

Third Circuit Follows D.C. Circuit On Noel Canning, Holds Becker Recess Appointment Invalid

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In another groundbreaking decision against the NLRB, the Third Circuit has followed the D.C. Circuit's reasoning in *Noel Canning* regarding presidential recess appointments and as a consequence, has found former Board member Craig Becker's recess appointment in March 2010 invalid.

In an opinion issued today in *NLRB v. New Vista Nursing*, the Third Circuit held that presidential recess appointments are only valid if they occur during the intersession break of the Senate, not during any break of significant time during a Senate session (as has been the commonly held interpretation of presidential administrations for the last several decades). The Court therefore found that NLRB member Becker's appointment in March 2010 was invalid because it did not occur during a recess of the Senate. Accordingly, any decisions made by a three-member Board with Member Becker participating (which [as we previously noted](#) go back to August 2011) are also invalid under the U.S. Supreme Court's decision in *New Process Steel*.

This decision bolsters the credibility of the D.C. Circuit's *Noel Canning* decision, which [many including the Board](#) dismissed as wrongly decided. It also virtually ensures that the NLRB's *Noel Canning* cert petition will be taken up by the U.S. Supreme Court.

Stay tuned for updates on this issue, including a future Barnes & Thornburg client alert. The Third Circuit case is *NLRB v. New Vista Nursing & Rehab.*, Third Circuit Case No. 12-1936 and today's opinion is [available here](#) (PDF). Our previous coverage of the recess appointments issue is [available here](#).

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