



The Daily Docket

Reuters

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Good morning. The 3rd Circuit has [created a test for determining whether student athletes are employees](#) of their school and the NCAA and therefore eligible for the minimum wage. In another first, a Senate panel [voted down one of the Biden administration's judicial nominees](#). Plus, AbbVie wants the U.S. Supreme Court to [look at the scope of attorney-client privilege](#), and a judge [tossed Baltimore's lawsuit](#) seeking to hold energy companies like Exxon Mobil liable for climate change. We made it to Friday!

[A test for when student athletes can be paid](#)

In the first ruling of its kind, the 3rd Circuit created a test for courts to determine when college athletes are the employees of their schools and the NCAA, making them eligible for the minimum wage.

[Our colleague Daniel Wiessner reports](#) that the court said athletes may be regarded as employees under federal wage laws if they primarily perform services for their schools' benefit "in return for express or implied compensation or in-kind benefits."

The 3rd Circuit's [ruling](#) did not directly answer the question of whether college athletes are employees of schools and the NCAA under federal wage laws, but set out a blueprint for deciding when they are. The court sharply rejected the NCAA's persistent claim that student-athletes cannot be employees by virtue of their amateur status.

The few courts to have addressed the issue had said that college athletes are not employees because they are primarily students and playing sports was part of their educational experience. But those rulings came before the U.S. Supreme Court in 2021 [threw out limits](#) the NCAA had set on compensating student-athletes.

The ruling allows a group of former college athletes to pursue a proposed class action against the NCAA and their former schools.

[More top news](#)

- > [Energy companies win dismissal of Baltimore's climate change case](#)
- > [Kansas researcher wins reversal of conviction in Trump-era China probe](#)
- > [Trump lawyers lay out case for reversing hush money conviction](#)

[The buzz](#)

- [This week's legal fee tracker](#) takes a close look at the fight over the fee sought by lawyers who persuaded a Delaware judge to void Tesla founder Elon Musk's \$56 billion pay package – more than 29 million Tesla shares, valued at roughly \$7.74 billion. That request is about 25 times more than what Tesla identified as the record in Delaware - \$304 million in attorney fees approved 2011 in shareholder litigation involving the Southern Peru Copper Corp.
- In a first for the Biden administration, [a U.S. Senate panel narrowly rejected one of President Joe Biden's judicial nominees](#) in New York after Republicans strenuously objected to a decision she issued as a magistrate judge recommending that a transgender inmate convicted of child sex abuse be transferred to a women's prison. Senator Jon Ossoff of Georgia broke with his fellow

Democrats on the Senate Judiciary Committee and joined with Republicans on a 10-11 vote to reject advancing U.S. Magistrate Judge Sarah Netburn's nomination.

- London-founded law firm Allen & Overy said [profits and revenue increased in the year leading up to its merger](#) with New York firm Shearman & Sterling. The legacy firm reported a 17.2% increase in profit before tax to 1 billion pounds (\$1.29 billion) in its financial year that ended April 30. Average profit per equity partner jumped to 2.2 million pounds (\$2.85 million), after profits dipped the prior year.
- Former U.S. bankruptcy judge David Jones [asked a federal judge in Texas to dismiss a lawsuit against him](#) that was prompted by his secret romance with a lawyer who was appearing before his court. Jones said the lawsuit filed by Morton Bouchard, former CEO of petroleum barge operator Bouchard Transportation, must be thrown out because, as a former judge, he has "absolute immunity from civil suits seeking damages." Jones is represented by prominent litigator David Boies, who [joined the former judge's legal team](#) last month.

[\\$241,000,000](#)

That's the settlement amount Marathon Oil is expected to pay over alleged air pollution violations at dozens of the company's oil and gas facilities on a North Dakota Indian reservation. The [deal](#) requires Marathon, represented by Baker Botts, to pay a \$64.5 million penalty — the largest ever for violations of the Clean Air Act from stationary sources — and invest in compliance measures estimated to cost \$177 million. The Biden administration has ratcheted up enforcement in the oil and gas sector to fight climate change and to counter pollution, particularly in poor and minority communities. [It is the administration's 12th case targeting oil and gas sector emissions, but by far its largest.](#)

[Columnist spotlight: With lawsuits against U.S. agencies set to ramp up, arcane legal doctrine takes on new resonance](#)

A pair of filings this week in two high-stakes cases challenging Biden administration initiatives highlights how business groups may try to use the obscure constitutional doctrine of associational standing to amplify the impact of their anti-regulatory lawsuits — and how federal agencies may fight back against those attempts. [Alison Frankel has the story.](#)

["But the government's cited cases miss the maker's mark."](#)

—U.S. District Judge Mark Pittman in Fort Worth, who [ruled that a 156-year-old ban on at-home distilling is unconstitutional](#), siding with a group that advocates for legalizing the ability of people to produce spirits like whiskey and bourbon for their personal consumption. Pittman [agreed with](#) the Hobby Distillers Association's lawyers that the longstanding ban exceeded Congress's taxing power and ran afoul of the U.S. Constitution's Commerce Clause. He issued a permanent injunction barring the ban from being enforced against the Hobby Distillers Association's members but paused his decision for 14 days so the government could seek a stay at the appellate court level.

[Our weekend reading](#)

- [Public policy favors \\$7 billion fee award in Musk pay case, Tesla shareholder's lawyer says](#)
- [US court grapples with scope of Biden ESG investing rule](#)
- [US appeals judge, 97, vows to keep fighting suspension](#)
- [Federal judge in Alaska resigned after sexual misconduct probe, panel says](#)
- [Trump hush money conviction reversal is unlikely, experts say](#)
- [Another US law firm touts fully remote option, bucking post-pandemic trend](#)
- [First trial against Abbott over premature infant formula kicks off in Missouri](#)
- [Elon Musk beats \\$500 million severance lawsuit by fired Twitter workers](#)
- [Ousted Fla. prosecutor slams appeals court for dragging out case against DeSantis](#)

- [Middlemen have outsized influence on US drug prices, FTC says](#)

Coming up today

- Medtech company AliveCor will ask the Federal Circuit to reverse a patent tribunal's decision to invalidate the patents at the heart of a dispute with Apple over technology in its Apple Watch smartwatches. AliveCor [won a ruling](#) from the U.S. International Trade Commission in 2022 that Apple Watch imports should be banned because they infringe AliveCor's intellectual property, but the Patent Trial and Appeal Board had earlier ruled that the patents were invalid. The ITC placed its ban on holding pending the appeal.
- Spotify will ask U.S. District Judge Aleta Trauger in Tennessee to dismiss a lawsuit from two owners of publishing rights to rapper Eminem's work, arguing that it has a valid license to the works from another publisher and does not owe them royalties. The [lawsuit](#) filed in 2019 said the recordings have streamed on Spotify "billions of times" despite not being licensed.
- In Las Vegas federal court, U.S. District Judge Richard Boulware II will meet with the lawyers for Ultimate Fighting Championship and a class of fighters, as the two sides gear up to defend a multimillion-dollar antitrust settlement over wages. UFC said in March it would pay [\\$335 million to settle](#) fighters' wage-fixing claims. Boulware subsequently raised some questions about the scope of the deal, and asked the attorneys to present a second version.

In the courts

- Pharmaceutical company AbbVie asked the U.S. Supreme Court to [take up its fight to protect corporate records](#), warning that a lower court ruling threatens to erode the shield that keeps most attorney communications off-limits from a company's courtroom opponents. The drugmaker's [petition](#), led by Munger Tolles' Donald Verrilli, challenges a 3rd Circuit ruling that said sham patent litigation can trigger the crime-fraud exception to the attorney-client privilege.
- The [7th Circuit made it easier for the CFPB to police a form of housing discrimination](#) known as redlining, reviving the agency's first such case against a non-bank mortgage lender. Reversing a lower court ruling, [the 7th Circuit said](#) the CFPB can try to prove that Chicago-based Townstone Financial and its co-founder Barry Sturner violated the federal Equal Credit Opportunity Act by discouraging Blacks from applying for mortgage loans.
- The musical group Beastie Boys sued Chili's restaurant owner Brinker [over its alleged misuse of the band's song "Sabotage"](#) in social media advertisements. The group said in its [complaint](#) in Manhattan federal court that Chili's ads falsely imply that the Beastie Boys endorsed the casual-dining restaurants. Brinker did not immediately respond to a request for comment.
- Apple [won a ruling in California federal court dismissing a proposed class action](#) that accused the company of restricting technology used to build apps on the iPhone, causing consumers to pay more for their devices. U.S. District Judge Richard Seeborg in San Francisco [said](#) the plaintiffs did not have legal standing to pursue their antitrust claims for now that Apple made unlawful agreements with Google and other browser makers to block competing developer technology.
- Chief U.S. District Judge Rodney Gilstrap in Marshall, Texas, [dismissed a \\$750 million lawsuit that accused Volkswagen of unfair business practices](#), the latest ruling in a long clash between the German vehicle maker and automotive parts supplier Prevent USA. Gilstrap [upheld](#) a report from a magistrate judge who had [recommended](#) in June that the case, which mainly concerns overseas conduct, did not belong in U.S. court. Gilstrap did not rule on the merits of the underlying claims.

Industry moves

- Foley & Lardner added a group of attorneys from K&L Gates, including corporate and health care partners Joshua Skora, Andrea Cunha and Leah D'Aurora Richardson. Skora is based in Dallas, Cunha in Miami and Richardson in Raleigh. ([Foley & Lardner](#))

- The Singapore office of K&L Gates added corporate partners David Kuo and Meraj Noor from DLA Piper. ([K&L Gates](#))
- Orrick added three life sciences and health technology partners: Georgia Ravitz, Amy Joseph and Jeremy Sherer. Ravitz, who is in D.C., was previously with Wilson Sonsini, while Joseph and Sherer were previously with Hooper, Lundy & Bookman and are in Boston. ([Orrick](#))
- **Saul Ewing added litigation partner Stephen Ma in the firm's Los Angeles office from Early Sullivan. ([Saul Ewing](#))**
- Simmons Hanly Conroy added senior attorney Juan Bauta in Miami. Bauta was previously at Bauta & Associates. ([Simmons Hanly Conroy](#))

Lawyer speak: [Federal court dismisses challenge to cannabis prohibition: analyzing Canna Provisions case](#)

In a closely watched decision released earlier this month, U.S. District Judge Mark G. Mastroianni dismissed a case brought by a coalition of cannabis companies challenging the federal prohibition on cannabis. Alex Malyshev and Sarah Ganley of Carter Ledyard & Milburn [explain Mastroianni's ruling dismissing the case and some of the resulting implications and complexities faced by the cannabis industry in pursuing federal cannabis reform.](#)