

22-3054

Haller v. U.S. Dep't of Health & Hum. Servs.

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit,
held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of
New York, on the 23rd day of January, two thousand twenty-four.

PRESENT:

**MICHAEL H. PARK,
EUNICE C. LEE,
SARAH A. L. MERRIAM,**
Circuit Judges.

Daniel Haller and Long Island Surgical PLLC,

Plaintiffs-Appellants,

v.

22-3054

**U.S. Department of Health and Human Services,
Xavier Becerra, in his official capacity as
Secretary of Health and Human Services, U.S.
Office of Personnel Management, Kiran Ahuja, in
her official capacity as Director of the U.S. Office
of Personnel Management, U.S. Department of
Labor, Julie Su, in her official capacity as Acting
Secretary of Labor, U.S. Department of the
Treasury, Janet Yellen, in her official capacity as
Secretary of the Treasury,**

*Defendants-Appellees.**

* The Clerk of Court is respectfully directed to amend the caption accordingly.

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2 **FOR PLAINTIFFS-APPELLANTS:**

NICK WILDER, The Wilder Law Firm,
New York, NY.

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5 **FOR DEFENDANTS-APPELLEES:**

SARAH J. CLARK (Joshua M. Salzman, *on*
the brief), U.S. Dep't of Justice,
Washington, DC.

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10 Appeal from a judgment of the United States District Court for the Eastern District of New
11 York (Donnelly, *J.*).

12 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND**
13 **DECREED** that the judgment of the district court is **AFFIRMED IN PART, VACATED IN**
14 **PART**, and **REMANDED** for further proceedings consistent with this order.

15 Daniel Haller and his associates at Long Island Surgical PLLC are surgeons who challenge
16 the constitutionality of the No Surprises Act. Pub. L. No. 116-260 (2020) (codified at 42 U.S.C.
17 § 300gg-111 et seq.) (the “Act”). Appellants argue that the Act exceeds Congress’s authority to
18 assign adjudicatory functions to non-Article III tribunals, violates their right to a jury trial under
19 the Seventh Amendment, and effects an unconstitutional taking of payments they would otherwise
20 receive from patients. We assume the parties’ familiarity with the underlying facts, the procedural
21 history of the case, and the issues on appeal.

22 We review a district court’s grant of a motion to dismiss de novo, accepting all factual
23 allegations as true and drawing all inferences in favor of the plaintiff. *Apotex Inc. v. Acorda*
24 *Therapeutics, Inc.*, 823 F.3d 51, 59 (2d Cir. 2016).

25 A. Article III and Seventh Amendment Claims

26 Appellants argued in the district court that Congress created no new public right when it
27 enacted the No Surprises Act because the Act supplanted doctors’ longstanding common-law

1 cause of action to sue *patients* for the reasonable value of emergency medical services. *See* Joint
 2 App’x at 128-29 (“Plaintiffs’ common law claims are against the recipient of the medical
 3 treatment, not the insurer.”).¹ Appellants did not argue that they had any particular right of action
 4 against *insurers*, and they expressly conceded before the district court that they had no such claims.

5 On appeal, Appellants assert for the first time that they may have held a cause of action
 6 against insurers before the No Surprises Act. We decline to consider that argument for the first
 7 time on appeal. But neither should Appellants be prejudiced if they wish to replead and to
 8 advance such claims before the district court at a later date. *See United States v. Gomez*, 877 F.3d
 9 76, 94-96 (2d Cir. 2017) (noting our discretion in handling forfeited arguments). We thus affirm
 10 the judgment of the district court only insofar as it concludes that Appellants failed to state a claim
 11 under Article III or the Seventh Amendment based on their right to bring common-law actions
 12 against patients – a claim Appellants have abandoned on appeal. To the extent the district court
 13 concluded that Appellants lacked a common-law cause of action against insurers, we vacate and
 14 remand with instructions to dismiss Appellants’ Article III and Seventh Amendment claims
 15 without prejudice to allow Appellants to plead such a claim if they so choose.²

16 B. Takings Clause Claims

17 We affirm the district court’s judgment as to Appellants’ takings claims. The Takings
 18 Clause provides that “private property [shall not] be taken for public use, without just

¹ The district court correctly concluded that the existence of a common-law cause of action against *patients* did not render providers’ right to recover against *insurers* a “private” right that might (or might not) have been supplanted by the No Surprises Act.

² We express no opinion as to whether providers had a common-law cause of action against insurers before the No Surprises Act or, if so, whether the Act replaced such a cause of action.

1 compensation.” U.S. Const. amend. V. Our precedents recognize two types of takings: physical
2 and regulatory. *See Buffalo Tchrs. Fed’n v. Tobe*, 464 F.3d 362, 374 (2d. Cir. 2006). Only the
3 regulatory variety is at issue here.

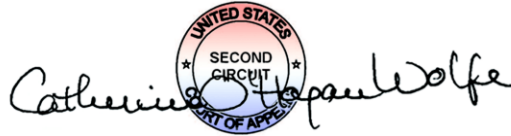
4 To determine whether “justice and fairness require that economic injuries caused by public
5 action must be deemed a compensable taking,” we employ an “ad hoc, factual” approach that
6 considers “the character of the governmental action, its economic impact, and its interference with
7 reasonable investment-backed expectations.” *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005-
8 06 (1984) (citation and quotation marks omitted); *Buffalo Tchrs. Fed’n*, 464 F.3d at 374,
9 *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980). Of course, not every alleged
10 reduction in the value of property is sufficient to support a takings claim. *Andrus v. Allard*, 444
11 U.S. 51, 66 (1979). We have observed that “loss of future profits—unaccompanied by any
12 physical property restriction—provides a slender reed upon which to rest a takings
13 claim. Prediction of profitability is essentially a matter of reasoned speculation that courts are not
14 especially competent to perform.” *Id.* We thus ask, for example, whether a regulation will
15 “unreasonably impair the value or use of [plaintiff’s] property.” *See PruneYard Shopping Ctr.*,
16 447 U.S. at 83 (emphasis added).

17 Appellants here fail to allege a regulatory taking. They argue that what was “taken” from
18 them was “the reasonable calculation of future income stream.” Appellant’s Br. at 56. Such
19 vague and speculative allegations of an unspecified diminution in future income are insufficient to
20 state a claim under the Takings Clause. We thus affirm the judgment of the district court as to
21 Appellants’ takings claim.

22 * * *

1 We have considered Appellants' remaining arguments and found them to be without merit.
2 For the foregoing reasons, the judgment of the district court is **AFFIRMED IN PART**,
3 **VACATED IN PART**, and **REMANDED** for further proceedings consistent with this order.

4
5 FOR THE COURT:
6 Catherine O'Hagan Wolfe, Clerk of Court

The image shows a handwritten signature in black ink that reads "Catherine O'Hagan Wolfe". The signature is written over a circular official seal. The seal is divided into two horizontal halves: the top half is red and the bottom half is blue. The words "UNITED STATES" are written in white along the top arc of the seal, and "SECOND CIRCUIT" is written in white along the bottom arc. Two small white stars are positioned on the left and right sides of the seal, separating the top and bottom text.

**United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007**

DEBRA ANN LIVINGSTON
CHIEF JUDGE

Date: January 23, 2024

Docket #: 22-3054cv

Short Title: Haller v. U.S. Department of Health and Human
Services

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

DC Docket #: 21-cv-7208

DC Court: EDNY (CENTRAL
ISLIP)

DC Judge: Donnelly

DC Judge: Shields

BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:

- * be filed within 14 days after the entry of judgment;
- * be verified;
- * be served on all adversaries;
- * not include charges for postage, delivery, service, overtime and the filers edits;
- * identify the number of copies which comprise the printer's unit;
- * include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
- * state only the number of necessary copies inserted in enclosed form;
- * state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
- * be filed via CM/ECF or if counsel is exempted with the original and two copies.

**United States Court of Appeals for the Second Circuit
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DC Judge: Shields

VERIFIED ITEMIZED BILL OF COSTS

Counsel for

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to
prepare an itemized statement of costs taxed against the

and in favor of

for insertion in the mandate.

Docketing Fee _____

Costs of printing appendix (necessary copies _____) _____

Costs of printing brief (necessary copies _____) _____

Costs of printing reply brief (necessary copies _____) _____

(VERIFICATION HERE)

Signature