This Report summarizes cases granted review on September 27, 2018 (Part I).

I. Cases Granted Review

- **Tennessee Wine & Spirits Retailers Ass’n v. Byrd**, 18-96. The question presented is “[w]hether the Twenty-first Amendment empowers States, consistent with the dormant Commerce Clause, to regulate liquor sales by granting retail or wholesale licenses only to individuals or entities that have resided in-state for a specified time.” Like many states, Tennessee has a “three-tier” system for alcohol that separately regulates (1) producers of liquor, (2) wholesalers, and (3) retailers that sell directly to consumers. Under Tennessee law, to obtain a license to sell alcohol at retail an individual must have been a “bona fide resident” of Tennessee for two years before applying for the license; to renew a license, the individual must have been a resident for 10 years. Tennessee law also requires that 100 percent of a licensee’s stockholders reside in Tennessee. Two businesses — Tennessee Fine Wines and Spirits and Affluere Investments — applied for licenses, even though they did not meet the residency requirement. Fearful that the Tennessee Alcoholic Beverage Commission would grant the licenses despite the state law, petitioner Tennessee Wine and Spirits Retailers Association threatened to file suit. Faced with imminent litigation, the Commission filed suit in state court seeking a declaration about the constitutionality of the residency requirements. The Association removed the case to federal court. The district court granted summary judgment to Fine Wines, holding that the durational-residency requirement violate the dormant Commerce Clause by discriminating in favor of in-state retailers. A divided panel of the Sixth Court affirmed. 883 F.3d 608.

“[T]he Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.” *Granholm v. Heald*, 544 U.S. 460, 488 (2005). In *Granholm*, however, the Court held that the Twenty-first Amendment did not “save” a state law that permitted in-state wineries, but not out-of-state wineries, to ship directly to in-state consumers. The Court stated that the amendment “does not displace the rule that States may not give a discriminatory preference to their own producers.” The Sixth Circuit majority held that *Granholm’s* reasoning is not limited to discrimination by producers; it extends to discrimination with respect to retailers and wholesalers. It pointed to *Granholm’s* statement that, notwithstanding the Twenty-first Amendment, “state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause.” The Sixth Circuit then ruled that Tennessee’s durational-residency requirement fails dormant Commerce Clause scrutiny because it is facially discriminatory and the state could achieve its goals of protecting “the health, safety and welfare” of its citizens through non-discriminatory alternatives. As examples, the court posited that the state could require a retailer’s general manager to be a state resident, require all retailers to post a substantial bond to receive a license, and hold public meetings regarding the issuance of licenses. Judge Sutton concurred in part and dissented in part. He agreed that the 10-year-residency requirement for license renewal and the requirement that all stockholders be Tennessee residents were invalid. But he dissented with respect to the two-year residency requirement, concluding that “[r]equiring individual retailers to reside in one place for a sustained, two-year period ensures that they will be knowledgeable about the community’s needs and committed to its welfare.”
The Association seeks review only with respect to Tennessee’s two-year residency requirement for initial license. It notes that 21 states impose durational-residency requirements on alcohol retailers or wholesalers, which range from 30 days (South Carolina) to 10 years (Oklahoma). The Association argues that the drafters of the Twenty-first Amendment expected it to “operate in tandem” with the Commerce Clause and that Granholm and related decisions “confirm that States retain special authority in regulating alcohol.” It points out that Granholm expressly did not “call into question the constitutionality of the three-tier system” and stated that “State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent.” The Association insists that it prevails under that standard because Tennessee’s durational-residency requirement doesn’t treat out-of-state producers differently than in-state producers. And even if the residency requirement is subject to dormant Commerce Clause scrutiny, says the Association, the law survives because it is a reasonable means of ensuring that the companies “know their community and are invested in its welfare.”

Thacker v. Tennessee Valley Authority, 17-1201. The Tennessee Valley Authority, one of the nation’s largest suppliers of electricity, is a governmental entity (a public corporation) that is authorized by statute to “sue and be sued in its corporate name.” At issue is whether there is a “discretionary function” exception to that waiver of sovereign immunity for the TVA’s performance of certain governmental, discretionary functions. This case arose out of an accident on the Tennessee River. While TVA workers were trying to raise a downed power line that fell into the river, a small fishing boat hit the line. One person was killed and the other person (petitioner Gary Thacker) was seriously injured. Thacker and his wife sued in federal district court, alleging common-law negligence. The district court dismissed the complaint, holding that TVA is immune from the Thackers’ suit. The Eleventh Circuit affirmed. 868 F.3d at 983.

The Eleventh Circuit acknowledged that the Supreme Court stated in Federal Housing Administration v. Burr, 309 U.S. 242 (1940), that “sue-and-be-sued” waivers are liberally construed. But it relied on circuit precedent for the proposition that “TVA cannot be subject to liability when engaged in governmental functions that are discretionary in nature.” The court had little difficulty concluding that the TVA’s challenged actions occurred while performing a governmental function — construction of power-transmission lines. The court then applied the same test that applies when the government invokes the discretionary-function exemption of the Federal Tort Claims Act (FTCA): (1) whether the conduct at issue “is a matter of choice for the acting employee,” and (2) whether the conduct at issue involves the kind of judgment designed to be shielded by the discretionary-function exception — that it, whether it involves considerations of public policy. The court concluded that the conduct at issue met that test.

The Thackers argue in their petition that the TVA is a largely commercial entity that is broadly amenable to suit because its organic statute says that it can “sue and be sued” in its own name. In their view, the Eleventh Circuit erred in applying a test derived from the FTCA because that statute expressly excludes the TVA. Rather, they contend, the court should have followed the opinion in FDIC v. Meyer, 510 471 (1994), which refused to read a government corporation’s “sue and be sued” clause coextensively with the waivers contained in the FTCA. The TVA responds that, “[f]or the TVA, discretionary function immunity arises not from the FTCA but from an implied exception — based on
constitutional separation-of-powers principles — to the waiver of sovereign immunity in the TVA’s organic statute, the TVA Act.” It quotes the Court as recognizing that the exception’s purpose is to “prevent judicial ‘second-guessing’ of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.” The TVA distinguishes Myer as a case where the FDIC asked the Court “to engraft a portion of the [FTCA] onto the [FDIC’s] sue-and-be-sued clause.” That is not, it says, the issue here.

● **Home Depot v. Jackson, 17-1471.** The Court will review a Fourth Circuit decision holding that Home Depot cannot remove, under Class Action Fairness Act (CAFA), the class-action claims brought against it by respondent because “the class action was originally asserted as a counterclaim against a co-defendant.” Citibank filed a state-court collection action against George Jackson in North Carolina state court. Home Depot was not a party to that action. Jackson counterclaimed in state court and asserted class-action consumer-protection claims against Citibank, Home Depot, and Carolina Water Systems. Citibank, the original defendant, dismissed its claims against Jackson and is no longer a party. Home Depot filed to remove the case to federal court under CAFA, but the district court denied removal and instead remanded the case back to state court. The Fourth Circuit affirmed, relying on Shamrock Oil & Gas Co. v. Sheets, 313 U.S. 100 (1941), which held that a state-court plaintiff against whom the defendant has asserted a counterclaim is not a “defendant” entitled to remove an action to federal court under the predecessor to 28 U.S.C. §1441, which provides for removal by “the defendant or the defendants.” The court rejected Home Depot’s contention that CAFA changed that rule with respect to covered class actions. 880 F.3d 165.

Home Depot’s petition emphasizes that the Class Action Fairness Act authorizes “any defendant” to remove a claim to federal court. It contends that it “is indisputably a defendant to the class-action claims asserted by [Jackson] — and that is Home Depot’s only role in this litigation. Under the plain text of CAFA, Home Depot is therefore indisputably ‘any defendant’ and is entitled to remove the class-action claims against it.” It adds that “the Court in Shamrock Oil had no occasion to consider whether the statutory term ‘the defendants’ would encompass a party who was not an original plaintiff.” Home Depot acknowledges that the federal courts of appeals have uniformly held that defendants in Home Depot’s situation may not remove class-action claims to federal courts. But it insists the courts are overreading unduly “broad language” from Shamrock. Home Depot adds that litigants have exploited the counterclaim loophole, leading to state-court litigation of class-action suits that Congress sought to prevent. In granting certiorari, the Court asked the parties to brief both whether CAFA authorizes removal and whether Shamrock’s holding “— that an original plaintiff may not remove a counterclaim against it — extends to third-party counterclaim defendants.”

● **Azar v. Allina Health Services, 17-1484.** At issue is whether the Department of Health and Human Services must conduct notice-and-comment rulemaking before issuing interpretive rules concerning “one statutory component (the so-called ‘Medicare fraction’) used to determine the total amount of payment that a hospital should receive under the Medicare program.” The Medicare Act provides an annual payment to certain hospitals for providing inpatient care to Medicare beneficiaries; it provides an additional payment to hospitals that provide a disproportionate share of their care to low-income patients. That share is calculated by the sum of two fractions: the “Medicare fraction” and the “Medicaid fraction.” The Medicare fraction is defined by the hospital’s number of patient days during the relevant time period attributable to patients who were both entitled to benefits under

Before 2004, the Centers for Medicare and Medicaid (CMS) did not count Part C patient days when calculating the Medicare fraction. In 2003, CMS published a proposed rule that would have adopted that longtime standard. After receiving public comments, however, CMS changed course in 2004 and published a final rule adopting the opposite standard: Part C patients would be included in the Medicare fraction. In a separate case, a federal district court vacated the 2004 rule on the ground that it was not a logical outgrowth of the original 2003 proposal. CMS has not undertaken notice-and-comment rulemaking on this issue since then. But it still had to determine the Medicare fractions. In 2014, CMS calculated the Medicare fractions for FY2012 to include Part C days based on the agency’s independent “interpretation of the statute” (and not, it said, by relying on the vacated 2004 rule). Allina Healthcare and other hospitals challenged CMS’s calculation of the fraction. The district court held that CMS’s calculation of the FY2012 Medicare fraction to include Part C days did not require notice-and-comment rulemaking. The court then rejected the hospitals’ substantive challenge to the interpretive rule. The D.C. Circuit reversed, holding that the relevant provisions of the Medicare Act required CMS to conduct notice-and-comment rulemaking before adopting its interpretation of the Medicare fraction issue. 863 F.3d 937.

Section 1395hh(a)(2) provides that “[n]o rule, requirement, or other statement of policy (other than a national coverage determination) that establishes or changes a substantive legal standard governing the scope of benefits, the payment for services, or the eligibility of individuals, entities, or organizations to furnish or receive services or benefits under [the Medicare Act] shall take effect unless it is promulgated by the Secretary by regulation under” notice-and-comment rulemaking. The D.C. Circuit held that this provision required CMS to engage in rulemaking here because its calculation of the Medicare fraction was “at the very least, a ‘requirement’ under” the provision; CMS had “established” a “substantive legal standard” by including “Part C days in the fiscal year 2012 Medicare fractions”; and CMS had “change[d]” a “substantive legal standard” because its pre-2004 approach was to exclude Part C days from the Medicare fraction. Finally, the D.C. Circuit held in the alternative that CMS had to engage in notice-and-comment rulemaking under a separate provision, §1395hh(a)(4), which requires notice and comment before CMS may adopt a final rule that is “not a logical outgrowth of a previously published notice of proposed rulemaking.”

CMS argues that the D.C. Circuit’s decision creates a circuit split and “threatens to undermine HHS’s ability to administer the Medicare Program in a workable manner.” In its view, “[c]onverting the agency’s non-binding manuals and other interpretive materials into regulations requiring notice and comment would jeopardize the flexibility needed in light of Medicare’s complex and frequently changing statutory context and administrative developments.” CMS insists that §1395hh(a)(2) embodies the Administrative Procedure Act’s distinction between “substantive rules” and “interpretive
rues,” with notice and comment required only for the former. And CMS asserts that §1395hh(a)(4) does not apply because it applies only to “regulations” covered by §1395hh(a)(2) — and (a)(2) does not apply to interpretive rules.

● **Rimini Street Inc. v. Oracle USA Inc.,** 17-1625. The Court will resolve “[w]hether the Copyright Act’s allowance of ‘full costs’ (17 U.S.C. §505) to a prevailing party is limited to taxable costs under 28 U.S.C. §§1920 and 1821, as the Eighth and Eleventh Circuits have held, or also authorizes non-taxable costs, as the Ninth Circuit holds.” Section 1920 sets out six specific categories of “taxable costs,” including such minor expenses as clerk fees, court reporter fees, and printing expenses. Section 1821 establishes taxable costs for witness attendance rates and witness travel expenses. These taxable costs are generally a fraction of the other, non-taxable costs litigants incur for attorneys, experts, consultants, and investigators. In this case, Oracle obtained a roughly $50 million damages award against Rimini Street for copyright infringement and violation of state anti-hacking statutes. Oracle then sought attorney’s fees, prejudgment interest, and (relevant here) $20 million in costs — $12 million of which are non-taxable costs, such as expert fees, consultant fees, and electronic discovery costs. The district court held that Oracle was entitled to non-taxable costs (though it reduced the award somewhat). The Ninth Circuit affirmed based on circuit precedent, namely, *Twentieth Century Fox Film Corp. v. Entertainment Distributing*, 429 F.3d 869 (9th Cir. 2005).

In *Twentieth Century Fox*, the Ninth Circuit reasoned that §505’s allowance for the recovery of “full costs” was “clear evidence of congressional intent that non-taxable costs should be available.” In its view, “[c]onstruing § 505 as limiting the costs that may be awarded to any particular subset of taxable costs effectively reads the word ‘full’ out of the statute.” Remini contends in its petition that the Ninth Circuit’s rule conflicts with several Supreme Court decisions, including *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 439 (1987), which held that when “a prevailing party seeks reimbursement for fees paid to its own expert witnesses, a federal court is bound” by the limitations of §§1920 and 1821. Turning to statutory language, Remini says “[t]here is nothing about the word ‘full’ that expressly authorizes non-taxable costs.” Rather, it argues (quoting a district court), it “re- fer[s] to the degree of costs recoverable under §§1821 and 1920.” Oracle counters that, as a matter of plain language, “full costs” “means full costs, not, as petitioners would have it, only some costs.” It adds that none of the cases upon which Remini relies (including *Crawford Fitting*) “concerned (or even mentioned) the term ‘full costs’ or §505 of the Copyright Act.”
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