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SPEAKERS

Anthony Sanders, Marco Vasquez, Rebecca Furdek

A Anthony Sanders 00:10

Hello and welcome to Short Circuit, your podcast on the federal courts of appeals. I'm your host, Anthony Sanders, director of the Center for Judicial Engagement at the Institute for Justice. We are recording this on Monday, June 29, 2026. We have a case from the Fifth Circuit that will be very interesting, which is actually about an old friend of the show's, and that is the private non-delegation doctrine. So it's the latest in that saga, and it involves horse racing, so yet again an opportunity for more horse puns on the show. And then we will move on to the Fourth Circuit, which again has a case about zombie precedent, and so there will be an opportunity for more zombie jokes. So if you're into horses and zombies, this is the show for you. Along the way, we will be discussing the latest iteration in our 12 Months, 12 Circuits series. This is the episode for July in that series, and that means we're going to be going to the Seventh Circuit because July is the seventh month. Now, we have discussed the Seventh Circuit a lot on this show, especially in the last couple years, and so we're not going to spend too much time on that. But we're going to give the bare bones of the Seventh Circuit later on in this podcast, so stay tuned toward the end for that. But before all that, we will have a special friend of the Institute for Justice, especially in our old Minnesota office, and I will introduce her in a moment, and then she'll be taking us to the Fifth Circuit. But first, I'm going to introduce IJ's Marco Vasquez, who is going to be discussing this Fourth Circuit zombie precedent case a little later. Now, the case involves something we're really into litigating lately at IJ, and that is your Seventh Circuit's - not Seventh Circuit, too many Sevenths here - Seventh Amendment right to a jury trial in cases at quote common law. Now, Marco, you were in Big Law for a little while before you came to IJ, and unusually - so this ties in with the case you'll be doing - unusually for an associate at Big Law, you were part of some jury trials. Am I right?

Marco Vasquez 02:42

Yeah.

Anthony Sanders 02:43

How the heck were you able to do that instead of being in some warehouse doing doc review for a couple years?

Marco Vasquez 02:50

I just chalk it up to being in the right place at the right time. The cases were in a spot where they needed people to try cases. So one, it was me and one partner. I was second chair and did the opening statement in that one, which was an amazing experience, and then the second one, I was third chair. So yeah, very unusual experience. They kind of trotted me out as a selling point for other associates: come to our firm, we try cases. Well, that's the exception, not the rule.

Anthony Sanders 03:14

So what what were the cases about those jury trials?

Marco Vasquez 03:17

Those were breach-of-contract cases. One of them was commercial real estate, and the other one was a residential property supposedly purchased by our client, who was a former NBA player. So it was a fun case.

Anthony Sanders 03:34

Okay. Well, I will dig no more. I won't try to have any attorney-client privilege revealed. Instead, it is my privilege to introduce Rebecca Furdek. So, Rebecca, I probably first met you in your job interview, I'm guessing, where you got the job and were a clerk for IJ. Now we call them Dave Kennedy Summer Fellows. Back then, we just called them summer clerks, but same thing. And she was a summer clerk for us at the Institute for Justice Minnesota office, and then she stayed on for the fall. That's right. Yeah, that's right. And did some great work for us. Then she went on to all kinds of more exciting things. And now she's kind of come full circle in the whole public-interest world because she just joined our friends at the Wisconsin Institute for Law & Liberty. So tell us a little bit about your journey.

R

Rebecca Furdek 04:34

Absolutely. Well, I'm just going to have one correction. I didn't necessarily go on to bigger and better things. I just went on to other great things. I had the opportunity to clerk in the Northern District of Texas, which actually is where this horse-racing case was initially brought. Fun fact. So I clerked for Judge O'Connor there, and then I went off to private practice in D.C. for a little bit. Then I worked at the Department of Labor as counsel to the Solicitor, and then I went to Husch Blackwell. I wanted to move back to my home state of Wisconsin, so I worked there for a little while.

A

Anthony Sanders 05:09

With our friend Joe Dietrich.

R

Rebecca Furdek 05:11

That's right. And I just couldn't shake that public-interest feeling and that calling, if you will, and I had a great opportunity to join WILL. I've been there about two months now, and it's just been such an honor to be there, working with great people and doing great work. So it's really fun to have come full circle and be with you all now in the public-interest sphere again.

A

Anthony Sanders 05:36

Yeah, and WILL is a fun and great organization that I've crossed paths with, and others at IJ have crossed paths with, many times over the years. So it's really great to see you end up there. They were extremely helpful to me a couple years ago when I was doing my book promotion, and they were also helpful right at the beginning when they started, when we had the case in Milwaukee challenging the taxi monopoly there, what seems like a long time ago now. So really happy to have another friend at WILL. By the way, I've always wondered: it's not the easiest acronym to use, right? Because it's a verb and it's a name, right? So do you have to work around that sometimes?

R

Rebecca Furdek 05:45

Yeah, and WILL is a fun and great organization that I've crossed paths with, and others at IJ have crossed paths with, many times over the years. So it's really great to see you end up there. They were extremely helpful to me a couple years ago when I was doing my book promotion, and they were also helpful right at the beginning when they started, when we had the case in Milwaukee challenging the taxi monopoly there, what seems like a long time ago now. So really happy to have another friend at WILL. By the way, I've always wondered: it's not the easiest acronym to use, right? Because it's a verb and it's a name, right? So do you have to work around that sometimes?

A

Anthony Sanders 06:46

Well, that's very encouraging. So another thing that people are trying to exploit - well, at least the plaintiffs in this case - is the private non-delegation doctrine. I'll go to Rebecca on this case in a moment, but I'll just set the stage. So, if you are a very longtime Short Circuit listener, you may remember when, in November of 2022, we first covered this issue. I think it was the Sixth Circuit case, which involved - no, it was the - I'm just looking now. It might have been this same case, or at least the earlier version of it, which is, yeah, Short Circuit 247, where Trace Mitchell, who was with us back then and is also a master pun-maker, had all kinds of horsey puns in this episode about this statute. So if you like horse puns, we'll put a link in the show notes to it. This statute was challenged. It's basically how to regulate the horse industry, but they allow the horse industry to regulate itself with governmental power, which sounds bad. And so it was challenged. There was a ruling here. There was also one in the Sixth Circuit that I think we may have covered on a different show. But basically, it was ruled unconstitutional. Congress, unusual for Congress, actually responded and quote fixed the law. That fix then went back to the courts, and the Fifth Circuit has kind of been the court that keeps saying, "No, there's still a problem. No, there's still a problem." And this is the very latest "no, there's still a problem" story. So with that table-setting, Rebecca, tell us what's up with this case, how the court is responding to the Supreme Court, and what the heck this law even does.

R

Rebecca Furdek 08:53

That's right. I will do a little bit more setting the stage as well, because what the statute does and doesn't do is pretty important to the decision. But yes, this is a long saga related to horse racing: three trips now to the Fifth Circuit, SCOTUS taking the case, SCOTUS remanding the case after deciding another case, and competing Sixth and Eighth Circuit decisions. So you could say - I don't have a lot of puns, but I will give you one - that the law is a little unstable in this area. So to set the stage, it's not firm...

A

Anthony Sanders 09:23

So its not in the ground.

R Rebecca Furdek 09:24

Good one. So while there have long been doping scandals in sports, in 2012 there was a New York Times article, and I found the totals kind of shocking, saying that on average 24 horses were dying on American racetracks every week. They were attributing those deaths to a culture relying on performance-enhancing substances to mask injuries. Fast forward: public attention was growing, and in March 2020, 27 individuals were indicted on federal charges related to horse doping. So, in response, the federal government decided to, unsurprisingly, regulate the area. And in December 2020, the Horseracing Integrity and Safety Act, or HISA, became law, recognizing what it called the Authority, capitalized, for purposes of developing and implementing programs within that industry. So what is the Authority, and what does it do? The Authority is a private nonprofit called the Horseracing Integrity and Safety Authority. So we're going to call it the Authority from now on. Sounds a little draconian, but that's what the courts call it. It was incorporated to establish safety and performance standards, as well as an anti-doping control program, racetrack safety, and those sorts of things. It wasn't created by Congress; Congress just recognized it in the statute and sort of left it to do its own thing, in a sense. It's led by a board of seven independent members from business, sports, and academia, and in some ways it works with and responds to the Federal Trade Commission, or the FTC. So here's a little bit about what it does. It can draft rules, but it cannot fully promulgate rules itself. The FTC has to approve them following the typical notice-and-comment period with federal agencies. Now, when this lawsuit was first brought, if the FTC didn't approve a rule, it couldn't just modify it. The FTC had no authority to do that. It had to send it back to the Authority and say, "Oh, you guys edit it."

A Anthony Sanders 11:38

And that was the first thing that the courts thought that sounds bad.

R Rebecca Furdek 11:42

That sounds bad. So that is trip one to the Fifth Circuit. And one other thing the Authority does is investigate on its own. Again, this is a private nonprofit. This isn't even a federal agency or government. It can investigate, assess penalties, and effectively prosecute administrative violations, so that's going to come up on trips two and three. In early 2022, as the date of HISA implementation was approaching, a trade association of horse trainers, owners, and a bunch of affiliate organizations - we're going to call them the horsemen, as apocalyptic as that may sound, but that's what the courts did as well, so I'm going to love saying it every time I say it - sued the FTC, the Authority, and committee members, arguing in part that HISA violated the private non-delegation doctrine. They brought other arguments as well, but we don't want to be here all day, so I will just stick with non-delegation. It was brought in the Northern District of Texas, and at the district court level, the court found that HISA was not unconstitutional under the non-delegation doctrine. For a couple reasons, they didn't focus on the enforcement issue on that first trip, but as to the regulatory authority, the court said it did not violate the private non-delegation doctrine because there was both an intelligible principle and the Authority was sufficiently subordinate to the FTC. So it went up to the Fifth Circuit, which reversed and remanded, finding that HISA's delegation did violate the doctrine because the Authority was not sufficiently subordinate. It pointed out that, for instance, if the rules the Authority drafts are consistent with the statute, the FTC must approve them. It has no leeway, and the FTC can't even review policy choices by the Authority within that broad range of authority. And just having worked at a federal agency, a rule can really vary a lot based on these so-called policy choices. So that's pretty breathtaking to me. The court said an agency does not have meaningful oversight if it does not write the rules, cannot change them, and cannot second-guess their substance. So, unconstitutional. Back to the district court. But in the interim, as you said, Congress amended the statute to give the FTC power to add to or modify the rules. So the FTC was no longer, as the horsemen said, a rubber stamp, in theory. The district court took that into account, consolidated that case with another challenge that had popped up, and ruled in favor of the defendants. The horsemen - again, love saying it - appealed. And so trip two to the Fifth Circuit found that the Authority's amended rulemaking powers were now fine with that amendment to the statute. However, the enforcement powers did violate the doctrine. Specifically, HISA, the court pointed out, allows the Authority to investigate these violations, issue subpoenas, conduct searches, levy fines, and seek injunctions. Interestingly, the Authority itself doesn't even do that. It makes a second delegation to another private nonprofit, the U.S. Anti-Doping Agency or some other entity, which then acts as the independent enforcement organization. So you have two layers of delegation from the government, bringing kind of full-scale administrative prosecution, if you will, against horse owners and trainers. The court found that unacceptable, saying that the Authority does not function subordinately to the FTC. It also looked at the Sixth Circuit rationale, which said that the enforcement was fine, but the court ultimately concluded that just because the FTC can come in at, wait for it, the tail end, the horse was already out of the barn. So I am using their language; I cannot take credit for that, but pretty good there by the Fifth Circuit.

A Anthony Sanders 15:53

And they have a disclaimer, right, that you knew that was coming?

R Rebecca Furdek 15:57

I did.

A Anthony Sanders 15:58

In the opinion. They say, "horse's out of the barn." Parentheses: "You knew this was coming."

R Rebecca Furdek 16:04

Oh, I didn't see that. Okay, that's hilarious. I love that. Well, we did know that was coming, so I guess my eyes glossed over that in preparing for this episode. That is fantastic. Yeah. So the court affirmed in part and reversed in part. They acknowledged the conflict with the Sixth Circuit, and by the way, the Eighth Circuit had also ruled in the meantime and aligned with the Sixth Circuit on that issue. So now we go up to SCOTUS. SCOTUS does accept cert to hear the three cases: the Fifth, Sixth, and Eighth Circuit cases. The petitions were distributed for conference a few times, granted, but then vacated and remanded in light of FCC v. Consumers Research, which came out last summer and also focused on the non-delegation doctrine. That was about the FCC, the Communications Act, and specifically an amendment to the Communications Act in which every carrier that provides interstate telecom services has to contribute to some fund. The FCC appointed a private nonprofit to be the permanent administrator of that fund, and it manages the operations and helps determine the amount each carrier has to contribute. The Court found that that was fine. The private entity was subordinate to the FCC. The entity was ultimately just making recommendations because the FCC could revise those financial projections. So, no violation of the non-delegation doctrine. The horsemen retreated back - they galloped back - to the various courts of appeals, and the Sixth Circuit again found that there was no non-delegation violation. But in a recent decision just a few weeks ago, the Fifth Circuit said that Consumers Research affected nothing. They reissued their opinion and just added a new section addressing Consumers Research. In that pretty short section, the Fifth Circuit mentioned that in that case the Supreme Court concluded that the private entity in the FCC matter merely played an advisory role, whereas here the Authority wields power of an entirely different color. Again, it emphasized the power to investigate, subpoena, sue, and sanction, saying that back-end review does not suffice for subordination. They also talked for quite some length about how it's distinct from the SEC and FINRA, for example, because the FTC in this instance lacks the tools to ensure that the law is being properly enforced.

A Anthony Sanders 18:42

Right. So FINRA - people who read their 401(k) statements may be somewhat familiar with it - is basically how securities in America from public companies are governed. It's a private group, but it's so enmeshed with what the SEC does that the courts seem to have not been worried about the delegation problem there.

R

Rebecca Furdek 19:09

Exactly. And that came up in one of the earlier challenges when they were looking more at the rulemaking piece because they said, "Hey, SEC and FINRA - the SEC at least has some expertise in the securities industry. But when you look at the FTC, they're not horse-racing experts by any means." So that just supports the argument that ultimately any rule that the Authority is going to draft, the FTC is probably just going to rubber-stamp. That is what the horsemen argued. So anyway, here we are. Because the Supreme Court had already accepted review, we expect, and most commentators are expecting, that this is going to get resolved now by the Supreme Court. So there we have it.

A

Anthony Sanders 19:52

Do we think that Congress might act again? It seems like it would be an easy fix to just make the FTC more involved with these investigations, and yet probably the industry doesn't want this because this was kind of a way to do it on the cheap, because the FTC wouldn't have to expend resources on all these investigations.

R

Rebecca Furdek 20:14

Probably, and again, I think that kind of goes to the expertise. If you did bring the FTC in to help enforce, you would have to, I would imagine, either hire people with expertise in this industry or otherwise make some pretty strong changes to the enforcement folks over there, because I don't know what their expertise would be in this area. You can issue a subpoena generally, but if you don't really understand the industry, that seems a bit of an uphill battle. But yeah, it could be a legislative fix, or maybe Congress is just going to bank on the Sixth and Eighth Circuits ultimately getting their way in this. But it's a very unique thing - the sort of double delegation to a private entity to initiate enforcement proceedings. At my last job, I did a lot of white-collar defense, and just going through that process for a company or an individual, it can be pretty taxing and last a long time. So just fixing it on the back end, the horse is already out of the barn, as the Fifth Circuit said.

A

Anthony Sanders 21:20

Ah, well, so Marco, I want to get your take on the field today, especially given your background clerking in the Fifth Circuit.

R

Rebecca Furdek 21:32

Is the field a pun, by the way? A little bit? Maybe we'll give it to you.

A

Anthony Sanders 21:38

I think they say that. I'm not a horse expert myself, but that's my memory.

M

Marco Vasquez 21:44

I won't be able to keep up with these puns, but very impressive. So I didn't clerk in the Fifth Circuit. I clerked in the Eighth, but I clerked for a district court in the Fifth Circuit, so I have some familiarity with the Fifth Circuit.

A

Anthony Sanders 21:54

That's what I meant. Sorry.

M

Marco Vasquez 21:55

Okay, gotcha. One of the things I think about with the Fifth Circuit is they're not afraid to go out and extend the law, apply precedent in a way that other circuits would not be comfortable with. So the way I think about the Fifth Circuit is: it's where the action is. If you want a separate opinion by maybe Judge Oldham or Judge Willett to flesh out your theory and think about it a little bit, you've got a good shot in the Fifth Circuit. So my first reaction when I saw this case, I saw vacate and remand for further consideration. And when I think about, as a former clerk, what your mindset is - don't get reversed by the Supreme Court, don't get reversed by the Court of Appeals - I don't think, "Let's double down," when I hear that. But the explanation here actually makes sense as to why the Fifth Circuit thought Consumers Research was different. Ultimately, I think the Fifth Circuit got it right here, and the key point for me was the back-end review of the penalty. That was what the Sixth Circuit said: oh, well, the FTC can review the penalty at the end of the day and change that. And the Fifth Circuit points out that doesn't change all of the executive power that's being utilized and is unreviewable in the interim. That practical effect really matters for people. If you're being subjected to a private entity harassing you or bothering you for multiple years, and you have no one who can step in and do anything about it, that's a problem. That's a waste of time and resources. And so the fact that the penalty can be assessed years down the road by the FTC isn't really comfort to a lot of these people subjected to these proceedings in the interim. So I think the Fifth Circuit had the better of the argument versus the Sixth Circuit. But I know that the Eighth Circuit still has to chime in again as well. So we'll see whether or not that circuit split deepens, but it's definitely one case to be on the lookout for at the Supreme Court.

A

Anthony Sanders 23:45

If I can play a little bit of devil's advocate here, because my gut, of course, wants to go with what the Fifth Circuit said and what both of you are saying. So the reasoning is that if you are investigated by someone, there are all kinds of costs to that. You have to reply to subpoenas. There's, of course, all the psychological and financial harm that's going on. And so at the end of the day, maybe you can then go to the FTC and have them reason with this Authority, and that will then lead to you not being prosecuted, perhaps. But the Fifth Circuit is saying that, in the interim, all this prosecution stuff has happened, it's real, and that was done by a private entity, right? So why is that different from what I'm about to say? And this kind of goes to Marco's case that he's going to discuss in a minute, which is that the Supreme Court has long said that things like your jury-trial rights, or essentially your right to produce evidence or things like that - if there is a lower-level proceeding before, say, an administrative law judge, or something that's not like a real court, that doesn't seem like real justice - that's fine as long as later you get to appeal it and maybe have de novo, so start-over-again review, in a real court with a real proceeding. It's kind of the same as having this private prosecutor and then later getting the real prosecutor. I guess, what would the advocate say is different between those two? Because I'm betting that would kind of eventually be the question that the Supreme Court grapples with.

R

Rebecca Furdek 25:37

Well, I think if you're leaning into the practical effect of both of those - the horse is out of the barn - it is fairly similar. But if you're looking at it as sort of due process versus just the delegation itself - should the delegation have happened? - I think if you look at it more on the front end, that's where the harm starts, versus due process being maybe everything that accumulates throughout the process. If you're thinking about a jury trial and what a defendant may face, I analogize it a little bit more. So if I were arguing for the Fifth Circuit, it's a little bit like the Zafirov False Claims Act litigation going on right now in the Eleventh Circuit with qui tam whistleblowers. Justice Thomas for a while has said that that's unconstitutional, in his opinion. But there, these whistleblowers can essentially sue on behalf of the United States and drive the litigation even if DOJ declines to intervene. So I see more of a parallel there between whether you even have that authority in the first place versus what happens to you along the way.

M

Marco Vasquez 26:44

Yep, that makes sense. One of the things the Fifth Circuit came back to, maybe anticipating this, not explicitly, is that the panel pointed out that the FTC has no role in suing. Suing is an executive function, they said. Regardless of the penalty, the FTC doesn't have any control over, or the Authority isn't subordinate to the FTC with respect to, that suing authority. So they kind of anticipated it there and picked through the statutory language and all of that stuff. But it's certainly a great question, and that came to mind as well when I was reading it.

A

Anthony Sanders 27:13

Gotcha. So it's like the private party is driving the race, not just who begins the race, you might say. All right, I'm going to give up. I'm going to give up with horses. Rebecca did a much better job than me with those puns, and so we're going to move on to zombies and see what Marco has to say about that and jury-trial rights. So this is a Fourth Circuit case. It is on this issue of kind of both the Seventh Amendment and Article III of the Constitution: your right to a jury trial and to a real court, a real federal court, when you're in trouble with the government. And we have a separate - it's kind of a separate issue - but another case in this field that is currently pending at the Supreme Court, will be argued next year, and that's our Sun Valley case, which listeners may have heard about before on this show. So, Marco, tell us about this, the latest chapter in this story in the Fourth Circuit.

M

Marco Vasquez 28:21

Sure. So this is a case about whether the federal government can fine you but then never put you in front of a jury. It's called Sligo Creek Center v. HHS, and the petitioner is a nursing home called Sligo Creek. That nursing home entered into an agreement with the government to be reimbursed by Medicare. But to get paid by the government, the nursing home has to follow certain requirements. It's not, we're just going to give you money; you've got to follow requirements. And one of those requirements under federal law is to maintain an infection-control program. Well, Sligo Creek employees and a former resident get tuberculosis, and so that's pretty concerning for a nursing home. The government catches wind of this and starts investigating, and ultimately HHS determines that Sligo Creek violated the statute requiring it to maintain an infection-control program. Again, that's the language of the statute that I just mentioned. The government's argument was: you failed to maintain the program by following only part of it, so you didn't maintain it. You only did part of the policy that you implemented, that you promulgated. So what does HHS do? Penalty. HHS imposes a civil monetary penalty: pay up because we think you violated the law. Sligo Creek challenges the decision, and its main argument is that a jury could have determined that it followed its own policy. A jury could have said this was fine. But I don't think anyone will be surprised to hear that they lost before the administrative law judge, and we use the word judge loosely because ALJs are employees of the executive branch. So after that administrative process ends, Sligo Creek petitions the Fourth Circuit. Now we're in a real court. We're in the U.S. Court of Appeals, and Sligo Creek's main argument is that imposing the fine without a jury violates the Seventh Amendment. Well, in this case they lose that argument before the Fourth Circuit, and that's because the Fourth Circuit applies an old Supreme Court case from the 1970s called Atlas Roofing. So what's Atlas Roofing? That was a case where the federal government imposed civil penalties - we're seeing a theme here - against two employers that violated safety regulations. The Supreme Court said that Congress could assign the adjudication of those violations to an administrative agency without a jury trial. So, no federal judge, no jury. What was the reason? The reason was that the public-rights exception applies, and according to the Supreme Court, that case involved public rights because the statute created a new cause of action. So this is not a case about common law or something similar to common law. It's new. It's different. Atlas Roofing is about the public-rights exception. Under that exception, an agency can decide without a jury so long as the case involves a public right. So besides a new cause of action, what else qualifies as a public right? To look for an answer, we fast forward to the Supreme Court's recent decision in SEC v. Jarkesy, and in that case, the Supreme Court said the plaintiff was entitled to a jury trial and that the public-rights exception doesn't apply. So how does it get there? How does it say no public-rights exception? Well, it starts off by trying to parse through its old case law - the frustration of a litigant going through the old cases trying to figure out a governing rule. The Supreme Court says its prior opinions about the public-rights exception have not always spoken in precise terms. That's lovely to hear. But the Court also said in Jarkesy it won't explain the distinction between public and private rights. So there's no clear answer for now. We still don't quite know what it means. But they gave us some examples of things that have qualified as public rights in the past, things like immigration or international trade cases involving those types of issues. Those are ones where the Supreme Court has said there's no right to a jury.

Anthony Sanders 32:35

Patz isanother one, right?

Marco Vasquez 32:36

Yes, exactly. They gave a list of, I believe, six situations. Well, the Supreme Court then distinguished Atlas Roofing. It said that Atlas Roofing applied because it was a new statutory duty, a new duty in its workplace-safety laws, and those standards looked more like a building code than a common-law claim. So they're trying to figure out what this claim is really about: is it more technical, or is it more like common law? According to Atlas Roofing, or at least how lower courts have interpreted it, a new statutory duty equals the public-rights exception, which means no jury. Going back to Jarkesy, the Supreme Court said Atlas Roofing doesn't apply there because in that case the SEC was bringing a statutory claim that's similar to common-law fraud. So the SEC wasn't really, in substance, bringing a new technical claim; it was bringing a common-law one, and that was fraud. To summarize what Atlas Roofing and Jarkesy mean in very broad terms: if it's a new statutory duty, something very technical, probably no jury. But a statutory duty that's new, perhaps, but similar to common law, you get a jury. And if that seems wrong to you, you're not alone, because in Jarkesy the Supreme Court said Atlas Roofing is, quote, a departure from our legal traditions. So, flagging for future litigants that Atlas Roofing might be on the table. Some people thought maybe Atlas Roofing is dead after Jarkesy. Well, not according to the Fourth Circuit. Turning now back to Sligo Creek, why did the Fourth Circuit reject the Seventh Amendment argument and allow HHS to proceed in-house instead of before a jury in federal court? Well, the government's argument hinges on whether the public-rights exception applies, and according to the Fourth Circuit, yes. The case against Sligo Creek, quote, cannot be distinguished, end quote, from Atlas Roofing, so it's close enough. They gave two main reasons. The first is that the statute's duty didn't come from common law; it wasn't similar to the SEC situation involving fraud. It came from a voluntary choice to join a program spending public money - so, voluntary choice, public money. And the second reason is that the law Sligo Creek allegedly violated didn't require an injury. That's different from common-law torts, which require an injury. But here, there was no injury required.

Anthony Sanders 35:18

Yeah, it's just they did the paperwork wrong, basically. Yes,

M

Marco Vasquez 35:21

Yes, they didn't do the paperwork. They didn't follow the policy correctly. And so at oral argument, the panel really pushed Sligo Creek: name a tort, name a tort that doesn't require an injury, right off the bat, just trying to find something analogous. And that just shows that courts applying Atlas Roofing are going to make you point to a similar common-law claim if it seems at all like something technical. One of the judges even asked, "Technical - isn't this where we are right here in this field?" And so the panel in that case wasn't convinced the statute was close enough to negligence or breach of contract.

A

Anthony Sanders 35:58

I mean, if I may, trespass. You could trespass without injury, and that's a tort at common law. Did that not come up?

M

Marco Vasquez 36:09

It did not come up. Nope. The panel, in the way that they wrote the opinion, was very firm that torts required injury, so they did not bring up trespass.

A

Anthony Sanders 36:21

All right, I won't comment on performance, but that's what I would have said.

M

Marco Vasquez 36:27

Sure. So, like in Atlas Roofing, the Fourth Circuit says the public-rights exception applies: no jury. So where does that leave us? According to the Fourth Circuit, Atlas Roofing is not zombie precedent; it's still alive, but the Fourth Circuit's.

A

Anthony Sanders 36:43

It kind of is zombie precedent, right? Because that's what zombie precedent does. You think it's dead, but it's still roaming around, causing havoc.

M

Marco Vasquez 36:50

Yeah, it's there. They're reading it pretty broadly, as far as I can tell, and that's what the Third Circuit chimed in on as well in a case called Axalta v. EPA. In that case, Judge Bibas wrote a concurrence asking the Supreme Court to clear up this area of law. He tried to explain the way this should work: private rights are the default rule; public rights are a very narrow exception; and the presumption is you're entitled to a real judge in federal court. But Atlas Roofing flips that. Under Atlas Roofing, you ask whether Congress created a novel cause of action, and then, if it did, you assume it's a public right unless the plaintiff can point to a similar common-law claim. So that puts the burden on the plaintiff. Judge Bibas says that's wrong, but Atlas Roofing binds us. So we have a federal appellate judge saying, "I think the Supreme Court's own principles cut the other way, but Atlas Roofing is on the books, so I have to follow it." No jury trial. So based on Jarkesy and where we are, the Supreme Court seems interested in revisiting Atlas Roofing. IJ is also interested in that, and like Anthony said, we're going to the Supreme Court soon to talk about the right to a real judge and the public-rights exception. So there is a lot of work to be done in this area, and I would keep your eyes out for more developments.

A

Anthony Sanders 38:16

Well, Rebecca, any thoughts about zombies or jury trials?

R

Rebecca Furdek 38:20

Well, I have a lot of thoughts on zombies, but sticking to the jury-trial issue, as I hear this, it's really interesting in the sense that cases like Atlas - I was going to say Atlas Shrugged. Wow - Atlas Roofing and others, the amount of authority, if you will, given to these agencies is pretty breathtaking, and it makes me think about...

A

Anthony Sanders 38:46

Just like an atlas shrugged.

R

Rebecca Furdek 38:47

Just like in Atlas Shrugged. Yes, thank you for saving me there. But I would say rulings like this one just make it all the more important, pivoting back to the horse racing, that if there is a delegation to a private entity, you really have to be looking at that. Because if the agency itself has this much leeway, do we really want that authority twice delegated off? It makes my case seem all the more egregious when you have agencies running amok.

M

Marco Vasquez 39:16

Sure. Yeah. Who decides, and how far are we going to go to remove accountability as part of the process?

R

Rebecca Furdek 39:22

Exactly.

A

Anthony Sanders 39:24

It seems like, also, that in this case the facts were kind of even better for the government than in Atlas Roofing itself. So my understanding is Atlas Roofing is an OSHA case, and the company was fined for not following safety protocols. Here, it's actually spending taxpayer dollars, the Medicare dollars, which of course gives the government all kinds of leeway there. Whether or not you think that the defendant should then have a jury-trial right when they're supposedly violating the law when it comes to that public money, it's a little bit of a no-brainer, I guess. This is almost going to be the last type of case that would get the jury-trial right compared to a lot of the others that are in the mix.

M

Marco Vasquez 40:11

Yeah, the government's main argument was the public funds, so you're hitting the nail on the head. At oral argument, what they really focused on is this: this falls within the line of cases that the Supreme Court has recognized as falling within the public-rights exception because it's public funds. So that's definitely what the government pushed, and they succeeded here.

Anthony Sanders 40:27

Yeah, well, the next case up at the Supreme Court, the Sun Valley case, has to do with employment. It involves immigration on the outside, but it really involves a farm employing people, and so I think that is much more at the core of the jury-trial right. And we'll see what the Court thinks about that next term. But for now, we're going to turn to yet another circuit, and that is the Seventh Circuit, to close out the show. And I bet Rebecca will have some thoughts about the Seventh Circuit, practicing in Wisconsin, because, as we have discussed on previous episodes, the Seventh Circuit's bailiwick is Wisconsin, Illinois, and Indiana. So the heartland of the Midwest is the Seventh Circuit. We went deep into the Seventh Circuit in our Seventh Circuit special, which we recorded on the eve of the Seventh Circuit Judicial Conference in Chicago last year. Rebecca was even in the audience because she was at that conference. So I'm going to put a link in the show notes for anyone who really wants a lot of Seventh Circuit. We're not going to beat that horse here again today, but if you're someone who doesn't want to do that and just wants the bare bones in our 12 Months, 12 Circuits series, a little bit more about the Seventh Circuit: as I said, it's those three states. It has 11 judges and, from what I can tell these days, only four senior judges. I think it's had more senior judges in the past, but these days it's only operating with four senior judges. They always seem to be up to date. They're very fast with some of their opinions. I think we're waiting on one or two here at IJ that have been a while, so I don't think that's for lack of resources, probably because of the difficulty of the issue. But it seems like if you get Judge Easterbrook on the panel, you'll get your opinion within about a week. That's sometimes how that happens. That used to be true of Judge Posner as well, but these days they still are pretty crisp with their work there. So they run out of the Dirksen Courthouse in downtown Chicago, although sometimes they hold arguments elsewhere around those states, but that's where they're based. The circuit justice is Justice Barrett, which makes a lot of sense because she is a former Seventh Circuit judge. She wasn't there that long, but before that she was, of course, a law professor at Notre Dame, which is part of the circuit. And it has this reputation, as we've talked about many times, including with our friend Patrick Eckler, who's been on a couple times, that they are very into jurisdiction - some might say overly so - and technicalities and that kind of thing. But they always seem very professional. They have tough oral arguments. They give oral argument to almost everyone - actually, everyone who is represented by an attorney who asks for one, I think, gets oral argument. So that's pretty unusual around the circuits. Some may quibble with their case law in different areas, including areas that IJ practices in, but that is the Seventh Circuit. So, Rebecca, any thoughts about your home circuit?

R

Rebecca Furdek 43:59

Yeah, well, just a couple other fun facts I dug up before today, and it was it was created in 1807, and the Seventh Circuit was initially Ohio, Kentucky, and Tennessee, which is kind of fun. And you know, especially with all the talk these days about potentially expanding the court or some folks wanting to do that, the same congressional act that created the Seventh Circuit was actually the first time that Congress increased the total number of justices on the U.S. Supreme Court, and so in creating the Seventh Circuit, they appointed a new Seventh SCOTUS justice as well, primarily to address land disputes as folks were heading west on the frontier. So that's kind of fun. So that first justice was Thomas Todd, who was nominated or appointed rather by Thomas Jefferson to fill the seat and was known as the first Western justice. So yeah, kind of fun.

A

Anthony Sanders 44:53

I wonder if it's one of the few circuits, then. I've dug into the history of these circuits in a couple of these segments, and I wonder if it's the first or the only court - we could look into this - whose original jurisdiction doesn't overlap in any way with its current jurisdiction, because basically at some point it got moved to the West, it seems.

R

Rebecca Furdek 45:17

Yeah, there was a series throughout the 1800s. I think Illinois went back and forth a couple times into the Seventh Circuit and out. But yeah, it took several iterations to get to where it is today. Kind of fun. As you mentioned, there are 11 active appellate judges, several new appointments recently, three just in the last two years, and most recently Rebecca Taibleson, who is based in Milwaukee, where I also practice at WILL. Another fun fact: the Seventh Circuit was actually the first court of appeals to offer opinions and audio oral arguments online, featuring both text opinions and podcast RSS feeds. And as you mentioned Justice Barrett, we've had three associate justices from the Seventh Circuit appointed to the U.S. Supreme Court, also including Sherman Minton and John Paul Stevens. And just a couple other little things. I didn't see really up-to-date stats, but at least as of 2023, the Seventh Circuit had the third-highest rate of holding oral argument, as you alluded to.

A

Anthony Sanders 46:27

Only the third highest.

R

Rebecca Furdek 46:28

Yeah D.C. and the Second Circuit beat them. Okay. But again, maybe that has changed in the last two to three years. That's where it was in 2023. And also, historically, it's had one of the top reversal rates of district court decisions. So I guess the takeaway there is that if you're going to have an oral argument and you're in that position, you have a greater chance than not of getting a case overturned. So prepare well.

A

Anthony Sanders 46:54

Yeah, and I'm betting that comes down to jurisdiction. That's why that reversal rate is a little bit higher there than perhaps elsewhere.

R

Rebecca Furdek 47:03

That would make sense.

A

Anthony Sanders 47:04

Well, great. I love that our listeners know a tiny bit more now about the Seventh Circuit. Marco, you have not graced the Seventh Circuit with your presence, I think.

M

Marco Vasquez 47:16

I have not. No. Well, based on some stories, I'm a little - I'm glad I'm not. Maybe I should be glad.

A

Anthony Sanders 47:25

Well, everyone eventually gets there, gets some fun in the Seventh Circuit. So I'm sure it will come your way sooner or later. But for now, we'll leave it there. Thank you very much, Rebecca. Congratulations again on your new appointment at WILL, and we'll look forward to great things, perhaps even in the Seventh Circuit, from you there. Thank you to Marco from Texas for his work this week on the Fourth Circuit, and thank you all for listening. And please be sure to follow Short Circuit on YouTube, Apple Podcasts, Spotify, and all other podcast platforms, and remember to get engaged.