampshire Supreme Court. The 8th Circuit has now followed Alito's approach.

Employment Discrimination

In an opinion written by Circuit Judge Edward R. Becker (but filed five days after his death), a divided panel of the 3rd Circuit created a circuit split by departing from the views of at least six other circuits regarding the scope of the so-called ministerial exception to federal employment discrimination actions.

In *Petruska v. Gannon University*, 2006 U.S. App. LEXIS 15088 (U.S. App., May 24), plaintiff Petruska claimed that she was demoted from her position as the chaplain of Gannon University, a Catholic diocesan college, based on her gender in violation of Title VII. According to Petruska's complaint, she had been demoted based on her gender, and there was no religious basis for such gender discrimination. The district court dismissed the action, apparently following the rationale of every other federal circuit court of appeals to address the issue that the ministerial exception bars discrimination actions by ministerial staff "regardless of whether the motive for the discrimination is religious in nature."

The 3rd Circuit reversed, holding that where a ministerial employee is subjected to adverse employment action because of her gender and where there is no religious basis for such gender-based action, the ministerial exception does not apply, and a Title VII action may go forward. The court

proffered rationales for the ministerial exception — 1) to avoid judicial scrutiny of religious affairs; 2) to avoid judicial oversight over the selection of clergy; 3) to avoid judicial inquiry into religious doctrine — supported barring discrimination claims where the discrimination was not the result of religious doctrine. Circuit Judge D. Brooks Smith dissented, arguing that the court had "effectively refuse[d] to recognize

any ministerial exception, placing this court at odds with every other federal court of appeals to consider the issue."

The court also further deepened an existing circuit split over whether the ministerial exception is jurisdictional in nature. Disagreeing with the 7th Circuit but agreeing with both the 9th and District of Columbia circuits, the court held that the ministerial exception is not jurisdictional.

International Commerce

The other opinion in which the 3rd Circuit declined to follow its sister circuits dealt with matters a bit more esoteric than the tension between religious freedom and sex discrimination.

In *Ferrostaal Inc. v. M/V Sea Phoenix*, 447 F.3d 212 (2006), the 3rd Circuit broke ranks with seven other circuits in a case regarding the Carriage of Goods by Sea Act, which is the U.S. enactment of the Hague Rules intended to produce standardized international shipping terms. One of these terms limits the liability of a carrier to \$500 per package, unless the shipper declares the nature and value of the goods and inserts this into the bill of lading. The doctrine at issue in *Ferrostaal*, and recognized in the 2nd, 4th, 5th, 6th, 8th, 9th and 11th circuits, is known as the fair opportunity doctrine. Under this doctrine, a carrier may not enforce the \$500 limit unless it presents a prima facie case that it offered the shipper a fair opportunity to avoid the limit by declaring a higher value. This generally requires the carrier to provide the shipper with notice of the limit and of the procedure for declaring value. In *Ferrostaal*, however, the 3rd Circuit rejected the doctrine, observing that the text of the act provides no basis for imposing an implied obligation

concluded that the unilateral imposition of the fair opportunity doctrine by U.S. courts undermines the whole purpose of the Carriage of Goods by Sea Act, which is to provide uniform default rules for international shipping.

First Amendment

The 10th Circuit has deepened a circuit split over the proper framework for analyzing First Amendment challenges to statutes or constitutional provisions that impose restrictions on the enactment of ballot initiatives relating to specific topics.

The D.C. Circuit had held that a law barring ballot initiatives that would legalize or reduce the penalties for the possession, use or distribution of controlled substances but permitting initiatives on other subjects did not constitute a restriction on expressive conduct and therefore did not implicate the First Amendment. See *Marijuana Policy Project v. U.S.*, 304 F.3rd 82 (2002).

The 1st Circuit last year rejected the D.C. Circuit's analysis, concluding that a state constitutional provision barring ballot initiatives that relate to religion or that call for public financial support for private schools constituted a ban on expressive conduct and was therefore subject to First Amendment review under the intermediate scrutiny test established in *U.S. v. O'Brien*, 391 U.S. 367 (1968). See *Wirzburger v. Galvin*, 412 F.3rd 271 (2005).

In *Initiative and Referendum Institute v. Walker*, 450 F.3d 1082 (2006), the 10th Circuit sided with the D.C. Circuit, "disagree[ing] with *Wirzburger's* premise that a state constitutional restriction on the permissible subject matter of citizen initiatives implicates the First Amendment in any way. The intermediate scrutiny standard ... applies to laws that restrict 'expressive conduct' such as flag burning, nude dancing, or sitting at a segregated lunch counter. It does not apply to structural principles of government making some outcomes difficult or impossible to achieve." Having rejected the plaintiffs' claim of heightened scrutiny, the 10th Circuit upheld the dismissal of a challenge to a state constitutional provision imposing a supermajority requirement for enactment of any initiative related to wildlife management.

Tax Procedure

In 1986, Congress amended Section 6404 of the Internal Revenue Code to allow abatement of interest assessed against a taxpayer. In the 1996 Taxpayer Bill of Rights II, Congress further

provided that the U.S. Tax Court would have jurisdiction to review the IRS's abatement determinations. In *Hinck v. U.S.*, 446 F.3d 1307 (2006), the Federal Circuit was called upon to decide whether this jurisdiction is exclusive.

The plaintiffs were a couple who filed suit in the Court of Federal Claims to seek review of the IRS's refusal to abate the interest assessed against them. Before 1996, several courts, including the 9th, 10th, and 11th circuits, had held that district courts had subject-matter jurisdiction over such claims but that the Administrative Procedure Act proscribed judicial review because abatement is discretionary. In 2003, however, the 5th Circuit held that the purpose of the 1996 amendment had been to remove any impediment to district court review of interest abatement claims. See *Beall v. U.S.*, 336 F.3d 419 (2003). In *Hinck*, the Federal Circuit disagreed, holding that the Tax Court's jurisdiction over such claims is exclusive.

Civil Procedure

In 2005, Congress passed the Class Action Fairness Act, which provides defendants an opportunity to remove to federal court any state-court class action with minimal diversity, at least 100 members, and an amount in controversy of more than \$5 million. By its terms, the act applies "to any civil action commenced on or after [Feb. 18, 2005]." At issue in *Prime Care of Northeast Kansas v. Humana Insurance Co.*, 447 F.3d 1284 (May 12, 2006), was whether defendants who were added after Feb. 18, 2005, to a complaint originally filed before Feb. 18, 2005, had the right to remove the action to federal court.

Splitting with the 5th and 7th circuits, but joining the 8th, the 10th circuit held that "the forum state's law governing the relation-back of pleading amendments" controls the issue. The 5th and 7th circuits had held an amended complaint related back to its original file date, except when a new defendant is added, in which case the defendant always has the option of removing to federal court under the Class Action Fairness Act.

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