

Summaries of Selected Opinions

No. 17-1282. *Allen v. United Services Automobile Ass'n.* 10/29/2018. D.Colo. Judge Holmes. *Automobile Insurance—One-Year Limit on Medical Expenses—Doctrine of Reasonable Expectations—MedPay Statute—Plain Text.*

Allen was injured in an automobile accident. His automobile insurance policy included coverage for medical expenses arising from car accidents, but did not allow reimbursement for medical expenses that accrued a year or more after an accident. Allen sought reimbursement for medical expenses that accrued more than a year after his accident. His insurer, United Services Automobile Association (USAA), denied reimbursement. Allen filed a class-action lawsuit against USAA, and USAA moved for summary judgment. The district court granted the summary judgment motion and entered final judgment against Allen.

On appeal, Allen argued that the one-year limit on medical payments coverage is unenforceable because it violates Colorado's reasonable-expectation doctrine. He claimed that based on a USAA disclosure form, he could have reasonably expected that there would be no time limit attached to the medical payments coverage. The reasonable-expectation doctrine renders exclusionary language in an insurance policy unenforceable where an ordinary, objectively reasonable insured would be deceived into believing he or she has coverage, while the insurer maintains he or she does not. Here, the disclosure form was not deceptive and the policy clearly limited medical expenses to one year. The doctrine of reasonable expectations did not apply.

Allen also argued that the one-year limit on medical payments coverage is unenforceable because it is prohibited by Colorado's MedPay statute, which requires car insurance companies

to offer at least \$5,000 of coverage for medical expenses. Nothing in the plain text of the MedPay statute prohibits an insurance company from putting a time limit on medical payments. Thus, the one-year time limit in Allen's insurance policy is enforceable.

The judgment was affirmed.

No. 17-7051. *United States v. DeLia.* 10/29/2018. E.D.Okla. Judge Phillips. *Statute of Limitations—*

Wartime Suspension of Limitations Act—Waiver.

DeLia, who was a licensed physician, operated a medical clinic in Oklahoma. He was also a member of the U.S. Army Reserve. In 2010, he learned that he was to be deployed to Afghanistan. To keep his clinic open while he was deployed, DeLia attempted to locate a physician to supervise his practice during his absence, but was unsuccessful. He also signed pads of blank prescription forms for clinic staff to

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use while he was away. His physician's assistant (PA) used the forms to prescribe Schedule II controlled substances, which under Oklahoma law is permissible if the PA is acting under a physician's supervision.

The Board of Medical Examiners discovered that DeLia's staff was using the pre-signed prescriptions and filed a disciplinary action against him in 2011. In 2012, DeLia surrendered his medical license. In 2016, he met with federal prosecutors and signed an agreement to waive the statute of limitations from the date of execution of the waiver, January 5, 2016, until July 31, 2016. In June 2016 he was indicted for healthcare fraud, which allegedly occurred between February 1, 2010 and November 9, 2010. DeLia moved to dismiss the indictment because the statute of limitations had expired. The district court denied the motion. A jury convicted defendant of healthcare fraud.

On appeal, DeLia argued that the district court erred in ruling that the statute of limitations had not expired. The Tenth Circuit noted that absent an exception, the five-year statute of limitations would have expired, for the acts charged, on November 9, 2015. The government argued that the Wartime Suspension of Limitations Act (the Act) tolled the limitations period until five years after the cessation of hostilities resulting from the September 11, 2001 attacks. The Tenth Circuit concluded that the Act does not apply to DeLia's charged offense.

The government further argued that even if the statute of limitations had expired, DeLia waived this defense. Here, the waiver purports to extend the limitations period, not to revive an already expired limitations period. By the waiver's own terms, DeLia did not waive the statute of limitations for the charges the government pursued against him.

The denial of the motion to dismiss was reversed and the case was remanded with instructions to vacate the conviction and dismiss the indictment.

No. 17-1143. Potts v. Center for Excellence in Higher Education, Inc. 11/6/2018. D.Colo. Judge Phillips. *False Claims Act—Whistleblower—Post-Employment Retaliation.*

Potts was the campus director for defendant's college campus. When she resigned, Potts and the college entered into an agreement whereby the college agreed to pay Potts \$7,000 and support her unemployment claim, and she agreed not to file a grievance or complaint with any governmental or regulatory agency or disparage the reputation of the college. Despite the agreement, Potts disparaged the college in an email she sent to another former college employee. The college sued Potts in state court



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for violating the agreement. Potts then sent a written complaint to the college's accreditor concerning the college's alleged deceptions in maintaining its accreditation. The college responded by adding a breach-of-contract claim to its state-court suit. Potts then filed the underlying federal suit invoking the anti-retaliation provision of the False Claims Act (FCA), which protects whistleblowers from retaliation. The district court granted the college's motion to dismiss.

The Tenth Circuit interpreted the statute and held that the FCA's anti-retaliation provision unambiguously excludes relief for retaliatory acts occurring after the employee has left employment.

The judgment was affirmed.

No. 16-3330. United States v. Olea-Monarez. 11/07/2018. D.Kan. Judge Eid. *Response to Juror Questions—Abuse of Discretion—Date of Indictment and Offense.*

Defendant was indicted for multiple drug-related charges, including knowingly and intentionally distributing more than 50 grams of methamphetamine. At trial, several witnesses testified to a controlled purchase of methamphetamine from defendant. During deliberations, jurors sent the district court two questions concerning the methamphetamine offense. First, the jurors asked what evidence would support the count. The judge responded that testimony and exhibits had been admitted concerning the count, which the jury had, except for a drug exhibit, which the jury could review upon request. The second question specified that the jury had evidence of a purchase on a different date than the date charged in the indictment and asked whether the indictment on the count had an incorrect date. The judge responded by noting that four witnesses had testified concerning the purchase, and exhibits relating to the charge, including drug evidence and a lab report, had been admitted. A jury convicted defendant of drug charges, including knowingly and intentionally distributing more than 50 grams of methamphetamine.

On appeal, defendant argued that the court's responses to the jury's questions were erroneous and require reversal. While the trial judge at

times directed the jury's attention to evidence, the judge did not evaluate the evidence and therefore did not impinge on the jury's role as factfinder. The district court's responses to the juror questions guided the jury toward an intelligent understanding of the factual issues it had to resolve and were not improper. Thus, there was no abuse of discretion.

The conviction was affirmed.

No. 17-4113. Southern Utah Wilderness Alliance v. Burke. 11/7/2018. D.Utah. Judge Briscoe. *Settlement Agreement—Jurisdiction—Ripeness—Actual Implementation of Agreement.*

Environmental groups, led by the Southern Utah Wilderness Alliance, and the Bureau of Land Management (BLM) entered into a settlement agreement in a complex dispute. The State of Utah sought to prevent the court from approving the settlement agreement. The district court approved the agreement.

On appeal, Utah argued that the BLM could not simultaneously comply with the settlement agreement, several federal laws, prior agreements, and pending litigation. Utah thus contended that the settlement agreement was unlawful and against public policy. The Tenth Circuit determined that Utah's concerns were anticipatory or were not within the purview of the settlement agreement. The Tenth Circuit can more confidently resolve the substantive legal arguments when the BLM implements the settlement.

The appeal was dismissed as unripe for adjudication.

No. 17-3067. United States v. Giannukos. 11/09/2018. D.Kan. Judge Briscoe. *Constructive Possession of Firearm—Intent Requirement—Plain Error.*

Officers conducted a parole search of defendant's home in response to an anonymous tip that he was involved in illegal drug and counterfeiting activities. Defendant lived in the house with his girlfriend and a friend. During the search, among other things, police found two firearms, one inside a hutch in the shared living room and another in the bedroom defendant shared with his girlfriend. Defendant was charged with multiple counts, including

possession of firearms. A jury instruction concerning possession of the firearms stated that "[a] person who, although not in actual possession, knowingly has the power at a given time to exercise dominion or control over an object, either directly or through another person or persons, is then in constructive possession of it." Defendant did not object to this instruction at trial. As relevant to this appeal, a jury convicted defendant of two counts involving the illegal possession of firearms.

On appeal, defendant argued that the firearms convictions should be reversed because the district court improperly instructed the jury on the definition of constructive possession. The government agreed that the instruction was erroneous, but argued that it did not require reversal. The instruction was plainly erroneous because it did not require the jury to find that defendant had the intent to exercise control over the firearm. Further, the lack of evidence relating to defendant's specific intent to exercise control of either firearm undermines confidence in the outcome and requires reversal.

The firearms convictions were reversed and the case was remanded for a new trial. **CL**

These summaries of selected Tenth Circuit opinions are written by licensed attorneys Katherine Campbell and Frank Gibbard. They are provided as a service by the CBA and are not the official language of the court. The CBA cannot guarantee the accuracy or completeness of the summaries. The full opinions are available on the CBA website and on the Tenth Circuit Court of Appeals website.



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