

## The 7th Circ.'s Top 10 Civil Opinions Of 2022

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It was a busy year for the Chicago-based U.S. Court of Appeals for the Seventh Circuit. We look back to review key decisions issued by the Seventh Circuit in 2022 that will affect the business community navigating legal risks, including opinions in the areas of antitrust, the False Claims Act, and federal jurisdiction.

We count down the top 10 such cases in ascending order of significance.

### 10. Employers' FMLA Obligations

On June 1, 2022, in *Zicarelli v. Dart*, the Seventh Circuit issued an important clarification regarding the scope of an employer's Family and Medical Leave Act obligations, affecting all businesses covered by the FMLA.[1]

The plaintiff in this case alleged that his employer's leave coordinator warned of potential discipline if he took additional FMLA leave. As a result, the plaintiff says, he retired.

The U.S. District Court for the Northern District of Illinois granted summary judgment to the employer, holding, with respect to an FMLA interference claim, that the plaintiff failed to identify an adverse employment action. The Seventh Circuit reversed as to the FMLA interference claim.

U.S. Circuit Judge David Hamilton, writing for the panel, clarified that notwithstanding inconsistent language in prior circuit decisions, an employer can violate the FMLA by discouraging an employee from exercising rights under the FMLA even absent a formal denial of leave.

Post-*Zicarelli*, employers should take note: The outright denial of leave is no longer the threshold for establishing FMLA interference. Discouraging an employee from using FMLA leave to which the employee is entitled is now formally recognized as sufficient if the employee can prove prejudice.

A petition for a writ of certiorari is now pending in the U.S. Supreme Court,



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highlighting what the petition characterizes as an entrenched circuit split on this issue.

## 9. An Insurer's Duty to Defend

USA Gymnastics filed for bankruptcy after being named in numerous lawsuits arising out of Dr. Larry Nassar's abuse of athletes. Three cases associated with USAG's bankruptcy were decided by the Seventh Circuit in 2022, each of which has important implications for other bankruptcy and insurance-related proceedings.

First, in its Feb. 25, 2022, decision in *USA Gymnastics v. Liberty Insurance Underwriters Inc.*, a split panel of the Seventh Circuit held that Liberty — USAG's insurer on a directors and officers liability policy — had a duty to defend USAG against allegations from all but 10 of Nassar's accusers.[2]

The opinion is favorable to policyholders: While recognizing that the "case is in the grey territory where the policy's broad language becomes ambiguous as applied to these unique facts," under Indiana law "ambiguous policy language is construed against the insurer."

Accordingly, the majority explained, the policy's wrongful-conduct exclusion applied only to the 10 instances of sexual abuse for which Nassar was criminally convicted, because of policy language limiting the exception to finally-adjudicated conduct.

U.S. Circuit Judge Michael Brennan concurred in part and dissented in part, opining that the wrongful conduct exclusion applies to all Nassar-related conduct.

Companies should take note of the court's interpretation of the phrase "finally adjudicated" as requiring a final conviction to trigger the coverage exclusion, as well as the breadth attributed to the phrase "in any way related to" in excluding coverage for claims based upon, arising from or in any way related to an insured's wrongful conduct.

Second, while the first appeal was pending, USAG sought to enforce an order entitling it to reimbursement for past attorneys' fees.

Liberty argued many of the fees were unreasonable and unnecessary. On Aug. 16, 2022, in *USA Gymnastics v. Liberty Insurance Underwriters Inc.*, the Seventh Circuit held that fees incurred by a policyholder after an insurer breaches its duty to defend are entitled to a market-tested presumption of reasonableness when there is "uncertainty about reimbursement." [3]

This presumption first was recognized by the Seventh Circuit in *Taco Bell Corp. v. Continental Casualty Co.*[4] and, here, the Seventh Circuit held that the insurer did not rebut the presumption. The court also rejected the insurer's challenges to the nature of USAG's supervision of outside counsel.

This opinion is significant for policyholders. The Seventh Circuit clarified that the market-tested presumption from *Taco Bell*

applies when, following an insurer's breach of the duty to defend, a policyholder has supervised and incurred legal fees without any expectation of payment by the insurer. Payment by the policyholder is not necessarily required. This is because, as here, the policyholder may lack sufficient funds to pay fees that are reasonable and necessary to its defense. But if the policyholder does pay a significant percentage of its fees — particularly when it has difficulty covering its day-to-day operating expenses — that is strong evidence of market incentives to economize, rendering the presumption applicable.

Third, in *Doe v. Bettinelli* (In re: USA Gymnastics), on July 18, 2022, the Seventh Circuit addressed the type of notice due to a claimant.[5]

The bankruptcy court set a deadline for claims to be filed. The plaintiff — a victim of Nassar's — argued that her belated claim should be treated as timely because she did not receive actual notice of the deadline.

The Seventh Circuit disagreed: Because the plaintiff was not a reasonably ascertainable creditor, she was entitled only to constructive notice.

This case provides helpful instruction on notice obligations when a debtor may have numerous potential claimants.

Here, the court found it dispositive that USAG did not possess, nor was it required to possess, the claimant's medical records. Thus, actual notice was not required as the claimant's identity was not reasonably ascertainable or discoverable using reasonably diligent efforts.

## **8. Article III Standing to Seek Money Damages**

In *Pierre v. Midland Credit Management, Inc.*,[6] an April 1, 2022, decision, the Seventh Circuit clarified what harm a plaintiff must suffer to have standing to seek money damages under the Fair Debt Collection Practices Act, or FDCPA.

In this case, Midland Credit sent the plaintiff a letter seeking to collect on time-barred debt. The letter clarified that, due to the debt's age, Midland would not sue or report the default.

The plaintiff alleged the letter was deceptive in violation of the FDCPA. The Northern District of Illinois certified a class of persons who had received similar letters, and a jury awarded damages totaling \$350,000.

A split Seventh Circuit reversed. U.S. Circuit Judge Diane Sykes writing for the majority explained that, to determine whether a plaintiff seeking money damages has suffered concrete harm necessary to have standing under Article III, a court looks to whether "legislatively identified harms ... bear a close relationship in kind to those underlying suits at common law."

Prior to the Supreme Court's 2021 opinion in *TransUnion LLC v. Ramirez*,[7] there was a "hint that the mere 'risk of real harm' could concretely injure plaintiffs seeking money damages." The court in *TransUnion* clarified that a risk of harm qualifies as a concrete injury only for claims for forward-looking, injunctive relief.

Applying that test to the record before it, the majority held that the plaintiff lacked standing because she claimed to have suffered only confusion, fear, and emotional harm — which alone were not concrete harms — and did not suffer any other injury.

U.S. Circuit Judge Hamilton dissented, arguing that the alleged injuries were sufficiently concrete. U.S. Circuit Judges Ilana Rovner, Diane Wood and Candace Jackson-Akiwumi joined Judge Hamilton in a dissent from the denial of rehearing en banc.[8] A petition for a writ of certiorari is now pending.

Midland is the latest in a string of Seventh Circuit decisions addressing when intangible harm is

sufficiently concrete to confer standing under the Supreme Court's recent cases. It likely will not be the last, either.

## **7. Actual Notice and Deliberate Indifference Under Title IX**

In *C.S. v. Madison Metropolitan School District*,<sup>[9]</sup> a student sued her school district under Title IX alleging that her school principal failed to prevent a school security guard from sexually abusing her, after the principal was warned of the guard's physical contact with students.

The U.S. District Court for the Western District of Wisconsin entered summary judgment for the school district, and a three-judge panel of the Seventh Circuit affirmed.

On May 10, 2022, sitting en banc, the Seventh Circuit affirmed but issued a lengthy opinion that clarifies Title IX obligations and seeks to reconcile inconsistencies in its past rulings on Title IX.

U.S. Circuit Judge Michael Scudder writing on behalf of the en banc court explained that Title IX imposes an obligation to act when a "relevant school official acquires actual notice upon learning that misconduct rising to the level of sex discrimination has occurred."

An official's knowledge of "the risk of future misconduct," by contrast, triggers no such obligation — although the court noted that, as a practical matter, a school district should err on the side of preventive compliance measures.

School districts should take heed: Title IX imposes significant obligations, and this en banc opinion defines circumstances under which a school is accountable for misconduct.

U.S. Circuit Judge Frank Easterbrook, joined by Judges Hamilton and Brennan, as well as U.S. Circuit Judge Michael Kanne, concurred.

While agreeing that the principal neither knew nor was deliberately indifferent to misconduct, the concurring judges took issue with the majority's attempt to "provide more concrete guidance to those tasked with complying with Title IX in the challenging setting of today's schools."

Characterizing this as the job of officials in the U.S. Department of Education with the power to issue regulations, the concurring judges expressed the view that the job of the court is only to decide the case at hand.

The concurrence specifically took issue with the majority's discussion of when "risqué" text messages could suffice for liability, and the majority's assertion that misconduct rising to the level of sex discrimination is required.

In other words, while the majority of the en banc court sought to clarify the framework for Title IX institutional liability, the concurrence's more limited view of the court's role has the potential to muddy the waters.

## **6. Post-Hughes ERISA Pleadings**

In *Albert v. Oshkosh Corp.*,<sup>[10]</sup> the Seventh Circuit court considered for the first time the ramifications of the Supreme Court's 2022 decision in *Hughes v. Northwestern University* on pleading standards for

401(k) excessive-fee suits.[11]

The plaintiff claimed his former employer violated the Employee Retirement Income Security Act by authorizing its retirement plan to pay unreasonable fees and maintain high-priced advisers.

The U.S. District Court for the Eastern District of Wisconsin dismissed the complaint. While the plaintiff's appeal was pending, the Supreme Court held in another ERISA action, *Hughes*, that the Seventh Circuit erred in focusing exclusively on whether the plan offered inexpensive investment options.

Instead, the Supreme Court explained, ERISA requires a context-specific inquiry that accounts for a plan fiduciary's duty to monitor investments and remove imprudent ones.

On Aug. 29, 2022, the Seventh Circuit affirmed the district court's dismissal of the complaint.

Considering for the first time the ramifications of *Hughes* for ERISA fee cases, U.S. Circuit Judge Amy St. Eve, writing for the panel, reasoned that "*Hughes* merely rejected this court's assumption that the availability of a mix of high-cost and low-cost investment options in a plan insulated fiduciaries from liability." It left untouched the rule that the allegations of a complaint must provide "the kind of context that could move th[e] claim from possibility to plausibility."

Here, the complaint did not pass that bar: It alleged high fees but lacked specificity as to the corresponding quality or type of services the plan, and comparator plans, provided.

The takeaway: After *Hughes* and *Albert*, a 401(k) excessive-fee suit may be subject to dismissal if the plaintiff does not support its allegations with details, such as a comparison of fees paid to different service providers or of the quality and types of service offered by other plans or plan managers.

## **5. The Applicable Knowledge Standard Under the False Claims Act**

In an opinion issued on April 5, 2022, in *U.S. v. Safeway, Inc.*, the Seventh Circuit clarified knowledge standards applicable to a False Claims Act action.[12]

The relator in this FCA action alleged the defendant knowingly submitted false Medicaid and Medicare claims when it reported drug retail prices — lowered as a result of discount clubs — instead of actual prices.

The defendant responded that its practice was not objectively unreasonable, since regulations were unclear about which price should be used. The U.S. District Court for the Central District of Illinois agreed.

A split Seventh Circuit affirmed.

Applying the Supreme Court's 2007 decision in *Safeco Insurance Co. of America v. Burr*[13] and the Seventh Circuit's 2021 decision in *U.S. v. SuperValu Inc.*,[14] the majority opined that a company acting under an incorrect interpretation of a statute or regulation did not act knowingly or recklessly if their interpretation was "objectively reasonable" and absent contrary "authoritative guidance."

Judge St. Eve, writing for the majority, reasoned that *Safeway's* conduct here was consistent with an objectively reasonable interpretation of federal law in "the absence of authoritative guidance warning

that [usual and customary price reported to Medicare and Medicaid] must include [club] discounts."

The court found that a footnote in a lengthy federal manual did not suffice as contrary authoritative guidance.

Judge Hamilton dissented. He reiterated his previously-stated position in SuperValu that "the majority's approach to the [FCA's] knowledge requirement is contrary to the text of [the statute], loses sight of its roots in the common law of fraud, and ignores the history and purpose of the Act's 'knowledge' provisions."

On Jan. 13, the Supreme Court granted certiorari in and consolidated SuperValu and Safeway. The court's disposition of these consolidated cases, which likely will be argued in the spring of 2023, will inform knowledge requirements under the FCA going forward.

#### **4. Delaware Forum-Selection Bylaws**

Seafarers Pension Plan ex rel. Boeing Co. v. Bradway<sup>[15]</sup> arose from the 2018 and 2019 crashes of Boeing 737 MAX airliners. Shareholders filed a federal derivative suit, alleging Boeing officers and directors misrepresented the 737 MAX's development and operation in proxy materials, in violation of Securities Exchange Act Section 14(a).

The Northern District of Illinois dismissed the suit, applying a Boeing bylaw specifying the Delaware Court of Chancery as the exclusive forum for shareholder derivative claims.

A split Seventh Circuit reversed on Jan. 7, 2022. The majority held that federal courts have exclusive jurisdiction over Section 14(a) claims, and thus a bylaw that applies to derivative suits cannot effectively preclude a federal court from hearing such a claim.

Judge Hamilton for the majority explained that, indeed, the defendants advocated for a "Catch-22 result that would bar plaintiff's derivative Section 14(a) claim in any forum," contrary to Delaware corporation law.

Judge Easterbrook dissented. In his view, even if federal jurisdiction is exclusive when it comes to direct suits arising under the Exchange Act, it is not exclusive when it comes to derivative suits arising under state law.

Just as a state could abolish derivative suits without violating federal law, a company may limit where such suits can be brought — so long as it does not impinge on the right to bring direct claims. Furthermore, forum exclusivity can be waived, and Boeing's bylaw functions as an agreed waiver.

In light of this decision, companies with forum-selection bylaws directing shareholder derivative suits to state court should prepare for the increased likelihood of defending such suits in federal court.

#### **3. The Intersection of Antitrust and Patent Law**

In an opinion issued on Aug. 1, 2022, in Mayor and City Council of Baltimore v. AbbVie Inc.,<sup>[16]</sup> the Seventh Circuit held that the establishment of an alleged "patent thicket" did not violate the Sherman Act, and the terms of the settlement agreements between manufacturer and competitors did not establish a cartel.

At issue in this case was AbbVie's 2016 accumulation of 132 U.S. patents for Humira. Without challenging the validity of the patents in the U.S. Court of Appeals for the Federal Circuit, welfare-benefit plans alleged that AbbVie violated Sections 1 and 2 of the Sherman Act by obtaining the patent thicket, and enforcing the patents against producers of biosimilar drugs — with whom AbbVie settled.

The Northern District of Illinois dismissed the complaint, and the Seventh Circuit affirmed.

Writing for the panel, Judge Easterbrook explained that accumulating many patents, even if it deters competitive market entry, is not itself anti-competitive. And the settlements — which entailed no payment to delay entry of other market participants — were permitted by law.

The opinion gives a valuable roadmap of how a competitor faced with a similar patent thicket could enter the market, including as a copycat for synthetic substances or as a biosimilar drug for biologics.

## **2. Pleading a Vertical Sherman Act Conspiracy**

In *Marion Diagnostic Center LLC v. Becton Dickinson & Co.*,<sup>[17]</sup> the Seventh Circuit held that the plaintiffs did not plead a Sherman Act vertical conspiracy where, without market power, it was implausible for allegedly conspiring nonexclusive distributors to raise prices on an allegedly conspiring manufacturer's products that purchasers could buy from other non-conspiring distributors.

In this case, a putative class of medical providers alleged two independent vertical price-fixing conspiracies between manufacturer Becton, Dickinson & Co., and distributors Cardinal Health and McKesson Medical-Surgical.

Building on a prior decision affirming dismissal of an earlier version of the complaint, the Seventh Circuit affirmed dismissal of the amended complaint on March 18, 2022.

Whether under Article III or the 1977 Supreme Court decision in *Illinois Brick Co. v. Illinois*,<sup>[18]</sup> the plaintiffs, who did not purchase from Cardinal, did not suffer an injury fairly traceable to Cardinal, and thus were not the proper parties to bring suit. And plaintiffs' allegations of a vertical conspiracy between Becton and McKesson were not plausible.

The opinion stated that the plaintiffs' allegations "could just as easily reflect innocent conduct or rational self-interest," rather than a conspiracy.

Of interest to attorneys litigating antitrust matters, the opinion clarifies the distinction between Article III's traceability requirement for standing and *Illinois Brick*'s direct-purchaser requirement.

The opinion also reminds readers that to state a claim a plaintiff must allege an antitrust conspiracy that is plausible in light of the market and context at issue.

## **1. *Scienter* Under the Commodities Exchange Act**

*Barry v. Cboe Global Markets Inc.*,<sup>[19]</sup> in which the Seventh Circuit redefined the intent standard applicable to a claim under Section 25(b) of the Commodity Exchange Act, tops the list of the Seventh Circuit's most significant opinions issued in 2022.

In this case, several traders claimed that Cboe Global Markets Inc. and its affiliates violated the Securities Exchange Act and the Commodity Exchange Act by failing to curb market manipulation related to volatility index, or VIX, contracts.

The plaintiffs asserted that Cboe knew its product was vulnerable to manipulation but failed to stop persons from taking advantage of its design and to enforce rules forbidding manipulation.

Affirming the Northern District of Illinois' dismissal of the complaint, the Seventh Circuit in an opinion issued on July 27, 2022, held that, like a Section 10(b) securities fraud claim, a claim under Section 25(b) of the Commodity Exchange Act requires wrongful intent not mere negligence.

In so doing, the court rejected long-standing precedent that equated Section 25(b)(1)(A)'s phrase "bad faith" with negligence. It characterized that precedent as dictum, unpersuasive and inconsistent with the Commodity Exchange Act's structure, context and history.

In light of Barry, plaintiffs must plead and prove that the Commodity Futures Trading Commission-registered entity knowingly acted or failed to act based on an ulterior motive. This stringent interpretation of bad faith will be harder for plaintiffs to satisfy, and thus may be significant to companies operating in the commodities space.

## **In the New Year**

Clues to what 2023 may bring for the Seventh Circuit also can be found in the changing composition of the 11-judge court. In the past year, the Seventh Circuit gained two new members. U.S. Circuit Judge John Lee, previously a federal district judge in Chicago, replaced Judge Wood.

U.S. Circuit Judge Doris Pryor, previously a federal magistrate judge in Indiana, replaced Judge Hamilton.

While Judges Wood and Hamilton will continue to decide cases on senior status, they have the discretion to reduce their case load.

Judge Jackson-Akiwumi, who like Judge Pryor is a formal public defender, is completing her first full calendar year on the Seventh Circuit.

And Joe President Biden has the opportunity to nominate a fourth judge, to an Indiana seat vacated as a result of Judge Kanne's death last year.

We will let you know next year whether four new members of a single circuit within the same presidential term affected the court's jurisprudence in 2023 and beyond!

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***Disclosure: Jenner & Block, including author Gabriel Gillett, represented Midland in Pierre v. Midland Credit Management, Inc. and continues to represent Midland in Ms. Pierre's appeal to the U.S. Supreme Court. In addition, Jenner & Block, including author Gabriel Gillett, represented McKesson Medical-Surgical, Inc. in Marion Diagnostic Center, LLC v. Becton Dickinson & Co.***

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[1] *Zicarelli v. Dart*, 35 F.4th 1079 (7th Cir.), cert. denied, 143 S. Ct. 309 (2022).

[2] *USA Gymnastics v. Liberty Insurance Underwriters, Inc.*, 27 F.4th 499 (7th Cir. 2022).

[3] *USA Gymnastics v. Liberty Insurance Underwriters, Inc.*, 46 F.4th 571 (7th Cir. 2022).

[4] *Taco Bell Corp. v. Continental Casualty Co.*, 388 F.3d 1069 (7th Cir. 2004).

[5] *Doe v. Bettinelli (In re USA Gymnastics)*, 40 F.4th 775 (7th Cir. 2022).

[6] *Pierre v. Midland Credit Management, Inc.*, 29 F.4th 934 (7th Cir. 2022), petition for cert. filed, 91 U.S.L.W. 3121 (U.S. Nov. 9, 2022) (No. 22-435).

[7] *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021).

[8] 36 F.4th 728 (7th Cir. 2022), petition for cert. filed, 91 U.S.L.W. 3121 (U.S. Nov. 9, 2022) (No. 22-435).

[9] *C.S. v. Madison Metropolitan School District*, 34 F.4th 536 (7th Cir. 2022) (en banc).

[10] *Albert v. Oshkosh Corp.*, 47 F.4th 570 (7th Cir. 2022).

[11] *Hughes v. Northwestern University*, 142 S. Ct. 737 (2022) (vacating *Divane v. Northwestern University*, 953 F.3d 980 (7th Cir. 2020)).

[12] *United States ex rel. Proctor v. Safeway, Inc.*, 30 F.4th 649 (7th Cir. 2022), petition for cert. filed, 91 U.S.L.W. 3023 (U.S. Aug. 5, 2022) (No. 22-111).

[13] *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47 (2007).

[14] *United States ex rel. Schutte v. SuperValu Inc.*, 9 F.4th 455 (7th Cir. 2021), petition for cert. filed, 90 U.S.L.W. 3324 (U.S. Apr. 5, 2022) (No. 21-1326).

[15] *Seafarers Pension Plan ex rel. Boeing Co. v. Bradway*, 23 F.4th 714 (7th Cir. 2022).

[16] *Mayor and City Council of Baltimore v. AbbVie, Inc.*, 42 F.4th 709 (7th Cir. 2022).

[17] *Marion Diagnostic Center, LLC v. Becton Dickinson & Co.*, 29 F.4th 337 (7th Cir. 2022).

[18] *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

[19] *Barry v. Cboe Global Markets, Inc.*, 42 F.4th 619 (7th Cir. 2022).