

First Impressions

The following pages contain brief summaries, drafted by the members of the *Seton Hall Circuit Review*, of issues of first impression identified by a federal court of appeals opinion announced between March 13, 2009 and October 1, 2009. This collection is organized by circuit.

Each summary presents an issue of first impression, a brief analysis, and the court's conclusion. It is intended to give only the briefest synopsis of the first impression issue, not a comprehensive analysis. This compilation makes no claim to be exhaustive, but will hopefully serve the reader well as a reference starting point. If a circuit does not appear on the list, it means that the editors did not identify any cases from the circuit for the specified time period that presented an issue of First Impression.

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FIRST CIRCUIT

***Braunstein v. McCabe*, 571 F.3d 108 (1st Cir. 2009)**

QUESTION ONE: Whether “there is a jury trial right under the Seventh Amendment in actions by trustees to compel the turnover of property to the estate under 11 U.S.C. § 542.” *Id.* at 112.

ANALYSIS: The court reasoned that in both the absence of a statute giving a right to jury trial in § 542 turnover actions by the trustee in the district court and the silence of the Bankruptcy Code, the claim is a purely constitutional claim to a jury trial under the Seventh Amendment. *Id.* at 116. The court proceeded to apply a three-part test established by prior Supreme Court cases, comparing “the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity,” and examines the remedy sought to “determine whether it is legal or equitable in nature.” *Id.* at 118. “[I]f the first two factors indicate a party has a jury trial right,” the court then decides whether Congress may assign and has assigned resolution of the relevant claim to a non-Article III adjudicative body that does not use a jury as factfinder.” *Id.* The court reasoned that there was a lack of a “precise action for ‘turnover’ sounding in common law in England before the enactment of the Seventh Amendment,” and that § 542 specifically calls for an accounting remedy, which the “Court has recognized as an inherently equitable remedy.” *Id.* The court also reasoned that its finding on the first two prongs of the tests eliminated the necessity of addressing the third prong. *Id.* at 118–22.

CONCLUSION: The 1st Circuit held that “no right to trial by jury attaches to the statutory turnover action authorized by § 542.” *Id.* at 115.

QUESTION TWO: “What is meant by the ‘ordinary course of business’ of a debtor for purposes of 11 U.S.C. § 363, which allows trustees to make ordinary expenditures necessary for the operation of a business without involvement of the bankruptcy court.” *Id.* at 112.

ANALYSIS: In answering the second question, the court applied two separate tests. First, the court applied the horizontal dimension test, under which courts ask “whether, from an industry-wide perspective, the transaction is of the sort commonly undertaken by companies in that industry.” *Id.* at 125. Second, the court applied the vertical dimension test, or creditor expectation test, under which “courts analyze the challenged transaction from a hypothetical creditor’s point of view and ask whether it “subjects a creditor to economic risks of a nature different from those he accepted when he decided to extend credit.” *Id.* at 125. The court reasoned that the costs were not uncured in a way common to

the industry, and that the transaction was within the context of the debtor-creditor relationship. *Id.* at 125.

CONCLUSION: The court held that the expenditures incurred did not meet either test for the ordinary course of business. *Id.* at 125.

QUESTION THREE: Whether a cause of action for negligent misrepresentation is stated by the debtors against the trustee's counsel. *Id.* at 112.

ANALYSIS: In answering the third question, the court reasoned that plaintiffs were "wrong to apply the general law of negligent misrepresentation involving non-attorney defendants, who do not owe legal duties to others, to an attorney defendant." *Id.* at 126. The court stated that while "[a]n attorney may owe a duty to a non-client who the attorney knows will rely on the services rendered . . . [that] duty will not be imposed if such an independent duty would potentially conflict with the duty the attorney owes to his or her client." *Id.* at 126–27. In addition, the court noted that reasoning otherwise would run contrary to the attorney's duty to the estate and counsel to the trustee, and would counter the efficient estate administration under federal bankruptcy laws. *Id.* at 127.

CONCLUSION: The court held that the plaintiffs could not maintain a cause of action for negligent misrepresentation against the attorney. *Id.*

***Grimsdale v. Kash N' Karry Food Stores, Inc.*, 564 F.3d 75 (1st Cir. 2009)**

QUESTION: Whether plaintiffs were entitled to a remand of the cause of action to state court under the Class Action Fairness Act ("CAFA") home state exception. *Id.* at 76.

ANALYSIS: The court first recognized "the burden is on the plaintiff to show that an exception to jurisdiction under CAFA applies." *Id.* at 76. The court looked to the plain language of the statute noting that "[t]he most natural reading of the home state exception is that Congress meant § 1332(d)(4)(B) to be read in conjunction with the federal class action rule, Fed. R. Civ. P. 23, or similar state statutes and rules of judicial procedure." *Id.* at 79. Further, the court rationalized that such a reading "is made explicit by the definition of 'class action' in § 1332(d)(1)(B), which refers to Rule 23 or similar state rules." *Id.* Finally, the court found that "[u]nder Rule 23, 'a class may be divided into subclasses that are each treated as a class under this rule.'" *Id.* at 79.

CONCLUSION: The 1st Circuit held that the language of the statute "requires a court to assess the citizenship of the class members when

applying the home state exception, an exercise Congress obviously did not consider to be impossible.” *Id.* at 81.

***United States v. Saccoccia*, 564 F.3d 502 (1st Cir. 2009)**

QUESTION: Whether “under either the [F]ifth or [S]ixth [A]mendment, [defendant] was entitled to appointed counsel in the district court to defend against the government’s attempt to forfeit the substitute assets in question.” *Id.* at 504.

ANALYSIS: The court rejected defendant’s argument under the Sixth Amendment, reasoning that “[b]ecause such a proceeding does not increase the quantum of punishment imposed on a defendant, no right to appointed counsel exists under the sixth amendment.” *Id.* at 505. The court similarly rejected defendant’s Fifth Amendment argument, noting that “in criminal cases, the Constitution does not by its terms provide for *appointed* counsel.” *Id.* (emphasis in original).

CONCLUSION: The 1st Circuit held that the defendant “in such cases is free to be represented by counsel but has no constitutional right to counsel at the expense of the government.” *Id.* at 506.

***Northeastern Land Servs. v. NLRB*, 560 F.3d 36 (1st Cir. 2009)**

QUESTION: “[W]hether a two-member Board decision complied with the quorum requirement of section 3(b) of the NLRA.” *Id.* at 37.

ANALYSIS: The court first considered the plain meaning of section 3(b). *Id.* at 41. The court then looked to the 9th Circuit’s interpretation that “analogized the quorum requirement in section 3(b) to the quorum for the federal courts of appeals.” *Id.* The court agreed with other courts that “have interpreted ‘quorum’ to mean the ‘number of the members of the court as may legally transact judicial business.’” *Id.* at 42. The court also considered similar approaches by other administrative agencies. *Id.*

CONCLUSION: The 1st Circuit held that “[t]he Board’s delegation of its institutional power to a panel that ultimately consisted of a two-member quorum because of a vacancy was lawful under the plain text of section 3(b).” *Id.* at 41.

***United States v. Vidal-Reyes*, 562 F.3d 43 (1st Cir. 2009)**

QUESTION: Whether the federal aggravated identity theft statute, 18 U.S.C. § 1028A, “curbs a district court’s discretion to take the statute’s mandatory sentence into account when sentencing a defendant on other [non-predicate] counts of conviction” in the same indictment. *Id.* at 45, 50.

ANALYSIS: The court reasoned that the statute’s plain language did not preclude courts from taking into account the mandatory two-year sentence for violating the statute when sentencing non-predicate offenses. *Id.* at 51. The court indicated that an opposite interpretation prohibiting consideration of mandatory sentencing for non-predicate counts would render the following section that addresses predicate counts superfluous. *Id.* at 52. The court posited that when drafting legislation, Congress is presumed to act deliberately in determining which terms to include in one part of a statute and which terms to exclude in another part of a statute. *Id.* at 53. The court further noted that legislative history confirmed this reading of the statute, as Congress was concerned about identity theft in relation to predicate felonies. *Id.* at 51, 54. Since Congress specifically distinguished between predicate and non-predicate felonies in the statute, the court found that the felonies were meant to be treated differently. *Id.* at 55.

CONCLUSION: The 1st Circuit held that a court may take “§ 1028A’s mandatory sentence into account in sentencing a defendant on other counts of conviction charged in the same indictment that are not predicate felonies underlying the § 1028A conviction.” *Id.* at 56.

Stornaway Fin. Corp. v. Hill (In re Hill), 562 F.3d 29 (1st Cir. 2009)

QUESTION: Whether “a debtor’s homestead exemption [may] be denied, under 11 U.S.C § 522(g), with respect to residential property fraudulently transferred but voluntarily reconveyed pre-petition in response to efforts of a creditor.” *Id.* at 30.

ANALYSIS: The court looked to the plain meaning of the statute and found that § 522(g) requires “a recovery by the trustee.” *Id.* at 33. The court noted that “the statute applies only to property that a trustee recovers. ‘Trustee’ and ‘creditor’ are separate nouns, with distinct meanings, and the Bankruptcy Code does not treat them as synonyms.” *Id.* Applying the plain meaning, the court stated that the term “recover” “ordinarily means to get or win back.” *Id.* (internal quotations omitted). Thus, the pre-petition suit by a creditor failed because the creditor could not avail itself of the enumerated powers of Chapter 7 to recover anything, as § 522(g) relief applies to trustees and not creditors. *Id.* The court further noted there was “no clear evidence that section 522(g) was sparked by Congress’s intention to punish all dishonest debtors.” *Id.* at 34.

CONCLUSION: The 1st Circuit held “that 11 U.S.C. § 522(g) does not authorize the Bankruptcy Court to deny a debtor’s homestead exemption with respect to property that had been fraudulently transferred

and then voluntarily reconveyed pre-petition, even though the retransfer came about through the efforts of a creditor.” *Id.* at 35.

SECOND CIRCUIT

United States v. Jass, 569 F.3d 47 (2d Cir. 2009)

QUESTION: Whether “using computer images to desensitize a child to sexual activity with adults in order to persuade that child to participate in such activity . . . fall[s] within the scope of [U.S. Sentencing Guidelines Manual] § 2G2.1(b)(3)(B)(ii) . . . [which] provides for a two-point enhancement when a computer is used to ‘solicit participation with a minor in sexually explicit conduct.’” *Id.* at 68.

ANALYSIS: The court reasoned that the district court’s interpretation of § 2G2.1(b)(3)(B)(ii) which would apply the two-point enhancement to the case at bar would lead to an “illogical” and “curious conclusion.” *Id.* Rather, the court noted that the type of computer use contemplated by § 2G2.1(b)(3)(B)(ii) was “the use of a computer to solicit a third party’s participation in sexual activities with a minor.” *Id.* at 70.

CONCLUSION: Thus, the 2nd Circuit held that section 2G2.1(b)(3)(B)(ii) did not apply to the circumstances of this case. *Id.* at 69.

Shomo v. City of N.Y., 579 F.3d 176 (2d Cir. 2009)

QUESTION: Whether “the continuing violation doctrine can delay accrual of an Eighth Amendment claim alleging a policy of deliberate indifference to serious medical needs.” *Id.* at 180.

ANALYSIS: The court noted that the Supreme Court has recognized that “the continuing violation doctrine can be applied when the plaintiff’s claim seeks redress for injuries resulting from a series of separate acts that collectively constitute one “unlawful [act],” but the doctrine cannot be applied when the plaintiff challenges conduct that is a discrete unlawful act.” *Id.* at 181. The court pointed to a 7th Circuit decision that applied this principle to an Eighth Amendment claim. *Id.* The court agreed that “the continuing violation doctrine can apply when a prisoner challenges a series of acts that together comprise an Eighth Amendment claim of deliberate indifference to serious medical needs.” *Id.* at 182. The court stated “[t]hat the continuing violation doctrine *can* apply, however, does not mean it must.” *Id.* (emphasis in original).

CONCLUSION: The 2nd Circuit held that “[t]o assert a continuing violation for statute of limitations purposes [on an Eighth Amendment

claim], the plaintiff must allege both the existence of an ongoing policy of [deliberate indifference to his or her serious medical needs] and some non-time-barred acts taken in the furtherance of that policy.” *Id.* at 180 (alterations in original) (internal quotations omitted).

***Henry v. Ricks*, 578 F.3d 134 (2d Cir. 2009)**

QUESTION: “[W]hether, or under what circumstances, due process requires that a new interpretation of a criminal statute by a state’s highest court be applied retroactively on collateral review” *Id.* at 139.

ANALYSIS: The 2nd Circuit noted that the Supreme Court “has held that the Constitution does not require a state’s highest court . . . to make retroactive its new construction of a criminal statute.” *Id.* at 140 (internal quotations omitted). The court found that when a state has decided that a new rule will not apply retroactively, the Constitution of the United States shall not “thrust upon [state] courts a different conception either of the binding force of precedent or of the meaning of judicial process.” *Id.* (internal quotations omitted). The court reasoned that “because the Constitution has no voice upon the subject, states may develop and apply their own rules of retroactivity.” *Id.* at 141 (internal quotations omitted).

CONCLUSION: The 2nd Circuit held that “the Due Process Clause does not require the retroactive application of a new interpretation of a criminal statute . . . in [the] collateral review of a conviction.” *Id.*

***Wilson v. Mazzuca*, 570 F.3d 490 (2d Cir. 2009)**

QUESTION: Whether “the standard of review prescribed by the Antiterrorism and Effective Death Penalty Act of 1996 (‘AEDPA’) for a claim resolved on the merits by a state court is displaced when a federal district court conducts additional fact-finding” *Id.* at 493.

ANALYSIS: The court noted that “[t]he standard of review set forth in AEDPA is not conditional,” but “stated in mandatory terms.” *Id.* at 500. The court reasoned that “these terms do not lose their force because an intervening evidentiary hearing is held in federal court,” and that “the provision of AEDPA setting forth the circumstances under which a federal evidentiary hearing can be held . . . does not suggest that holding such a hearing has any impact whatsoever on the standard of review governing habeas claims.” *Id.* The court further reasoned that “a habeas claim, even if subject to a federal evidentiary hearing” remains a claim adjudicated on the merits in state court proceedings. *Id.*

CONCLUSION: AEDPA’s deferential standard of review is not displaced and applies even when a district court conducts additional fact-finding on habeas review. *Id.* at 490.

***United States v. Polouizzi*, 564 F.3d 142 (2d Cir. 2009)**

QUESTION: Whether multiple convictions for possession of child pornography pursuant to 18 U.S.C. § 2252(a)(4)(B) constitutes a plain error in violation of the Double Jeopardy Clause of the Constitution. *Id.* at 145.

ANALYSIS: The 2nd Circuit explained that to demonstrate plain error, a defendant “must show: (1) error, (2) that is plain, and (3) affect[s] substantial rights.” *Id.* at 154 (internal quotations omitted). The court also explained that an “error is plain if the [lower court’s] ruling was contrary to law that was clearly established by the time of the appeal.” *Id.* at 156 (internal quotations omitted). The court reasoned that “the plain language of the statute provides that a person who possesses ‘1 or more’ matters containing a prohibited image has violated the statute only once.” *Id.* at 155. The court further stated that although it had “not previously held . . . that simultaneous possession of multiple matters containing images of child pornography constitutes a single violation of 18 U.S.C. § 2252(a)(4)(B), [such a] conclusion is demanded by the plain language of the statute and is entirely consistent with Supreme Court and circuit precedent addressing similar statutes.” *Id.* at 156. The court noted that it has “often found multiple convictions for a single statutory violation to constitute plain error although [it] had not previously addressed specifically whether the [possession of child pornography] was intended by Congress to be a single statutory violation.” *Id.*

CONCLUSION: The 2nd Circuit held that “[b]ased on the clear language of the statute . . . Congress intended to subject a person who simultaneously possesses multiple books, magazines, periodicals, films, video tapes, or other matter containing a visual depiction of child pornography to only one conviction under 18 U.S.C. § 2252(a)(4)(B).” *Id.* at 155.

***Bustamante v. Napolitano*, 582 F.3d 403 (2d Cir. 2009)**

QUESTION: Whether a properly filed petition under 8 U.S.C. § 1447(b) divests the United States Citizenship and Immigration Services (USCIS) of jurisdiction over a naturalization application. *Id.* at 405.

ANALYSIS: The court first looked to the language of the statute, which confers jurisdiction to the district court “when a naturalization applicant requests a hearing before the district court on a pending application that USCIS has not decided for more than 120 days after the initial examination of the applicant” *Id.* at 406. The court then reasoned that once 120 days have elapsed since the initial examination of the petitioner, “[s]ection 1447(b) ‘provides for judicial intervention at

the election of the naturalization applicant.” *Id.* The court then opined that it would be illogical for both the USCIS and the district court to simultaneously possess jurisdiction over the naturalization application. *Id.*

CONCLUSION: The 2nd Circuit held that “only the district court has jurisdiction over a naturalization application once an applicant files a proper [s]ection 1447(b).” *Id.* at 405.

ASM Capital, LP v. Ames Dep’t Stores, Inc. (In re Ames Dep’t Stores, Inc.), 582 F.3d 422 (2d Cir. 2009)

QUESTION: Whether 11 U.S.C. § 502(d) of the Bankruptcy Code, which disallows claims from which property is recoverable under certain circumstances, bars a request for payment of an administrative expense allowed under § 503. *Id.* at 427.

ANALYSIS: The court reviewed the plain language of the statute and determined that “[t]he structure and context of section 502(d) suggests that Congress intended it to differentiate between claims and administrative expenses, and not to apply to the latter.” *Id.* at 429. In terms of structure, the court noted that “[s]ection 502, in conjunction with section 501, provides a procedure for the allowance of claims that is entirely separate from the procedure for allowance of administrative expenses under section 503.” *Id.* Additionally, the court acknowledged “[t]he language of section 502(d) suggests that it applies only in the context of section 502, and not to claims addressed by section 503.” *Id.* at 430. The court further reasoned that “the mandatory terms in which section 503(b) is drafted, requiring courts to allow requests for administrative expenses, suggest a conflict with section 502(d)’s equally mandatory disallowance of claims.” *Id.* Finally, the court noted that “the context of these provisions in the Bankruptcy Code counsels in favor of holding section 502(d) inapplicable to administrative expenses under section 503(b).” *Id.* at 431. The court reasoned that “the Bankruptcy Code establishes a clear division between an entity in its pre- and post-petition states. [It also] gives a higher priority to requests for administrative expenses than to prepetition claims in order to encourage third parties to supply goods and services on credit to the estate, to the benefit of all of the estate’s creditors. That intent would be frustrated by allowing a debtor automatically to forestall or avoid payment of administrative expenses by alleging that the vendor had been the recipient of a preferential transfer.” *Id.*

CONCLUSION: The 2nd Circuit held that “section 502(d) does not apply to administrative expenses under section 503(b).” *Id.*

***Lindsay v. Ass’n of Prof’l Flight Attendants*, 581 F.3d 47 (2d Cir. 2009)**

QUESTION: Whether the First and Seventh provisions of the Railway Labor Act (“RLA”), 45 U.S.C. § 152, provide for a private right of action by individual employees. *Id.* at 50.

ANALYSIS: The court first examined the text and structure of the statute and found that nothing in the text or structure indicated that Congress intended to create a private remedy for these provisions. *Id.* at 53. The court next considered whether a private remedy was implicit in the statute. *Id.* at 52. The court looked at four factors in its decision: (1) whether the plaintiff was one of the class for whose benefit the statute was enacted, (2) if there was any indication of legislative intent to create or deny a private remedy, (3) whether it was consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff, and (4) whether the cause of action was one of traditional state law regulation, such that it would be inappropriate to infer a cause of action based only on federal law. *Id.*

The court applied the factors to the First provision of the RLA and found there was no private right of action because (1) the provision focused on agreements reached by union representatives with employers instead of individual employee rights, (2) the employees were represented by a union that made and maintained agreements on their behalf, and (3) the goals of the statute were to prevent interruption in commerce by appointing representatives to negotiate for employees. *Id.* at 53–54. Likewise, the court found no private right of action under the Seventh provision of the RLA because the provision gave legal and binding effect to collective agreements and “preserve[d] the status quo while the employer and the union engage in” negotiations on behalf of the employee class. *Id.* at 56.

CONCLUSION: The 2nd Circuit held that the First and Seventh provisions of the RLA do not provide a private cause of action to individual employees against their employers. *Id.* at 52–56.

THIRD CIRCUIT

***William A. Graham Co. v. Haughey*, 568 F.3d 425 (3d Cir. 2009)**

QUESTION: Whether the discovery rule or the injury rule governs the accrual of claims under the Copyright Act, 17 U.S.C. § 507(b), which has a three-year statute of limitations for civil actions. *Id.* at 427–28.

ANALYSIS: Under the discovery rule, a claim under the Copyright Act accrues when the plaintiff knows or has reason to know of a

Copyright Act violation. *Id.* at 438. Under the injury rule, a claim accrues, and the statute of limitations begins to run, when the plaintiff suffers a legally cognizable injury. *Id.* at 428. The court noted that the 1st, 2nd, 4th, 5th, 6th, 7th, 8th and 9th Circuits have all held that the discovery rule applies to Copyright Act claims. *Id.* at 433. The court found that “Congress used different language in the *civil* limitations provision (‘after the claim accrued’), which the Supreme Court had previously interpreted as embodying the discovery rule,” from that which it had used in the criminal limitations provision. *Id.* at 435 (emphasis in original). The court further noted that Congress left out statutory exceptions to the statute of limitations “in order to ensure that the courts could consider any equitable circumstances sufficient to excuse a plaintiff’s failure to sue within the three-year limitations period.” *Id.* at 436.

CONCLUSION: The 3rd Circuit joined its eight sister circuits and held that “the federal discovery rule governs the accrual of civil claims brought under the Copyright Act.” *Id.* at 437.

***United States v. Tann*, 577 F.3d 533 (3d Cir. 2009)**

QUESTION: Whether under 18 U.S.C. § 922(g)(1), a court can enter separate convictions and sentences for the simultaneous possession of a firearm and ammunition, or whether such finding constitutes error. *Id.* at 535.

ANALYSIS: First, the court relied on prior precedent to establish that under 18 U.S.C. § 922(h), the predecessor to the current version of § 922(g)(1), multiple convictions cannot be upheld for simultaneous support of multiple weapons. *Id.* at 536. The court then noted that under the former 18 U.S.C. § 1202(a), possession of multiple weapons by a convicted felon did not warrant multiple convictions, “absent a showing that the weapons were separately stored or acquired.” *Id.* at 536–37.

CONCLUSION: The 3rd Circuit held that the “possession of both a firearm and ammunition, seized at the same time in the same location, supports only one conviction and sentence under [current] § 922(g)(1).” *Id.*

***United States v. Cole*, 567 F.3d 110 (3d Cir. 2009)**

QUESTION: Whether “a District Court exceeds its authority under 18 U.S.C. § 3583 when it orders that a term of supervised release be tolled during the time that a defendant is excluded from the United States following removal.” *Id.* at 112.

ANALYSIS: The court noted that § 3583 “authorizes district courts to include a period of supervised release as part of a defendant’s

sentence,” and may also order “any other conditions it considers to be appropriate.” *Id.* The court then compared “tolling,” or “a suspension of the time that supervised release runs” with other permissible conditions that courts may impose on supervised release. *Id.* at 114. The court listed such acceptable conditions as “refraining from illegal drug use; going to a rehabilitation program for sex offenders; [and] providing a DNA sample,” and contrasted them with tolling. *Id.* The court also noted the structure of the supervised release statutes and reasoned that because “Congress has explicitly allowed for tolling only when the defendant is imprisoned on another charge, it does not intend for district courts to toll supervised release under any other circumstance.” *Id.* at 115.

CONCLUSION: The 3rd Circuit held that “the District Court did not have authority to suspend [the] period of supervised release . . .” under 18 U.S.C. § 3583. *Id.* at 111.

***Jonathan H. v. Souderton Area Sch. Dist.*, 562 F.3d 527 (3d Cir. 2009)**

QUESTION: Whether a counterclaim brought ninety days after the final administrative decision in an Individuals with Disabilities Education Improvement Act of 2004 (IDEA) suit constitutes an “action” as defined in the statute. *Id.* at 529–30.

ANALYSIS: The court acknowledged that the word “action” could be interpreted broadly and could possibly include a counterclaim. *Id.* at 529. However, the court looked to the statutory language and read “bring an action” to mean to affirmatively sue for relief, not to merely respond to a plaintiff with a compulsory counterclaim. *Id.* at 529–30.

CONCLUSION: The 3rd Circuit held that “the plain language of the IDEA allows for a compulsory counterclaim to be filed beyond the 90-day window for bringing a civil action . . .” *Id.* at 530.

***United States v. Saybolt*, 577 F.3d 195 (3d Cir. 2009)**

QUESTION: Whether violations of 18 U.S.C.S § 286, the federal statute regarding conspiracy to defraud the government with respect claims, and § 287, the federal statute regarding false, fictitious, or fraudulent claims, “always require proof of materiality.” *Id.* at 199.

ANALYSIS: The 3rd Circuit found that § 287 “connects the terms ‘false,’ ‘fictitious,’ and ‘fraudulent’ with the disjunctive ‘or,’” and thus give the terms separate meanings. *Id.* at 200. Since “fraudulent” requires proof of materiality whereas “false” or “fictitious” would not require proof of materiality, the court determined that “proof of materiality is not always required to establish a section 287 violation.” *Id.* Conversely, the court observed that when “it is alleged that the

conspirators agreed to make false statements or representations as part of the conspiracy,” § 286 requires “proof that the conspirators agreed that these statements or representations would have a material effect on the decision to pay a false, fictitious, or fraudulent claim.” *Id.* at 204. The 3rd Circuit held that although the word “material” was missing in the indictment, it was “sufficient because it alleged facts warranting an inference that the Appellants agreed to make materially false statements as part of their conspiracy to defraud the IRS.” *Id.* at 206.

CONCLUSION: The 3rd Circuit held that § 287 did not always require proof of materiality because the statutory terms “false,” “fictitious,” and “fraudulent” were connected with the disjunctive “or.” *Id.* However, proof of materiality was required to convict defendants under § 286 because the government alleged that defendants agreed to make false statements or representations as part of the conspiracy. *Id.* Nevertheless, “[s]ince the factual allegations contained in the Indictment warrant an inference of materiality, the absence of the word ‘material’ [did] not render it insufficient.” *Id.*

***United States v. Hammer*, 564 F.3d 628 (3d Cir. 2009)**

QUESTION: Whether a court of appeals “has jurisdiction to review an order under 28 U.S.C. § 2255 granting a new sentencing hearing but denying a new trial in a capital murder prosecution.” *Id.* at 632.

ANALYSIS: The 3rd Circuit first noted that “while [it has] not before addressed the priced issue presented here, [it] did consider whether a grant of new trial is a final appealable order under § 2255.” *Id.* Specifically, the court emphasized that the “crucial question in these cases in determining finality is whether the district court has entered one of the orders specified in paragraph 3 of [the statute].” *Id.* The court found that a district court “order that contemplates a future resentencing but does not accomplish it is not an ‘order entered on the motion’” under paragraph 3 of the statute, and thus is not final and appealable. *Id.* at 634. Although the court had not previously contemplated the process of capital resentencing, the court nonetheless determined that the terms of the statute apply in capital and non-capital cases alike. *Id.*

CONCLUSION: The 3rd Circuit held that the order denying defendant relief under 28 U.S.C. § 2255 did not become final until he was resentenced, and thus, the court did not have jurisdiction over his appeal. *Id.*

***Tice v. Bristol-Myers Squibb Co.*, 325 F. App'x 114 (3d Cir. 2009)**

QUESTION: Whether “an administrative ruling under the Sarbanes-Oxley Act may have preclusive effect on a subsequent discrimination claim brought in federal court.” *Id.* at 115.

ANALYSIS: The court began by noting a tension between Title VII’s grant of de novo review with the principle that “final agency decisions outside the Title VII context normally have preclusive effect in federal courts.” *Id.* at 118. In determining the preclusive effect of a claim, the court indicated that it must examine the legislative intent. *Id.* at 120. The court determined that Congress did not intend for common-law preclusion principles to be used to bar discrimination claims in federal court. *Id.* at 118–19. However, Congress provided that a claim brought under the Sarbanes-Oxley Act is not subject to collateral attack in another forum. *Id.* at 121.

CONCLUSION: The 3rd Circuit held that since the Sarbanes-Oxley Act is outside the scope of Title VII and expressly prohibits collateral attacks, normal preclusion principles apply. *Id.* at 123.

***Kaufman v. Allstate N.J. Ins. Co.*, 561 F.3d 144 (3d Cir. 2009)**

QUESTION: “[W]hether the significant basis provision [of 28 U.S.C. § 1332(d)] requires that every class member must assert a claim against the local defendant; and second, whether the principal injuries provision of 28 U.S.C. § 1332(d) requires that principal injuries resulting from the alleged conduct and any related conduct of each defendant must be incurred in the state in which the action was originally filed.” *Id.* at 149–50.

ANALYSIS: The court noted that the significant basis “provision requires that the class action include at least one local defendant ‘whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class.’” *Id.* at 154. The court then articulated that “[t]he term ‘class’ plainly refers to all the members of the proposed plaintiff class,” and ‘the claims asserted’ refers to “all the claims asserted.” *Id.* at 155. The court reasoned, however, “[t]he provision does not require that the local defendant’s alleged conduct form a basis of *each* claim asserted; it requires the alleged conduct to form a significant basis of *all* the claims asserted.” *Id.* (emphasis added). The court focused on the plain meaning of the statute and noted found that it is satisfied either “when principal injuries resulting from the alleged conduct of each defendant were incurred in the state in which the action was originally filed [or] when principal injuries resulting from any related conduct of each defendant were incurred in that state.” *Id.* at 158.

CONCLUSION: The 3rd Circuit held that the significant basis provision does not require every class member to assert a claim against a local defendant; the local defendant's alleged conduct form a significant or important basis of all claims asserted. *Id.* at 156. The 3rd Circuit further held that the principal injuries provision does not require both alleged conduct and any related conduct to occur in the state in which the action is filed. *Id.* at 158.

***Kossler v. Crisanti*, 564 F.3d 181 (3d Cir. 2009)**

QUESTION: “Whether acquittal on at least one criminal charge constitutes ‘favorable termination’ for the purpose of a subsequent malicious prosecution claim, when the charge arose out of the same act for which the plaintiff was convicted on a different charge during the same criminal prosecution.” *Id.* at 188.

ANALYSIS: The court first pointed out that “various authorities refer to the favorable termination of a ‘proceeding,’ not merely a ‘charge’ or ‘offense.’” *Id.* The court further noted that “favorable termination of some but not all individual charges does not necessarily establish the favorable termination of the criminal proceeding as a whole.” *Id.* The court explained that “the favorable termination element is not categorically satisfied whenever the plaintiff is acquitted of just one of several charges in the same proceeding.” *Id.* The court reasoned that “upon examination of the entire criminal proceeding, the judgment must indicate the plaintiff's innocence of the alleged misconduct underlying the offenses charged.” *Id.* Finally, the court recognized that both the 2nd and 11th Circuits had dealt with the same issue, and found that they utilized the same analysis. *Id.* at 190.

CONCLUSION: The 3rd Circuit held that “[w]hen the circumstances—both the offenses as stated in the statute and the underlying facts of the case—indicate that the judgment as a whole does not reflect the plaintiff's innocence, then the plaintiff fails to establish the favorable termination element.” *Id.* at 188.

***Brown v. J. Kaz, Inc.*, 581 F.3d 175 (3d Cir. 2009)**

QUESTION: Whether a plaintiff's discrimination claims pursuant to § 1981 are barred because of her status as an independent contractor. *Id.* at 181.

ANALYSIS: The court first noted that plaintiff's claims under Title VII and the Pennsylvania Human Rights Act were barred because of plaintiff's status as an independent contractor. *Id.* The court then noted that although this was an issue of first impression for the 3rd Circuit, three other circuits “have held that an independent contractor may bring

a discrimination claim under section 1981 against the entity with which she contracted.” *Id.* The court reasoned that the “text of section 1981 provides that *all persons* . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens.” *Id.* (emphasis in original) (internal quotations omitted). The court further reasoned that “section 1981 ‘does not limit itself, or even refer, to employment contracts but embraces all contracts and therefore includes contracts by which a[n] . . . independent contractor . . . provides service to another.’” *Id.* (internal citations omitted).

CONCLUSION: The 3rd Circuit held that “an independent contractor may bring a cause of action under section 1981 for discrimination occurring within the scope of the independent contractor relationship. *Id.*

***Lohman v. Duryea Borough*, 574 F.3d 163 (3d Cir. 2009)**

QUESTION: “[W]hether and to what extent the trial court may consider settlement negotiations when awarding fees.” *Id.* at 164.

ANALYSIS: The court, examining the language of Federal Rule of Evidence 408, noted that “Rule 408 requires exclusion of evidence of such negotiations ‘when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction.’” *Id.* at 167. The court did not “disagree that settlement negotiations cannot be used in this way, for the Rule clearly places settlement negotiations off limits where the validity of the claim is at issue.” *Id.* However, the court then stated that “[w]hile evidence of settlement negotiations is inadmissible to prove the merit or lack of merit of a claim, the use of such evidence as bearing on the issue of what relief was sought by a plaintiff does not offend the clear terms of Rule 408.” *Id.* Furthermore, the court stated that “[s]uch evidence can be relevant when comparing what a plaintiff ‘requested’ to what the plaintiff was ultimately ‘awarded.’” *Id.* The court then cited decisions that allowed attorney fees to be adjusted based on success. *Id.* Finally, the court stated that “[w]hile evidence of settlement negotiations is only one indicator of the measure of success, it is a permissible indicator that is not precluded by Rule 408.” *Id.* at 168.

CONCLUSION: The 3rd Circuit held “that settlement negotiations *may* be relevant in measuring success, and, if so, are clearly only one factor to be considered in the award of fees. A court is also free to reject such evidence as not bearing on success when, for instance, negotiations occur at an early stage before discovery, or are otherwise not a fair measure of what a party is truly seeking in damages.” *Id.* at 169 (emphasis in original).

***Erdman v. Nationwide Ins. Co.*, 582 F.3d 500 (3d Cir. 2009)**

QUESTION ONE: Whether a plaintiff can claim “remedial eligibility” for accumulating sufficient hours to qualify for leave under Family Medical Leave Act (“FMLA”) in accordance with 29 C.F.R. § 825.110(d). *Id.* at 506.

ANALYSIS: The court reasoned that the version of 29 C.F.R. § 825.110(d) in effect at the time of plaintiff’s dismissal was invalid because the “provision . . . purported to give otherwise non-eligible employees a cause of action for an employer’s failure to respond to an application for FMLA leave in contravention of the statute.” *Id.* at 507. The court found this conclusion “consistent with the recent amendment to § 825.110, which removed the remedial eligibility provision in light of the Supreme Court’s pronouncement that [another] remedial eligibility provision . . . was invalid for similar reasons.” *Id.*

CONCLUSION: The 3rd Circuit held that a claim of remedial eligibility is in contravention to the FMLA and cannot create a cause of action. *Id.*

QUESTION TWO: Whether an employee must actually take FMLA leave prior to the employee’s dismissal to prove a retaliation claim. *Id.* at 508.

ANALYSIS: The court noted that “it would be patently absurd if an employer who wished to punish an employee for taking FMLA leave could avoid liability simply by firing the employee before the leave begins.” *Id.* The court determined that this circuit had never held “that an employee fired after requesting FMLA leave but before the leave begins cannot recover for retaliation” *Id.* at 509. In addition, the court interpreted “the requirement that an employee ‘take’ FMLA leave to connote invocation of FMLA rights, not actual commencement of leave.” *Id.*

CONCLUSION: The 3rd Circuit held that “firing an employee for a valid request for FMLA leave may constitute interference with the employee’s FMLA rights as well as retaliation against the employee” even where the employee has not yet actually take FMLA leave. *Id.*

FIFTH CIRCUIT***In re Ford Motor Co.*, 58 F.3d 308 (5th Cir. 2009)**

QUESTION: Whether the court “can grant mandamus on a district court’s refusal to reconsider a pretrial [multidistrict litigation (MDL)] decision.” *Id.* at 311.

ANALYSIS: The court noted “transferor courts should use the law of the case doctrine to determine whether to revisit a transferee court’s decision,” as a bright-line rule that transferee courts should not reconsider motions from a transferor court is not consistent with 5th Circuit precedent. *Id.* at 312. Under the law of the case doctrine, the court found that both of the transferee and transferor courts’ decisions were clearly erroneous due to 5th Circuit precedent establishing that Mexico is an adequate alternate forum. *Id.* at 313. The court noted that the standard for mandamus review requires exceptional circumstances establishing either judicial usurpation of power or a clear abuse of discretion. *Id.* at 316. The court then reasoned that in the case at bar, the transferor court’s declination to review the transferee court’s forum non conveniens (FNC) decision can plainly constitute an exceptional circumstance. *Id.* The court also reasoned that because the transferor court declined to remedy the transferee court’s decision, which relied on an erroneous conclusion of law, clear abuse of discretion had taken place. *Id.*

CONCLUSION: The 5th Circuit held “the district court erred in not overruling the MDL court’s FNC decision, and that error is serious enough to require mandamus as the appropriate relief.” *Id.* at 317.

SeaQuest Diving LP v. S & J Diving Inc. (In the matter of SeaQuest Diving LP), 579 F.3d 411 (5th Cir. 2009)

QUESTION: Whether an “unsecured claim based on a state court judgment is subject to mandatory subordination under 11 U.S.C. § 510(b) because it arose from the rescission of a purchase or sale of a security of the debtor.” *Id.* at 414.

ANALYSIS: The court noted that § 510(b) “serves to effectuate one of the general principles of corporate and bankruptcy law: that creditors are entitled to be paid ahead of shareholders in the distribution of corporate assets.” *Id.* at 417. The court stated that the issue in this case is whether the claim qualifies as “a claim arising from rescission of a purchase or sale of a security of the debtor.” *Id.* at 418. Because the debtor “had not identified any cases under § 510(b) that subordinate claims arising from post-issuance rescission of a contract by mutual agreement of the parties,” the court started its analysis by looking to “cases involving the damages category for guidance.” *Id.* at 420. The court noted, in an effort to clarify the extent and scope of § 510(b), that the 2nd, 3rd, 9th and 10th Circuits “have adopted a broad reading of the damages category” and “have rejected [the notion] that § 510(b) only applies to securities fraud claims.” *Id.* at 421. The court concluded that “[f]or purposes of the damages category, the circuit courts agree that a

claim arising from the purchase or sale of a security can include a claim predicated on post-issuance conduct, such as breach of contract.” *Id.*

CONCLUSION: The 5th Circuit held that “the rescission category also extends to claims arising from post-issuance conduct” and that “[t]he scope of the rescission and damages categories should be construed consistently.” *Id.* at 422.

***Wion v. Quarterman*, 567 F.3d 146 (5th Cir. 2009)**

QUESTION: Whether “special review tolls the AEDPA limitations period.” *Id.* at 148.

ANALYSIS: The court compared the law governing good-time credit, noting “Texas law does not allow a prisoner to file a state habeas petition regarding a revocation of good-time credits unless he first obtains a written decision from the administrative procedure.” *Id.* at 148. The court then compared those regulations to “the regulations creating the special review process,” finding the latter “do not indicate that special review has any effect on a potential habeas petition.” *Id.*

CONCLUSION: The 5th Circuit held that “[b]ecause [the plaintiff] was not required to seek special review to exhaust his state remedies, AEDPA limitations were not tolled while his special review was pending.” *Id.*

***Frame v. City of Arlington*, 575 F.3d 432 (5th Cir. 2009)**

QUESTION: Whether “Title II of the [Americans with Disabilities Act] authorizes the plaintiffs’ claims; specifically, whether the City’s curbs, sidewalks, and parking lots constitute a service, program, or activity within the meaning of Title II.” *Id.* at 433. The 5th Circuit then asked, “whether those claims are subject to a statute of limitations and, if so, when the claims accrued.” *Id.*

ANALYSIS: The 5th Circuit first confronted whether Title II is applicable, beginning the analysis by looking to the other circuits, noting that the 2nd, 3rd, 5th and 9th Circuits have all either favored including public sidewalks within the scope of Title II, or construed services, programs, and activities as described in Title II broadly. *Id.* at 437. Regarding the statute of limitations issue, the 5th Circuit noted that “courts regularly apply statutes of limitation to claims under Title III of the ADA,” and declined to “treat the plaintiffs’ Title II claims differently.” *Id.* at 437–38. As to the accrual of plaintiff’s claims, the court explained that while they “borrow the statute of limitations for plaintiffs’ Title II claims from state law, federal law governs the claims’ accruals.” *Id.* at 439. When considering whether the “discovery rule” should be applied to denote the commencement of accrual, the 5th

Circuit noted that “the alleged ADA violations are not latent” and thus “attaching accrual to an individual plaintiff’s discovery effectively would eliminate the applicability of any statute of limitations in like ADA cases, and would therefore subject municipalities to unlimited and continuing liability.” *Id.* at 439–41. The 5th Circuit concluded by pointing out that “the party that asserts an affirmative defense, including the expiration of a limitations period, bears the burden of proof.” *Id.* at 441. Therefore, the defendant had the burden to establish “that the plaintiffs’ claims have expired.” *Id.*

CONCLUSION: The 5th Circuit found that “Title II authorizes the plaintiffs’ claims,” and “[w]e hold that the plaintiffs’ claims are subject to a two-year statute of limitations, and that they accrued upon the City’s completion of any noncompliant construction or alteration.” *Id.* at 433. The court further held “that it was the City’s burden to prove accrual and expiration of any limitations period.” *Id.*

***Admiral Ins. Co. v. Abshire*, 574 F.3d 267 (5th Cir. 2009)**

QUESTION: Whether the court will allow a suit under the Class Action Fairness Act of 2005 (“CAFA”) to be “commenced” more than once as appellant’s ninth amended “complaint seeks class treatment for the first time and exposes appellant to additional liability via (1) a claim for attorneys’ fees and costs, (2) the ‘resurrection’ of claims held by deceased, substitution-less plaintiffs, and (3) the ‘resurrection’ of the dual-capacity plaintiffs’ previously dismissed claims.” *Id.* at 273.

ANALYSIS: The 5th Circuit initially confronted whether “class treatment” would commence “a new civil action for purposes of CAFA.” *Id.* The court noted that “[c]onceptually, a ‘civil action’ is a more extensive, more inclusive proceeding than a ‘class action,’ which is a subset of all civil actions.” *Id.* at 273–274. Further, a “‘civil action’ may commence before it becomes a ‘class action.’” *Id.* at 274. The 5th Circuit further cited the fact that “the date on which a civil action commences is determined according to state law, and [appellant] has not invited our attention to any authority holding that controlling state law deems a civil action to have been re-commenced when a complaint is amended to seek class treatment.” *Id.* Regarding the claim for attorneys’ fees and cost, the 5th Circuit found “no authority that holds a request for attorneys’ fees does not relate back to an original filing.” *Id.* at 278. Rather the court held that “attorneys’ fees obviously arise out of the same transaction or occurrence that led to the filing of the original complaint, which is the test for relating back under both federal and [state] law.” *Id.* Finally, the 5th Circuit confronted the “resurrection” claims, stating that “any resurrection worked here does not work a ‘drastic modification’ in

the case by ‘significantly increas[ing] the size of the potential class.’” *Id.* at 275. Because no “drastic modification” has been effected, “merely melding the plaintiffs previously joined to a suit into a class for case management purposes is not itself sufficient to commence a new suit under CAFA.” *Id.*

CONCLUSION: The 5th Circuit held that whether the state or federal relation-back analysis is applied to the ninth amended complaint, there is obviously no new “civil action” and “Abshire et al. commenced this civil action only once.” *Id.* at 278–79.

***Certain Underwriters at Lloyds London v. Law*, 570 F.3d 574 (5th Cir. 2009)**

QUESTION: Whether the insured’s loses were covered under either “(1) the policy’s coverage of vandalism damage or (2) the policy’s burglary exception to its theft exclusion.” *Id.* at 575.

ANALYSIS: The court initially noted that there is “no ambiguity in the operable terms of the [insured’s] policy,” and therefore it must “interpret the plain meaning of the words to ascertain the mutual intent of the parties to the contract.” *Id.* at 578. The court then reasoned that the vandalism provision did not cover the damage because the damage was “solely to further theft.” *Id.* at 579. The court reasoned that: (1) the thieves damaged just enough material to access the stolen goods, (2) there was no evidence of malice or willful damage, and (3) damage was done entirely to gain access to the stolen property. *Id.* The court therefore reasoned that the policy excluded the damage unless the “theft exclusion’s ingress/egress exception” applied. *Id.* The court again noted that the exception was not ambiguous, and therefore reasoned that the phrase “breaking into or exiting” should not “be given a meaning any broader than its ordinarily understood meaning: entry into the interior space of the building itself.” *Id.* at 580. The court further reasoned that the Texas definition of burglary supported a requirement of “bodily intrusion into the interior of the building.” *Id.* at 581.

CONCLUSION: The 5th Circuit held that because the damaged property was located on the building exterior, the damage suffered “resulted from neither vandalism nor the breaking into or exiting of the insured building by burglars;” therefore the policy excluded coverage. *Id.* at 583.

***United States v. Dison*, 330 F. App’x 56 (5th Cir. 2009)**

QUESTION: Whether a defendant, who altered currency as opposed to manufacture it in its entirety, should receive an offense level

calculated under Sentencing Guidelines Section 2B5.1 or 2B1.1. *Id.* at 61.

ANALYSIS: The court began the “effort to resolve the sentencing questions by using ordinary rules of statutory construction.” *Id.* The court reasoned that “[a]mbiguity . . . will cause the court to look for evidence of meaning in other relevant sources.” *Id.* The court noted that “another location for relevant language in this case is the heading or title to Section 2B1.1.” *Id.* at 62. The court noted that the Sentencing Commission’s proposed “amendment was not in effect at the time the defendants were sentenced,” and therefore, “[i]t remains ineffective.” *Id.* at 63. The court further noted that “[f]aced with such ambiguity, we are constrained to apply the rule of lenity in this case.” *Id.* Thus, the court held that “when [a] choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.” *Id.*

CONCLUSION: Thus, the 5th Circuit held “[s]ection 2B5.1 to be the Guideline provision for determining the defendants’ base offense levels . . .” *Id.*

***Affiliated Computer Servs. Inc. v. Wilmington Trust Co.*, 565 F.3d 924 (5th Cir. 2009)**

QUESTION: Whether § 314 of the Trust Indenture Act of 1939 (TIA) requires a debt issuer to file all reports to its trustees, even if the reports were not filed with the Securities and Exchange Commission (SEC). *Id.* at 928.

ANALYSIS: The court considered whether the debt issuer was only required to file the necessary reports to the SEC under 15 U.S.C. §§ 78m and 77o(d), or if other reports that were completed but not sent to the SEC also needed to be disclosed. *Id.* at 926–29. The 8th Circuit previously took a limited view, not requiring any independent reporting to trustees. *Id.* at 928–30. That court reasoned that “the TIA’s reference to §§ 13 and 15(d) of the Exchange Act merely identifies *which* reports must eventually be forwarded to the trustee. It does not independently impose any particular timetable for filing nor does it incorporate the SEC’s regulatory deadlines.” *Id.* at 929 (emphasis in original).

CONCLUSION: The 5th Circuit agreed with the 8th Circuit and held that “the TIA does not impose an independent obligation timely to file reports with the SEC. Rather, § 314(a) requires [the debt issuer] to provide copies of reports that are actually filed with the SEC.” *Id.* at 930.

***St Paul Fire & Marine Ins. Co. v. Labuzan*, 579 F.3d 533 (5th Cir. 2009)**

QUESTION: Whether creditors of the bankruptcy debtor “have standing to claim damages based on violations of the bankruptcy automatic-stay provision, 11 U.S.C. § 362(k).” *Id.* at 536.

ANALYSIS: The 5th Circuit reasoned that creditors must “meet both constitutional and prudential requirements” in order to establish standing pursuant to § 362(k). *Id.* at 539. The court noted that creditors easily satisfied the constitutional standing requirement by showing “(1) an injury in fact (2) that is fairly traceable to the actions of the defendant and (3) that likely will be redressed by a favorable decision.” *Id.* The court found that prudential standing requirements are also satisfied “based on § 362(k)’s plain language, its legislative history, the Bankruptcy Code’s purposes, and the weight of judicial authority.” *Id.* at 545.

CONCLUSION: The 5th Circuit held that creditors of a bankruptcy debtor have standing to claim damages for violations of the bankruptcy automatic-stay provision under § 362(k). *Id.*

***United States v. Dison*, 573 F.3d 204 (5th Cir. 2009)**

QUESTION: Whether a defendant who pleads guilty to failure to surrender for service of sentence in violation of 18 U.S.C. § 3146 is subject to a sentence enhancement under § 3147 for committing that offense while on release. *Id.* at 207.

ANALYSIS: The court noted that the plain language of § 3147 unambiguously applied to the petitioner and therefore, the rule of lenity did not apply. *Id.* at 208. The court reasoned that even if the “§ 3147 enhancement could be read as extending to the § 3146 offense of failure to appear,” the Double Jeopardy Clause of the Fifth Amendment is not violated. *Id.* The court further alluded to the Supreme Court’s definition of the nature of double jeopardy protection with respect to “cumulative sentences imposed in a single trial,” as doing “no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.” *Id.* The court reasoned that the unambiguous statutory language coupled with a non-absurd result amounted to a presumption that “Congress intended the § 3146 and the § 3147 enhancement to interact in the matter that the plain text mandates,” and that if Congress finds the result “unpalatable,” it would be “within its power to rewrite the existing statute.” *Id.* at 210.

CONCLUSION: Under § 3147 and § 3C1.3 of the U.S. Sentencing Guidelines Manual, “a defendant is subject to the enhancement for committing an offense while on release even if the defendant, while on

release, commits only the offense of failure to appear in violation of 18 U.S.C. § 3146.” *Id.*

***United States v. Harris*, 566 F.3d 422 (5th Cir. 2009)**

QUESTION: Whether “a magistrate judge taking a pretrial motion under advisement is subject to a statutory limit of thirty excludable days” pursuant to 18 U.S.C. § 3161 (the “Speedy Trial Act”). *Id.* at 430.

ANALYSIS: The court explained that the “Speedy Trial Act, which is designed to protect a criminal defendant’s constitutional right to a speedy trial and to serve the public interest in bringing prompt criminal proceedings, requires that a defendant’s trial commence within seventy days from his indictment or initial appearance, whichever is later.” *Id.* at 428. The court pointed out that certain delays will be excluded from the Act’s tolling period, including “[d]elay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on . . . such motion.” *Id.* at 429. The court further noted that such exclusions will also include “time [needed] after a hearing [] to allow the trial court to assemble all papers reasonably necessary to dispose of the motion” and explained that at such a point, the court will be deemed to have taken the motion “under advisement.” *Id.* The court reasoned that this will give a court “thirty excludable days in which to rule,” and that “the clock begins to tick again at the end of that thirty-day period, regardless of whether the court has ruled on the motion.” *Id.* The court explained that it was following other circuits that have considered the issue, pointing out that they have all “refused to provide the magistrate a blank check to consume unlimited time before issuing his report and recommendation on the motion.” *Id.* at 430.

CONCLUSION: The 5th Circuit held that a “magistrate judge taking a pretrial motion under advisement is subject to a statutory limit of thirty excludable days under § 3161(h)(1)(H).” *Id.*

***United States v. Sylvester*, 583 F.3d 285 (5th Cir. 2009)**

QUESTION: Whether “the government may use a defendant’s statements made in the course of plea negotiations in its case-in-chief, when the defendant, as a condition to engaging in negotiations with the government, knowingly and voluntarily waived all rights to object to such use.” *Id.* at 288.

ANALYSIS: The court noted that the Supreme Court in *United States v. Mezzanato* “upheld a more limited waiver . . . that allowed the government to use statements made in plea negotiations to impeach the defendant if he testified at trial,” and this court could see “no convincing reason for not extending *Mezzanato*’s rationale to this case.” *Id.* at 288–

89. The court reiterated the reasoning from *Mezzanato*, stating that a waiver does not affect the “integrity of the judicial system,” a waiver is not “at odds with Rule 410’s goal of encouraging voluntary settlement,” and a waiver does not “invite prosecutorial overreaching and abuse.” *Id.* at 289–90. The court further reasoned that *Mezzanato*’s reach should be extended to a case-in-chief waiver for those aforementioned reasons. *Id.* at 291–94.

CONCLUSION: The 5th Circuit held that the law announced in *Mezzanato* should be extended to this case and thus, “the government may use a defendant’s statements made in the course of plea negotiations in its case-in-chief, when the defendant, as a condition to engaging in negotiations with the government, knowingly and voluntarily waived all rights to object to such use.” *Id.* at 288.

***United States v. Taylor*, 582 F.3d 558 (5th Cir. 2009)**

QUESTION: Whether a district court’s order of both restitution payable to FEMA and forfeiture to the Department of Justice constitutes “double recovery” for the United States. *Id.* at 566.

ANALYSIS: The court found that under the plain language of the restitution and forfeiture statutes at bar, “forfeiture was mandated and imposition of restitution was permitted.” *Id.* at 565. The court, adopting the reasoning of the 7th Circuit, found “FEMA, an executive agency under control of the United States Department of Homeland Security, is a distinct entity from the Department of Justice.” *Id.* at 566.

CONCLUSION: The 5th Circuit found “[t]he district court’s order of restitution and forfeiture against [the plaintiff] will not result in double recovery to the government and was therefore not an abuse of discretion.” *Id.* at 567.

***Ford Motor Credit Co., LLC v. Dale*, 582 F.3d 568 (5th Cir. 2009)**

QUESTION: Whether the exception to bifurcation of a lien creditor’s secured claim under 11 U.S.C. § 1325(a) for purchase-money security interest in an automobile applies to those portions of a claim attributable to the pay-off of negative equity in a trade-in vehicle, gap insurance, and an extended warranty. *Id.* at 570.

ANALYSIS: The court began its analysis by recognizing that “[t]he phrase ‘purchase-money security interest’ does not have an ordinary or generally understood meaning; rather, it is a term of art.” *Id.* at 573. As the 2nd Circuit has noted, Congress must have intended for courts to apply state law to determine the meaning of “purchase-money security interest.” *Id.* Under Texas law, which the court found applied to defining the statutory language, “a ‘purchase-money security interest’ in

goods is defined as a security interest in goods that are ‘purchase-money collateral,’ and ‘purchase-money collateral’ is in turn defined as goods that secure a ‘purchase-money obligation.’” *Id.* Texas law provides that the “purchase-money obligation contains two prongs: (i) the price of the collateral, and (ii) value given to enable the debtor to acquire rights in or use of the collateral.” *Id.* The state’s Uniform Commercial Code provides that the “price” and “value given” prongs “include certain expenses that might not otherwise come within the common understanding of ‘price,’ such as ‘freight charges,’ ‘demurrage,’ ‘administrative charges’” and other similar obligations. *Id.* at 574. According to the court, the phrase “‘and other similar obligations’ demonstrates that the enumerated expenses are merely examples and do not constitute an exhaustive list of eligible expenses.” *Id.*

CONCLUSION: The 5th Circuit held that “negative equity, gap insurance, and extended warranties constitute ‘purchase-money obligations’ under Texas law,” thereby bringing the claim within the exception of 11 U.S.C. § 1325(a) and preventing bifurcation of the debt. *Id.* at 575.

***Castellanos-Contreras v. Decatur Hotels LLC*, 576 F.3d 274 (5th Cir. 2009)**

QUESTION: “Whether, under the FLSA [Fair Labor Standards Act], an employer must reimburse guest workers for (1) recruitment expenses, (2) transportation expenses, or (3) visa expenses, which the guest workers incurred before relocating to the employer’s location.” *Id.* at 276.

ANALYSIS: For recruitment expenses, the court determined that the FLSA provisions and implementing regulations at issue were not applicable unless they were kickbacks, which they were not in the case at bar. *Id.* at 283–84. The court further noted that this case was distinguishable from one where recruitment expenses were part of an employer’s business expense because the company there “[r]equired guest workers to hire a particular recruitment company.” *Id.* at 284. For transportation expenses, the court considered the Department of Labor’s policy and concluded that it was incoherent and did not deserve deference. *Id.* at 280–81. It further noted that the kickback provision, other regulations for outbound expenses, and case law did not apply to inbound expenses. *Id.* at 281–83. Finally, the court noted with regard to visa expenses that regulations “[c]larify that employee-paid expenses to obtain H-2B visas more properly belong to the guest worker than to the employer.” *Id.* at 280.

CONCLUSION: The 5th Circuit held that the employer “incurred no FLSA liability to reimburse its guest workers for the recruitment fees, transportation costs, or visa fees that they incurred to work in the United States.” *Id.* at 284.

SIXTH CIRCUIT

***Reinhardt v. Vanderbilt Mortgage & Fin., Inc.*, 563 F.3d 558 (6th Cir. 2009)**

QUESTION: Whether “§ 1322(b)(2) of the [Bankruptcy] Code precludes the modification of a secured interest in an unattached mobile home if the secured creditor also holds a security interest in the real property beneath the home.” *Id.* at 562.

ANALYSIS: The court looked to the statute, interpreting § 1322(b)(2) to “contain two requirements: that the property be real property and that it be the debtor’s principal residence.” *Id.* at 562. The court then affirmed the lower court decision to analyze whether the mobile home qualified as real property, noting “bankruptcy courts in this circuit, recognizing that the Code does not define ‘real property,’ have looked to state law to determine whether a mobile home constituted real property.” *Id.* at 563–64.

CONCLUSION: The 6th Circuit held that “[b]ecause Ohio state law is clear that Debtors’ mobile home is not real property, the bankruptcy court correctly held that it could modify [the creditor’s] secured claim on the mobile home under § 1322(b)(2), despite [the creditor’s] secured interest on both the mobile home and the real property beneath it.” *Id.* at 564–65.

***United States v. Herrera-Zuniga*, 571 F.3d 568 (6th Cir. 2009)**

QUESTION: Whether the authority recognized by the Supreme Court that courts may “vary from the crack cocaine Guidelines based on a *policy* disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence,” is “limited to the crack cocaine context.” *Id.* at 584–85 (internal citations omitted) (emphasis in original).

ANALYSIS: The 6th Circuit looked to the Supreme Court’s holding that, “at least with respect to the crack cocaine Guidelines, a categorical disagreement with and variance from the [Sentencing] Guidelines is not suspect.” *Id.* (internal quotations omitted). The Supreme Court further clarified by stating, “sentencing judges possess the authority to ‘categorically’ reject the sentencing range prescribed by the Guidelines,

even in a mine-run case where there are no ‘particular circumstances’ that would otherwise justify a variance from the Guidelines’ sentencing range.” *Id.* (internal quotations omitted). The Court “expressly noted that because the Guidelines are advisory only, as a *general matter*, courts may vary from Guidelines ranges based solely on policy considerations, including disagreements with the Guidelines.” *Id.* (emphasis in original) (internal quotations omitted). The 6th Circuit also noted that all the other circuits who have considered this issue have come to the same conclusion. *Id.* at 585.

CONCLUSION: By applying the Supreme Court’s rationale, the 6th Circuit held that the district court had “an adequate and appropriate basis for refusing to follow the advisory Guidelines range.” *Id.*

***QSI Holdings, Inc. v. Alford*, 571 F.3d 545 (6th Cir. 2009)**

QUESTION: Whether “§546(e) of the Bankruptcy Code applies to privately traded securities.” *Id.* at 547.

ANALYSIS: The 6th Circuit looked to a recent case in the 8th Circuit with facts similar to the instant case. The court cited that “[n]othing in the relevant statutory language suggests Congress intended to exclude these payments from the statutory definition of ‘settlement payment’ simply because the stock at issue was privately held.” *Id.* at 550. The 6th Circuit described the instant case as one that “considers a transaction with the characteristics of a common leveraged buyout involving the merger of nearly equal companies, and nothing in the statutory language indicates that Congress sought to limit that protection to publicly traded securities.” *Id.*

CONCLUSION: The 6th Circuit held “that §546(e) is not limited to publicly traded securities but also extends to transactions such as the leveraged buyout at issue here, involving privately held securities.” *Id.* at 547.

***Cunningham v. Interlake Steamship Co.*, 567 F.3d 758 (6th Cir. 2009)**

QUESTION: Whether an analogous statute of limitations period or another ruling applies to an action for “maintenance and cure,” which does not have a specific statute of limitations. *Id.* at 759.

ANALYSIS: The court noted that when a “cause of action does not have a specific statute of limitations, the equitable defense of laches can serve to limit the period of time during which an individual may file suit,” and a number of federal courts have applied laches to determine the timeliness of claims for maintenance and cure. *Id.* at 761. The court then noted that it had used the doctrine of laches in similar settings, and a party “asserting laches must show: (1) lack of diligence by the party

against whom the defense is asserted, and (2) prejudice to the party asserting it.” *Id.* at 761–62 (internal quotations omitted). The court then noted that “there is a strong presumption that a plaintiff’s delay in asserting its rights is reasonable as long as an analogous state statute of limitations has not elapsed.” *Id.* at 762. The court then reasoned that other courts “have used the three-year statute of limitations found in the Jones Act as an analogous statute of limitations period” and agreed that the maintenance and cure claim is “more similar to a maritime tort action than to a contractual dispute.” *Id.*

CONCLUSION: The 6th Circuit held that a three-year statute of limitations for federal maritime torts is the appropriate benchmark for the maintenance and cure claim. *Id.*

***Limbright v. Hofmeister*, 566 F.3d 672 (6th Cir. 2009)**

QUESTION: Whether “a district court must have ancillary jurisdiction to summarily enforce a settlement agreement.” *Id.* at 674.

ANALYSIS: The court first noted that while the Supreme Court established that “a district court may . . . summarily enforce a settlement agreement if the court has ancillary jurisdiction over the breach claim,” circuit courts that have addressed this issue “held that a district court may rely on a non-ancillary source of jurisdiction.” *Id.* The court noted that summary enforcement of settlement agreements has long been approved as an efficient resolution to disputes, and such a benefit accrued “regardless of the source of jurisdiction.” *Id.* at 675. The court finally noted that the appellants misapplied precedent as the court understood the Supreme Court’s “failure to consider diversity jurisdiction explicitly” as reflecting an “obvious lack of the required amount in controversy . . . not a hidden intent to preclude summary enforcement based on diversity jurisdiction.” *Id.* at 676.

CONCLUSION: The 6th Circuit held that Supreme Court precedent and 6th Circuit case law “allow an ‘independent basis for federal jurisdiction’ such as diversity or federal question jurisdiction, to support summary enforcement.” *Id.*

***In re Mitan*, 573 F.3d 237 (6th Cir. 2009)**

QUESTION: Whether a bankruptcy court has the power to issue a retroactive order converting a bankruptcy case from Chapter 11 to Chapter 7 nunc pro tunc. *Id.* at 239.

ANALYSIS: The court noted that the bankruptcy court gave sufficient notice of the conversion because the Bankruptcy Rules require notice twenty days before the hearing and that notice was given within the time allotted. *Id.* at 244. The court related that entering a nunc pro

tunc order converting a petition from Chapter 11 to Chapter 7 is permitted in a case full of “extraordinary circumstances warranting equitable relief.” *Id.* at 246. The court further reasoned that “the decision to dismiss or convert a Chapter 11 case falls within the sound discretion of the Bankruptcy Court and is thus reviewed only for an abuse of that discretion.” *Id.* at 247. In this case, the court found that there was no abuse of discretion. *Id.* at 247–48.

CONCLUSION: The 6th Circuit held that “under the circumstances of this case the bankruptcy court did have the power to issue the retroactive conversion order” to convert Chapter 11 to Chapter 7 nunc pro tunc. *Id.* at 248.

***Sanford v. Main St. Baptist Church Manor, Inc.*, 327 F. App’x 587 (6th Cir. 2009)**

QUESTION: “Whether and how different employees of joint employers may be aggregated for purposes of satisfying the numerosity requirement” of Title VII of the Civil Rights Act of 1964. *Id.* at 592.

ANALYSIS: The court reasoned that “several other jurisdictions have allowed aggregation in certain circumstances.” *Id.* at 593. The court noted that in aggregating employees, “only those employees over whom the employer has a certain amount of control should be counted.” *Id.* at 594. The court further noted that “a variety of factors, such as exercise of authority to hire, fire, and discipline . . . can bear on whether an entity, which is not the formal employer, may be considered a joint employer.” *Id.* Ultimately, the court determined that the following factors should be applied “to determine when aggregation is appropriate: (1) the extent of the employer’s control and supervision over the worker, including directions on scheduling and performance of work; (2) the kind of occupation and nature of skill required, including whether skills are obtained in the work place; (3) responsibility for the costs of operation, such as equipment, supplies, fees, licenses, workplace, and maintenance of operations; (4) method and form of payment and benefits; and (5) length of job commitment and/or expectations.” *Id.*

CONCLUSION: Thus the 6th Circuit held that aggregation of joint employees by joint employers for purposes of the numerosity requirement under Title VII is permissible when one of the joint employers has sufficient control over the employees of the other joint employer. *Id.*

***Thornton v. Graphic Commc'ns. Conf. of the Int'l Bhd. of Teamsters Supplemental Ret. & Disability Fund*, 566 F.3d 597 (6th Cir. 2009)**

QUESTION: Whether “post-retirement benefit increases are accrued and protected by the anti-cutback rule” under ERISA. *Id.* at 603 (internal quotations omitted).

ANALYSIS: The court reasoned that a “thorough analysis of the text and context of [the statute] demonstrates that Congress did not consider a post-retirement increase in pension benefits to be an accrued benefit.” *Id.* at 606 (internal quotations omitted). The court noted that “repeated emphasis on the accrual of benefits during service makes plain that the terms of pension plan document(s) in effect while a participant worked for a covered employer dictate his or her accrued benefits.” *Id.* (internal quotations omitted). The court further noted that “Congress’s stated motivations for enacting ERISA . . . show no legislative concern for the guarantee of benefits doled out of the pension plan’s largesse after the employee ceases covered employment.” *Id.* at 606–07. Additionally, the court further reasoned that nowhere in the “language of [the statute], or statutory construction thereof . . . remotely suggests that a given participant may amass accrued benefits after he or she permanently separates from covered employment.” *Id.* at 606 (internal quotations omitted).

CONCLUSION: The 6th Circuit held that a “post-retirement increase in benefits does not create an accrued benefit for a given participant under [ERISA] unless it is in accordance with the plan in effect while the employee works in the service of the employer.” *Id.* (internal quotations omitted).

***Moses v. Providence Hosp. & Med. Ctrs., Inc.*, 561 F.3d 573 (6th Cir. 2009)**

QUESTION: Whether the Emergency Medical Treatment and Active Labor Act (EMTALA) authorizes a private cause of action against an individual physician. *Id.* at 587.

ANALYSIS: The court looked at the statutory construction of the EMTALA. *Id.* The court compared the civil enforcement provision with the preceding government enforcement provision and found no reference to physicians within the civil enforcement provision. *Id.* The court decided that Congress intentionally omitted any reference to physicians in that provision. *Id.* Furthermore, the court referenced the legislative history behind the EMTALA and specified that a cause of action under the civil enforcement provision can only be brought against the hospital. *Id.*

CONCLUSION: The 6th Circuit held that the Emergency Medical Treatment and Active Labor Act does not allow a private cause of action to be brought against an individual physician. *Id.*

***United States v. Shafer*, 573 F.3d 267 (6th Cir. 2009)**

QUESTION: Whether self-masturbation is covered by 18 U.S.C. § 2246(3)'s definition of "sexual contact," under which "sexual contact" has been defined as "the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." *Id.* at 272–73.

ANALYSIS: The Court reasoned that 18 U.S.C. § 2246(2) and (3) contain different definitions for "sexual act" and "sexual contact" respectively. *Id.* at 273. A "sexual act" is defined as an act that involves "another person," where a "sexual contact" involves "any person." *Id.* The court noted that "any person" included a person touching himself or herself. *Id.* The court stated that "because Congress chose to use different language when defining 'sexual contact,' it seems clear that Congress intended not to limit 'sexual contact' in the same way it limited 'sexual act.'" *Id.* The court further reasoned that "the Sexual Abuse Act of 1986, of which § 2246(3) is a part, was drafted with the intention of reaching all forms of sexual abuse of another [and] [t]he activity at issue in this case—the coerced self-masturbation by a minor child—is a form of sexual abuse of another." *Id.* at 274 (internal quotations omitted).

CONCLUSION: The 6th Circuit held "that 'sexual contact,' as defined by § 2246(3), includes self-masturbation, as long as the other requirements of the statute are satisfied." *Id.* at 273–74.

***Bowling Green v. Martin Land Dev. Co.*, 561 F.3d 556 (6th Cir. 2009)**

QUESTION: Whether 49 U.S.C. § 40103 implies a private cause of action. *Id.* at 559.

ANALYSIS: First, the court noted that "[t]he language of Section 40103(e) does not explicitly provide for a private cause of action, nor does any other provision of the statute. Thus, the only basis for asserting a claim under that provision would be that the statute implies a private right of action." *Id.* The court articulated the Supreme Court's four-part test for determining whether an implied private cause of action exists. *Id.* The court stated that congressional intent is the determinative factor, reasoning "[i]f Congress has intended to create a private right, it could have done so at the time." *Id.* In further support of its position, the court lastly pointed to a comprehensive administrative enforcement scheme

that “strongly suggests that Congress did not intend to imply a private right of action.” *Id.* at 561.

CONCLUSION: The 6th Circuit held 49 U.S.C. § 40103 does not provide a private cause of action. *Id.*

***Terrell v. United States*, 564 F.3d 442 (6th Cir. 2009)**

QUESTION: Whether the United States Parole Commission may use videoconferencing in parole determination hearings in light of the statutory requirement of 18 U.S.C § 4208(e). *Id.* at 444.

ANALYSIS: Section 4208(e) requires that “[t]he prisoner shall be allowed to appear and testify on his own behalf at the parole determination hearing.” *Id.* The court interpreted “appear” under Section 4208(e) by noting that “if we were to conclude that the statute is unambiguous, an in-person hearing would be required; otherwise, we would defer to the agency’s interpretation that videoconferencing satisfies the ‘appear’ requirement.” *Id.* at 449. The court then stated, “statutory ambiguity must be determined at the time the language was enacted into law.” *Id.* The court observed that “[a]t the time [the term] ‘appear’ pursuant to 18 U.S.C. § 4208(e) was enacted into law, videoconferencing did not exist.” *Id.* Furthermore, the court stated that under its plain meaning, “[i]n 1976, to appear meant to be physically present.” *Id.* at 451. The court then acknowledged that “[n]othing in the text of those [statutory] extensions [after 1976] gives an indication of Congressional awareness of videoconferencing much less a desire to enact it into the statutes.” *Id.* at 454.

CONCLUSION: The 6th Circuit held that as “[t]he statute unambiguously required an in-person parole proceeding” at the time it was enacted, and “Congress never acted to change the statute to allow videoconferencing,” parole determination proceedings conducted via videoconferencing violates 18 U.S.C. § 4208(e) and are therefore invalid. *Id.* at 454–55.

***Ottawa Tribe of Okla. v. Logan*, 577 F.3d 634 (6th Cir. 2009)**

QUESTION: Whether the Ottawa Tribe of Oklahoma, under various treaties, “retains the right to fish in Lake Erie, and that the state of Ohio, through the Director of the Ohio Department of Natural Resources . . . lacks the authority to regulate this activity.” *Id.* at 634.

ANALYSIS: The court found that under the Treaty of Greenville, “Indian tribes residing in Ohio and Indiana . . . ceded to the United States more than one half of the present state of Ohio.” *Id.* at 635. The court noted that “[a]ll of the subsequent treaties relevant to this case regarded land to which the tribes held the right of continued occupancy under the

Treaty of Greenville,” and that “[i]n each treaty, the Tribe ceded more and more land to the United States,” where “[n]one of these treaties granted the Tribe stronger property rights than it had held previously.” *Id.* at 638–39. Thus, the court determined that “whatever fishing rights the Tribe may have retained under [other treaties], those rights were the same as, or lesser than, the rights it retained under the Treaty of Greenville.” *Id.* at 639.

CONCLUSION: The 6th Circuit held that “because the Tribe, under these treaties, retained at most a right of occupancy to the lands in Ohio, and this right was extinguished upon abandonment, any related fishing rights it may have reserved were similarly extinguished when the Tribe removed west of the Mississippi.” *Id.* at 634.

***Allen v. Butler County Comm’r*, 331 F. App’x 389 (6th Cir. 2009)**

QUESTION: Whether “an employee on FMLA leave may be terminated for violating the more stringent requirements of a concurrent paid sick leave policy.” *Id.* at 394.

ANALYSIS: The court reasoned that an employer’s paid sick leave policy “merely sets forth obligations of employees who are on leave, regardless of whether the leave is pursuant to the FMLA.” *Id.* at 395 (internal citations omitted). The court determined that the employer’s call-in requirement helps “ensure[] that employees who are on leave from work do not abuse their leave.” *Id.* at 396. The court noted the employer’s “internal call-in policy neither conflicts with nor diminishes the protections guaranteed by the FMLA.” *Id.*

CONCLUSION: The 6th Circuit held “nothing in the FMLA prevents employers from ensuring that employees who are on leave from work do not abuse their leave.” *Id.*

***Saginaw Hous. Comm’n v. Bannum, Inc.*, 576 F.3d 620 (6th Cir. 2009)**

QUESTION: Whether “a federal court should abstain from a decision involving the interpretation of a local land use ordinance.” *Id.* at 626.

ANALYSIS: The court found that federal forum should abstain from hearing statewide policies so as not to disrupt “state regulatory process,” in order to facilitate “the relationship between the federal government and the states.” *Id.* The court noted “the importance of preserving the rightful independence of state governments in carrying out their domestic policy.” *Id.* (internal quotations omitted). The court determined, however, that “[m]unicipalities have no such independence,” and unlike states, municipalities “are not themselves sovereign.” *Id.*

CONCLUSION: The 6th Circuit ruled that federal forum should abstain from hearing only “state policy, rather than local policy.” *Id.* at 628.

***Anderson-Tully Co. v. Fed. Ins. Co.*, 2009 U.S. App. LEXIS 21141 (6th Cir. Sept. 23, 2009)**

QUESTION: Whether the word “parties,” pursuant to a dismissal under Federal Rule of Civil Procedure 41(a)(1)(A)(ii), requires only those entities remaining in an appellate action to sign the stipulation in order to satisfy the Rule and complete the dismissal. *Id.* at *10.

ANALYSIS: Defendant contended that the “dismissal was not effective without a court order because it did not include the signatures of ‘all parties who have appeared,’ which [included Defendant].” *Id.* at *11 (emphasis in original). In determining who is included in the word “parties,” the court noted that “the drafters could just as easily have written ‘all existing parties who have appeared,’ or ‘all remaining parties who have appeared,’” but instead choose to write “all parties who have appeared.” *Id.* at *12 (emphasis in original). The court then pointed to the drafters’ usage of modifiers in Rule 19(b) stating that “the drafters used the phrase ‘existing parties’ to describe those parties currently in the action, and in Rule 25(a)(2), the drafters used the phrase ‘remaining parties.’” *Id.* at *13. The court subsequently noted that “once the litigation has terminated and the appeal stage has begun, the word ‘parties’ unquestionably means those entities that *were* parties to the litigation, no matter when (or how) they were removed from the litigation.” *Id.* at *14 (emphasis in original).

CONCLUSION: The court found the “plain meaning of ‘all parties who have appeared’ to include all entities who have appeared in the action as parties,” including parties removed from the action through summary judgment. *Id.* Without convincing contrary authority, the court found that the “more prudent course is to decline the invitation to qualify the meaning of the word ‘parties’ when the drafters could have done so themselves” *Id.*

SEVENTH CIRCUIT

***United States v. Patterson*, 576 F.3d 431 (7th Cir. 2009)**

QUESTION: Whether a violation of 18 U.S.C. § 2423(a), which prohibits transporting a minor in interstate commerce with intent that the minor engage in prostitution, qualifies as a ‘crime of violence’ under the Federal Sentencing Guidelines. *Id.*

ANALYSIS: The court reasoned that while the crime as defined by “statute does not contain as an element any use of violence or force . . . [a] violation of the statute creates a significant risk of violence against the victim by the perpetrator as well as third parties.” *Id.* at 442. The court further reasoned that “the risk of violence which attends a violation of 18 U.S.C. § 2423(a) justifies its classification as ‘violent’ and that 18 U.S.C. § 2423(a) is therefore ‘similar in kind’ to the Guideline’s enumerated crimes.” *Id.* The court acknowledged that “the Supreme Court has not definitively indicated whether ‘attendant risks’ should be taken into account when analyzing whether a crime is similarly violent,” but for this crime “consideration of this factor would appear to be appropriate in light of the fact that the second clause of U.S.S.G. § 4B1.2(2) itself refers to the ‘potential risk’ inherent in crimes of violence.” *Id.*

CONCLUSION: The 7th Circuit held that “18 U.S.C. § 2423(a) is ‘similar in kind’ to the enumerated crimes in U.S.S.G. § 4B1.2(2) and is a crime of violence for purposes of the Sentencing Guidelines.” *Id.* at 444.

***United States v. Cox*, 577 F.3d 833 (7th Cir. 2009)**

QUESTION: Whether “knowledge of a victim’s minor status is an element of the [18 U.S.C.] § 2423(a) offense.” *Id.* at 836.

ANALYSIS: The court held that “the most natural reading of § 2423(a) is that the adverb ‘knowingly’ modifies only the verb ‘transports’ and does not extend to the victim’s minor status.” *Id.* The court additionally determined that “the best reading of § 2423(a) is that the inclusion of age was intended to create an aggravating factor for penological purposes, in order to provide greater protection against the sexual exploitation of minors.” *Id.* at 837.

CONCLUSION: The 7th Circuit concluded “that the district court correctly held that for purposes [of] §2423(a) the Government need not prove that [the defendant] knew that [the victim] was a minor.” *Id.* at 838.

***Ruth v. Triumph P’ships*, 577 F.3d 790 (7th Cir. 2009)**

QUESTION: Whether a communication “sent in connection with collection of a debt should be measured by an objective standard rather than a subjective one” pursuant to the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq. *Id.* at 798.

ANALYSIS: The court determined that to hold “that a communication is made in connection with collection of a debt—and, therefore, is subject to the FDCPA’s protections—only if the

unsophisticated consumer recognizes it as such, would stand the statute on its head.” *Id.* The court found that “[u]nscrupulous debt collectors could shield themselves from liability simply by disguising their collection letters as something else,” and “Congress’ intent in enacting the FDCPA was not to encourage debt collectors to deceive consumers.” *Id.*

CONCLUSION: The 7th Circuit held that “whether a communication was sent ‘in connection with’ an attempt to collect a debt is a question of objective fact, to be proven like any other fact,” and “need not be established by extrinsic evidence of what the unsophisticated consumer might think.” *Id.*

***Twenhafel v. State Auto Prop. & Cas. Ins. Co.*, 581 F.3d 625 (7th Cir. 2009)**

QUESTION: Whether an insurance policy’s exclusion of “property in the open” refers to property simply left outside, or in the alternative, property unprotected from the elements. *Id.* at 627.

ANALYSIS: The court noted that the phrase “property in the open” is not defined in the insurance policy. *Id.* at 629. Therefore, in order to give meaning to the undefined phrase, the court first recognized that the insurance policy was “clear and unambiguous, and not susceptible to more than one interpretation.” *Id.* at 630. The court further recognized that “the common or ordinary meaning of the phrase controls.” *Id.* Based on this standard, the court reasoned that defining “property in the open” to mean all property left outside was over-inclusive, and is therefore, “something different than its [‘property in the open’] common or ordinary meaning.” *Id.* at 629–30.

CONCLUSION: The 7th Circuit held that “property in the open” excludes insurance coverage for items “unprotected from the elements” as opposed to property simply left outside. *Id.* at 629.

EIGHTH CIRCUIT

***Serna v. Goodno*, 567 F.3d 944 (8th Cir. 2009)**

QUESTION: What is the appropriate standard for considering whether a particular search violates the Fourth Amendment rights of a person who is involuntarily civilly committed as a sexually dangerous person? *Id.* at 948.

ANALYSIS: The court noted that the standard applicable to an alleged seizure of an involuntarily committed person is equivalent, in the 8th Circuit, to “the . . . standard usually applied to . . . claims brought by

pretrial detainees.” *Id.* The court then cited the Supreme Court’s prior analogy between pretrial detainees and civilly committed persons “as two groups that could be subjected to liberty restrictions” so long as they were not tantamount to punishment but rather reasonably related to legitimate government objectives. *Id.*

CONCLUSION: The 8th Circuit held that the standard applicable in considering whether a particular search violates the Fourth Amendment rights of a person who is involuntarily civilly committed is the same standard applied to the alleged seizure of an involuntarily civilly committed person—a reasonableness test “requir[ing] a balancing of the need for the particular search against the invasion of personal rights that the search entails.” *Id.*

***United States v. Bender*, 566 F.3d 748 (8th Cir. 2009)**

QUESTION: Whether a special condition banning a defendant from entering “a public or private library facility at any location” within a 10-year supervised release is overly broad. *Id.* at 753 (internal quotations omitted).

ANALYSIS: The court noted that “[t]erms and conditions of supervised release are reviewed for abuse of discretion.” *Id.* at 751. The court reasoned that conditions must: be “reasonably related to the sentencing factors set forth in 18 U.S.C. § 3553(a) [involve] no greater deprivation of liberty than is reasonably necessary for the purposes set forth in § 3553(a);” and be “consistent with any pertinent policy statements issued by the Sentencing Commission.” *Id.* The court noted that it has previously been “particularly reluctant to uphold sweeping restrictions on important constitutional rights.” *Id.* at 753 (internal quotations omitted). The court further reasoned that although the defendant had “improperly used library resources, libraries are essential for research and learning.” *Id.* The court noted that the District Court had imposed an absolute ban on defendant’s access to libraries, and “such bans are disfavored.” *Id.*

CONCLUSION: The 8th Circuit held that “the district court abused its discretion” and could “formulate a more tailored restriction” upon remand. *Id.* at 753.

***United States v. Barrera*, 562 F.3d 899 (8th Cir. 2009)**

QUESTION: Whether a defendant’s probation term ends upon his deportation. *Id.* at 801.

ANALYSIS: The court first noted that federal, not state, law controls in determining whether a defendant is subject to a criminal sentence. *Id.* at 901. The court then pointed to a 1st Circuit decision which “relied on

immigration law” in finding “that a deportation action should proceed apace notwithstanding an alien’s parole status ‘or possibility of arrest or further imprisonment.’” *Id.* at 902. Finally, the court cited that the 1st, 2nd, 3rd, 5th, 7th and 11th Circuits decided, on similar issues, that “deportation does not automatically extinguish penal supervision such as parole and supervised release.” *Id.* at 901–02.

CONCLUSION: The 8th Circuit agreed with the majority of circuits and determined that deportation does not release defendant from probation for sentencing purposes. *Id.* at 902.

Doyle v. Graske, 579 F.3d 898 (8th Cir. 2009)

QUESTION: Whether the spouse of an individual suffering nonfatal injuries due to negligence beyond the territorial waters of the United States may recover loss-of-consortium damages. *Id.* at 906.

ANALYSIS: The court stated that “[w]here there is no recognized claim under general maritime law . . . an admiralty court should look to legislative enactments governing closely related claims for policy guidance.” *Id.* at 907. In its review of these enactments, the court came to the conclusion that “allowing recovery for loss of consortium here would give rise to two serious disparities between general maritime law and legislative policies.” *Id.* “First, the spouses of those injured nonfatally beyond state territorial waters would be treated differently than the spouses of those injured fatally,” who “may recover only for pecuniary loss; damages for loss of society are not available.” *Id.* “Second, if the spouses of injured nonseafarers . . . could recover loss-of-consortium damages on claims of negligence, then their rights under general maritime law would be greater than the rights of the spouses of injured seamen under the Jones Act,” and “[t]here is no reason to believe that Congress meant to place the spouses of injured seamen in a worse position than the spouses of injured nonseafarers.” *Id.*

CONCLUSION: The 8th Circuit agreed with the 5th and 9th Circuits “that general maritime law does not allow recovery of loss-of-consortium damages by the spouses of nonseafarers negligently injured beyond the territorial waters of the United States.” *Id.* at 908.

Eisenrich v. Minneapolis Retail Meat Cutters and Food Handlers Pension Plan, 574 F.3d 644 (8th Cir. 2009)

QUESTION: Whether the meaning of “trade or craft” in the Employment Retirement Income Security Act (“ERISA”) is defined by the skills actually used while employed. *Id.* at 650, 652.

ANALYSIS: The court notes that “ERISA does not define ‘trade’ or ‘craft,’ or elaborate on what it means for a job to be ‘in the same trade or

craft' as another . . . [n]or does the statute's history or purpose shed much light on the issue." *Id.* at 649. The court recognized that "ERISA's definition of 'trade or craft' is a matter of what Congress (or an agency exercising rulemaking authority delegated by Congress) meant." *Id.* (parenthetical in original). The court further noted that the Department of Labor explained in commentary published with the regulation that a functional analysis is appropriate because it is "the use . . . of particular skills, rather than performance of duties under any specified job description or classification, which is important for determining whether there is employment in the same trade or craft" *Id.* at 650. The court acknowledged that it is entitled to give substantial deference to the Department's statutory interpretation, so long as it is reasonable. *Id.* The court noted the Department of Labor's regulation, 29 C.F.R. § 2530.203-3(c)(2)(ii), states that "the determination whether a particular job classification, job description or industrial occupation constitutes or is included in a trade or craft shall be based on the facts and circumstances of each case." *Id.* The court reasoned that the Department of Labor's interpretation was reasonable "[b]ecause a plan must rely on the 'facts and circumstances of each case,' it must consider the 'skill or skills' actually used by the retiree in his job." *Id.*

CONCLUSION: The 8th Circuit held "trade or craft" should be defined by the skills actually used while employed. *Id.*

NINTH CIRCUIT

***Hyde v. Midland Credit Mgmt. Inc.*, 567 F.3d 1137 (9th Cir. 2009)**

QUESTION: Whether 15 U.S.C. § 1692k(a)(3) of the Fair Debt Collection Practices Act allows for the award of attorney's fees and costs against an unsuccessful plaintiff's attorney. *Id.* at 1140.

ANALYSIS: The court reasoned that § 1692k(a)(3) is silent as to which party should pay attorney's fees and costs, merely stating that "the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs." *Id.* The court noted that the statute "nowhere specifically authorizes an award against an 'attorney,'" and that both Rule 11 of the Federal Rules of Civil Procedure and 28 U.S.C. § 1927 already provide for sanctions against attorneys in specific circumstances. *Id.* at 1141.

CONCLUSION: The 9th Circuit held that 15 U.S.C. § 1692k(a)(3) does not authorize the award of attorney's fees and costs against attorneys. *Id.* at 1142–43.

***United States v. George*, 579 F.3d 962 (9th Cir. 2009)**

QUESTION: Whether a state's failure to implement the Sex Offender Registration and Notification Act (SORNA) "precludes a federal prosecution for failure to register as a sex offender in that state." *Id.* at 965.

ANALYSIS: The court reasoned that even though states have until July 2009 to implement the administrative portions of SORNA, "the statute itself became effective on July 27, 2006." *Id.* The court then noted that SORNA's registration requirements for sex offenders became effective upon enactment of the law, even though states have a three-year grace period to implement the law. *Id.*

CONCLUSION: The 9th Circuit held that "the statute became effective July 27, 2006, and registration [for sex offenders] under it became a requirement of federal law at that time." *Id.*

***United States v. Overton*, 573 F.3d 679 (9th Cir. 2009)**

QUESTION: Whether "[18 U.S.C.] § 2251(a) and (b) punish the same offense or separate offenses." *Id.* at 691.

ANALYSIS: The Court noted that "[t]he Supreme Court set forth a generally applicable test . . . to determine whether two statutory provisions prohibit the same offense." *Id.* The court noted that the test states "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.* (internal quotations omitted). The court further noted that to obtain a conviction under section 2251(b) required proof of fact that the defendant was a parent, legal guardian, or had legal custody over or control over a minor; a requirement that was not in section 2251(a). *Id.* at 962.

CONCLUSION: The 9th Circuit held that in "[a]pplying the [Supreme Court] test to this case, it is readily apparent that § 2251(a) and (b) constitute separate offenses from which we infer Congress's intent to authorize multiple punishments for a single act or transaction." *Id.* at 691.

***In re Warren*, 568 F.3d 1113 (9th Cir. 2009)**

QUESTION: Whether "the bankruptcy court has discretion, *after* the passing of the forty-five day filing deadline set forth in [11 U.S.C.S] § 521(i)(1), to 'order[] otherwise' and thereby waive the [11 U.S.C.S] § 521(a)(1) filing requirement." *Id.* at 1117 (emphasis in original).

ANALYSIS: The court noted that the 1st Circuit was the only other circuit to address this issue. *Id.* The court further noted that “the approach taken by the First Circuit is consistent with the language of section 521 and congressional intent in enacting BAPCPA.” *Id.*

CONCLUSION: The 9th Circuit held “consistently with the First Circuit, that a bankruptcy court retains discretion to waive the section 521(a)(1) filing requirement even after the forty-five day filing deadline set forth in section 521(i)(1) has passed.” *Id.*

***Gordon v. Virtumundo, Inc.*, 575 F.3d 1040 (9th Cir. 2009)**

QUESTION: Whether the Controlling the Assault of Non-Solicited Pornography and Marketing (“CAN-SPAM”) Act of 2003 preempts a claim under the provision of the Washington Commercial Electronic Mail Act (“CEMA”) that the header information in an e-mail misrepresents or obscures the identity of the sender. *Id.* at 1059.

ANALYSIS: The court noted that in analyzing the scope of the preemption, the interpretation of the text of the statute should be guided by the “presumption against supplanting the historic police powers of the States by federal legislation unless that [is] the clear and manifest purpose of Congress,” and by the principle “that the purpose of Congress is the ultimate touchstone in every preemption case.” *Id.* at 1060 (internal citations omitted). Recognizing that Congress’s intent under CAN-SPAM is to regulate commercial e-mail on a nationwide basis in order to ensure that businesses would not have to guess at the meaning of different state laws governing cyberspace, and to save from preemption only “statutes, regulations, or rules that target *fraud or deception*,” Congress did not intend that states retain unfettered freedom to create liability for immaterial inaccuracies or omissions. *Id.* at 1062–63 (emphasis in original).

CONCLUSION: The 9th Circuit held that because fanciful domain names used by the sender of the e-mail in the header were not fraudulent or deceptive and the identity of the sender could still be discovered, the claims under CEMA were preempted by CAN-SPAM. *Id.* at 1063–64.

***Talamantes v. Leyva*, 575 F.3d 1021 (9th Cir. 2009)**

QUESTION: “Whether a person no longer incarcerated must exhaust administrative remedies pursuant to the [Prison Litigation Reform Act (“PLRA”)] as a prerequisite to filing an action in the district court relating to the conditions of his incarceration.” *Id.* at 1023.

ANALYSIS: The court stated that when analyzing a statute, the interpretation begins with the language of the statute; when the language is clear, judicial analysis of the statute usually ends. *Id.* The court

reasoned that the language of the statute is unambiguous in stating that the exhaustion requirement applies only to “prisoners.” *Id.* at 1023–24. The court stated, “a ‘prisoner’ is defined as ‘any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.” *Id.* at 1023. Thus, a person not detained in this manner when he or she files the action is not a “prisoner” under the statute. *Id.*

CONCLUSION: The 9th Circuit held that those who are not incarcerated at the time they file suit need not comply with the exhaustion requirements of PLRA. *Id.* at 1024.

***In re B. Del C. S. B.*, 559 F.3d 999 (9th Cir. 2009)**

QUESTION: Whether “a child is not ‘settled’ for the purposes of Article 12 of the Hague Convention for the reason that she does not have lawful immigration status.” *Id.* at 1001–02.

ANALYSIS: In determining whether a child is settled within the meaning of Article 12, the court considered “a number of factors that bear on whether the child has significant connections to the new country.” *Id.* at 1009 (internal quotations omitted). “These factors include: (1) the child’s age; (2) the stability and duration of the child’s residence in the new environment; (3) whether the child attends school or day care consistently; (4) whether the child has friends and relatives in the new area; (5) the child’s participation in community or extracurricular school activities, such as team sports, youth groups, or school clubs; and (6) the respondent’s employment and financial stability.” *Id.* The court noted that it would also look to the immigration status of the child and the respondent, but that this “consideration will be relevant only if there is an immediate, concrete threat of deportation.” *Id.* Rather, the court found that the “most important [consideration] is the length and stability of the child’s residence in the new environment.” *Id.*

CONCLUSION: The 9th Circuit held that lawful immigration status would be a factor in considering whether a child is settled under Article 12 of the Hague Convention “only if there is an immediate, concrete threat of deportation.” *Id.*

***Morrison v. C.I.R.*, 565 F.3d 658 (9th Cir. 2009)**

QUESTION: “Whether, and, if so, under what circumstances a taxpayer who has not yet paid any attorneys’ fees has nonetheless incurred them.” *Id.* at 661 (internal quotations omitted).

ANALYSIS: The court reasoned that “because [the statute] does not provide a definition for the word ‘incur,’ we look to other sources to discern its ‘ordinary or natural’ meaning.” *Id.* at 661–62. The court noted that *Black’s Law Dictionary* “defines incur as to become liable or subject to, to bring down upon oneself, as to incur debt, danger, displeasure and penalty” *Id.* at 662. The court further reasoned that “[the] interpretation of the statute, and of the *Black’s* definition of ‘incur,’ is too narrow to give effect to the statute as a whole.” *Id.* The court further noted that “as a general rule, the use of a disjunctive in a statute indicates alternatives and requires that they be treated separately.” *Id.*

CONCLUSION: Thus, the 9th Circuit held that a “taxpayer ‘incurs’ the fees so long as he assumes: (1) an absolute obligation to repay the fees, regardless of whether he successfully moves for an award . . . ; or (2) a contingent obligation to pay the fees in the event that he is able to recover them.” *Id.* at 666.

***Catz v. Chalker*, 566 F.3d 839 (9th Cir. 2009)**

QUESTION: “Whether a motion to correct a clerical mistake pursuant to Fed. R. Civ. P. 60(a) filed within ten days of the entry of judgment tolls the time for the filing of an appeal.” *Id.* at 840.

ANALYSIS: The court reasoned that the appellate rules “toll[] the time for the filing of an appeal if a party has moved for relief under Rule 60.” *Id.* at 841. The court noted that “[i]f the [federal rules] were intended to be limited to motions under Rule 60(b), it would have been clearer and simpler.” *Id.* The court further noted that “[i]t is unlikely that the drafters of [the appellate rules] decided to rely upon subtle indirection by use of the words ‘for relief’ to indicate that only motions under Rule 60(b) are covered.” *Id.* at 842. Additionally, the court reasoned that “the title [of the rule] suggests that both 60(a) and 60(b) motions may be viewed as seeking relief.” *Id.*

CONCLUSION: The 9th Circuit held that “a motion to correct a clerical mistake pursuant to Fed. R. Civ. P. 60(a) [filed within ten days of entry of judgment] tolls the time for the filing of an appeal” *Id.*

***United States v. Knight*, 580 F.3d 933 (9th Cir. 2009)**

QUESTION ONE: “Whether under the amended version of [18 U.S.C.] § 3583(e)(3) the district court must reduce the maximum term of imprisonment to be imposed upon revocation of a defendant’s supervised release by the aggregate length of any and all terms of imprisonment imposed upon revocation of supervised release.” *Id.* at 935 (emphasis in original).

ANALYSIS: The court noted that, in enacting the 2003 Amendment to § 3583(e)(3), “Congress intended to ensure that a district court is no longer required to reduce the maximum term of imprisonment to be imposed upon revocation by the aggregate length of prior revocation imprisonment terms.” *Id.* at 937. The language added by the Amendment makes it “clear that defendants are not to be credited for prior terms of imprisonment imposed upon revocation of their supervised release.” *Id.* at 938.

CONCLUSION: The 9th Circuit held that “under the amended version of § 3583(e)(3) it is clear that defendants are not to be credited for prior terms of imprisonment imposed upon revocation of their supervised release.” *Id.*

QUESTION TWO: “Whether under the amended version of [18 U.S.C.] § 3583(h) the district court must reduce the maximum term of *supervised release* to be imposed upon revocation of a defendant’s supervised release by the aggregate length of any and all terms of imprisonment imposed upon revocation of supervised release.” *Id.* at 935 (emphasis in original).

ANALYSIS: The court distinguished the Amendment’s effect on terms of imprisonment from its effect on terms of supervised release by noting that “the 2003 Amendment did not significantly alter the relevant portions of § 3583(h) . . . which address[] the ‘length’ of a term of supervised release and require[] the district court to subtract ‘any term of imprisonment that was imposed upon revocation of supervised release.’” *Id.* at 939.

CONCLUSION: The 9th Circuit held that “the maximum term of *supervised release* to be imposed following the multiple revocations of supervised release must be reduced by the aggregate length of any and all terms of imprisonment that have been imposed upon revocation of supervised release.” *Id.* at 940 (emphasis in original).

***United States v. Alderman*, 565 F.3d 641 (9th Cir. 2009)**

QUESTION: Whether the sale of body armor in interstate commerce creates a sufficient nexus between possession of the body armor and commerce to allow for federal regulation under Congress’s Commerce Clause authority. *Id.* at 643.

ANALYSIS: The 9th Circuit specifically cited the Supreme Court precedent of *Scarborough v. United States*, 431 U.S. 563 (1977), for the proposition that proof that a firearm traveled in interstate commerce satisfies the required nexus between possession of the firearm and commerce. *Id.* The court viewed the present circumstances as factually

analogous to *Scarborough* and thus concluded its decision was bound to the applicable precedent of *Scarborough*. *Id.*

CONCLUSION: The 9th Circuit held that “absent the Supreme Court or our en banc court telling us otherwise,” the felon-in-possession of body armor statute in question was subject to federal regulation on Congress’s Commerce Clause authority. *Id.*

***United States v. Reed*, 575 F.3d 900 (9th Cir. 2009)**

QUESTION: Whether 18 U.S.C. § 2518(8)(a), which requires “[i]mmediately upon the expiration of the period of [a wiretap] order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed,” applies to call data content (“CDC”). *Id.* at 913.

ANALYSIS: First, the court noted “that CDC is separate and distinct from the substantive, oral content of a telephone call” and pertains to “call origination, length, and time of call.” *Id.* at 914. The court further stated that the plain language of the wiretap statute makes it “clear that the sealing and recordation requirements of § 2518(8) apply only to (1) the contents of (2) a wire, oral, or electronic communication (3) that is transmitted between the parties to that communication (4) and intercepted by the Government, and then (5) only when the contents of the communication are able to be recorded.” *Id.* at 916. The court further reasoned that 18 U.S.C. §§ 2510(1)-(2) defines “a wire or oral communication [a]s an aural communication made by aid of a wire, or an ‘oral communication’ uttered by a person . . . [and] CDC clearly does not fall within this definition, because it is not an aural communication of any kind.” *Id.* at 915.

CONCLUSION: The 9th Circuit held that “CDC is not an intercepted communication of any sort and does not contain the content of an intercepted wire, oral or electronic communication,” and as such “it is not subject to the recordation and sealing requirements of § 2518(8).” *Id.* at 917.

***In re Egebjerg*, 574 F.3d 1045 (9th Cir. 2009)**

QUESTION: Whether, under the Bankruptcy Abuse Prevention and Consumer Protection Act, “a debtor’s repayment of a 401(k) loan constitutes a ‘monthly payment on account of secured debts’ or an ‘[o]ther [n]ecessary [e]xpense’ that can be deducted from a debtor’s monthly income for purposes of calculating the debtor’s disposable monthly income under [11 U.S.C.] § 707(b)(2).” *Id.* at 1047.

ANALYSIS: First, the court noted that for a repayment to qualify as an “average monthly payment on account of *secured debts*,” the plan

administrator must have a claim for repayment of the 401(k) loan. *Id.* at 1049 (emphasis in original). The court reasoned that in these cases, the debtor's obligation "is essentially a debt to himself" and the administrator has no personal recourse against that debtor; therefore there is no debtor-creditor relationship. *Id.* Second, to qualify as an "other necessary expense," the court acknowledges that "the Internal Revenue Manual . . . lists fifteen categories of expenses which may be considered necessary under certain circumstances," however bankruptcy courts differ about whether this list is exhaustive. *Id.* at 1051. The court, however, notes that it need not resolve this issue because "under either interpretation, [the debtor's] repayment of his 401(k) loan does not qualify as an 'Other Necessary Expense' [because] . . . the 401(k) loan repayments themselves are voluntary in the sense that [the debtor] can simply ask the loan administrator to treat his outstanding loan balance as an early withdrawal from his 401(k) and thereby relieve himself of a future repayment obligation." *Id.*

CONCLUSION: The 9th Circuit held that "the debtor's obligation to repay a loan from his or her retirement account is not a 'debt' under the Bankruptcy Code," thus, "the debtor may not include payments on such [401(k)] loans as a deduction for purposes of the means test under § 707(b)(2)." *Id.* at 1049–50. Further, the 401(k) loan repayments do not constitute an "other necessary expense" and cannot be included as a deduction for purposes of the means test under § 707(b)(2). *Id.* at 1051.

***Barrios v. Holder*, 2009 U.S. App. LEXIS 14147 (9th Cir. June 26, 2009)**

QUESTION: Whether "a minor who applies for . . . relief [under the Nicaraguan Adjustment and Central American Relief Act ('NACARA')] as a derivative of his parent be permitted to impute his parent's physical presence for purposes of satisfying the seven-year requirement." *Id.* at *23.

ANALYSIS: The court examined a threshold requirement for qualifying for a special rule cancellation under NACARA, under which various forms of immigration benefits and relief from removal are provided to nationals of Central American and former Soviet Bloc countries. *Id.* at *14. The court reasoned that the minor satisfied the requirement of being a "child of a person . . . applying for NACARA." *Id.* The court noted that the minor did not personally satisfy the seven year continuous physical presence requirement, but that prior cases demonstrated an imputation of "a parent's status, intent, or state of mind to satisfy immigration criteria that an unemancipated minor child must meet." *Id.* at *31. The court reasoned that the meaning of "physical

presence” here was “distinct from the requirements . . . previously held to be imputable,” and was “so great as to be dispositive.” *Id.* at *30. The court further stated that NACARA’s legislative history did not mention imputation, and policy rationales for permitted imputation in prior cases, where “the minor resided with his or her family in the United States,” were absent. *Id.* at *40. Furthermore, the court stressed that “[b]ecause disallowing imputation in this context does not sever the bonds between parents and their children who had resided legally in the United States for the better part of their lives, it does not frustrate the just and humane goal of providing relief to those for whom deportation would result in peculiar or unusual hardship.” *Id.*

CONCLUSION: The 9th Circuit held that a minor who applies for NACARA relief as a derivative of his parent is not permitted to impute his parent’s physical presence for purposes of satisfying a residency requirement. *Id.*

***In re Lehtinen*, 564 F.3d 1052 (9th Cir. 2009)**

QUESTION: Whether “the bankruptcy court has the power to disbar or suspend an attorney under its inherent authority power.” *Id.* at 1059.

ANALYSIS: The court explained that a bankruptcy court may disbar or suspend an attorney under its inherent authority power if it first makes “an explicit finding of bad faith or willful misconduct,” which requires “something more egregious than mere negligence or recklessness.” *Id.* (internal quotations omitted). The court limited its holding by cautioning that “inherent powers must be exercised with restraint and discretion” and that “[p]unitive sanctions are prohibited, at least in part, because the bankruptcy court cannot provide the due process protections that a criminal defendant is ordinarily entitled to.” *Id.* at 1059 (internal quotations omitted). Furthermore, the court noted that a lawyer disciplinary proceeding is “not for the purpose of punishment but to maintain the integrity of the courts and the profession.” *Id.* (internal quotations omitted). Because of these considerations, the court held that “when using the inherent sanction power, due process is accorded as long as the sanctionee is provided with sufficient, advance notice of exactly which conduct was alleged to be sanctionable, and [was] furthermore aware that [he] stood accused of having acted in bad faith.” *Id.* at 1060 (internal quotations omitted).

CONCLUSION: The 9th Circuit held that where an attorney is “accorded due process, the bankruptcy court possess[es] the inherent power to suspend him.” *Id.* at 1062.

***United States v. Santacruz*, 563 F.3d 894 (9th Cir. 2009)**

QUESTION: “Whether possession of child pornography is a crime involving moral turpitude.” *Id.* at 896.

ANALYSIS: The court explained that “to determine whether a crime involves moral turpitude we ask whether a crime is vile, base or depraved and . . . violates societal moral standards.” *Id.* (internal quotations omitted). The court pointed out that the Supreme Court has “characterized sexual abuse of a minor as an act repugnant to the moral instincts of a decent people.” *Id.* at 897 (internal quotations omitted). The court also noted that “child pornography, as permanent record of a child’s abuse, causes continuing injury to the child’s reputation and well-being.” *Id.* (internal quotations omitted). The court reasoned that “[b]ecause possession of child pornography offends conventional morality and visits continuing injury on children, it is vile, base or depraved and . . . violates societal moral standards.” *Id.*

CONCLUSION: The 9th Circuit held that “[p]ossession of child pornography is a crime involving moral turpitude under 18 U.S.C. § 2252A(a)(5)(B).” *Id.*

***United States v. Juvenile Male*, 581 F.3d 977 (9th Cir. 2009)**

QUESTION: Whether retroactive application of the Sex Offender Registration and Notification Act’s (“SORNA”) provision covering individuals who were adjudicated juvenile delinquents because of the commission of certain sex offenses before SORNA’s passage violates the Ex Post Facto Clause of the United States Constitution. *Id.* at 979.

ANALYSIS: The 9th Circuit conducted a four-part analysis in assessing the constitutionality of retroactive application of SORNA to adjudicated juvenile delinquents. The court first considered whether “retroactive application of SORNA’s juvenile registration provision imposes an affirmative disability or restraint.” *Id.* at 984 (internal quotations omitted). The court next considered “whether requiring former juvenile sex offenders to register and report to law enforcement regularly is an historical means of punishment.” *Id.* at 988. The court then evaluated whether SORNA promotes the traditional aims of punishment—particularly, retribution. *Id.* at 989. Finally, the court considered “whether SORNA’s juvenile registration provision has a non-punitive purpose and, if it does, whether the requirement is excessive in relation to that goal.” *Id.* at 990.

CONCLUSION: The 9th Circuit held that “[i]n light of the pervasive and severe new and additional disadvantages that result from the mandatory registration of former juvenile offenders and from the requirement that such former offenders report in person to law

enforcement authorities every 90 days for 25 years, and in light of the confidentiality that has historically attached to juvenile proceedings, . . . the retroactive application of SORNA's provisions to former juvenile offenders is punitive and, therefore, unconstitutional." *Id.* at 979.

***Countrywide Home Loans, Inc. v. Hoopai*, 581 F.3d 1090 (9th Cir. 2009)**

QUESTION: Whether the temporal scope of 11 U.S.C. § 506(b) entitles an oversecured creditor to reasonable attorney's fees while the debtor is undergoing bankruptcy proceedings. *Id.* at 1099.

ANALYSIS: The 9th Circuit cited the Supreme Court, which noted in dicta that § 506(b) "governs fees only 'until the confirmation or effective date'" of a Chapter 13 plan. *Id.* Moreover, the court indicated that "every circuit that has addressed the issue has followed the Court's statement," citing decisions by the 2nd, 3rd, 4th, 5th and 11th Circuits, all of which adopted the dicta as the governing standard. *Id.*

CONCLUSION: The 9th Circuit held that "the applicability of § 506(b) ends at a plan's confirmation or 'effective date' despite the lack of an explicit temporal limitation in the statute." *Id.*

***United States v. \$6,190.00 in United States Currency*, 581 F.3d 881 (9th Cir. 2009)**

QUESTION: "[W]hether the word 'court' in the [28 U.S.C.] § 2466(a)(1)(C) [the Fugitive Disentitlement Statute], refers only to a federal courts or whether it refers to both state and federal courts." *Id.* at 887.

ANALYSIS: The 9th Circuit first explained that fugitive disentitlement "prohibits an individual from using the courts to further one claim while avoiding the courts' jurisdiction on another matter." *Id.* at 885. The court noted that the statute's "omission of the qualifier ['of the United States'] strongly suggests that 'court' in § 2466(a)(1)(C) has a broader meaning than 'courts of the United States' in § 2466(a)." *Id.* at 887. The court reasoned that because "in § 2466(a)(1)(B) and (C) the phrase 'United States' is also used, referring to the 'jurisdiction of the United States' . . . [h]ere, it is obvious that the phrase 'jurisdiction of the United States' does not refer to the subject matter jurisdiction of the United States courts, but rather to the jurisdiction of the United States as a political entity." *Id.* The court further reasoned that because the statute reads simply "'the court in which a criminal case is pending'" it strongly suggests that it refers to any court in the United States, whether federal or state. *Id.* at 887.

CONCLUSION: The 9th Circuit concluded that 28 U.S.C. § 2466 “applies to fugitives from both state and federal criminal proceedings.” *Id.* at 888.

***Cassirer v. Kingdom of Spain*, 580 F.3d 1048 (9th Cir. 2009)**

QUESTION: Whether section 1605(a)(3) of the Foreign Sovereign Immunities Act (“FSIA”), requires exhaustion of foreign remedies before being invoked. *Id.* at 1060.

ANALYSIS: The court explained that FSIA “is a jurisdictional statute incorporating international law principles to guide U.S. courts in determining when a foreign state is or is not entitled to sovereign immunity.” *Id.* The court explained that while the “doctrine of exhaustion of domestic remedies is a well-established rule of customary international law . . . where Congress has not clearly required exhaustion, we have not (and likely cannot) impose exhaustion as an absolute jurisdictional requirement.” *Id.* at 1061 (internal citations omitted). The court reasoned that “[i]nternational law may define the substantive rights of parties in actions permitted by the FSIA, but it cannot compel or restrict Article III jurisdiction.” *Id.* at 1061–62. Thus, “[a]bsent clear Congressional intent, we cannot incorporate exhaustion as an absolute requirement merely because international law would require it.” *Id.* at 1062. The court further reasoned that “[a]n absolute exhaustion requirement amounts to an absolute limitation on the jurisdiction of federal courts. To impose such a requirement would, in essence, usurp the Constitutional power vested in Congress and cede foreign lawmakers and jurists with power to limit the jurisdiction of United States federal courts.” *Id.*

CONCLUSION: The 9th Circuit remanded to the District Court to determine whether there should be an exhaustion of remedies requirement after concluding that “[n]either Congress nor this court have imposed an absolute exhaustion of remedies requirement in cases brought against foreign states under an exception to the FSIA” and that “domestic prudential standards and core principles of international law require a district court to consider exhaustion in appropriate cases.” *Id.*

***Bosack v. Soward*, 573 F.3d 891 (9th Cir. 2009)**

QUESTION: Whether “the *functus officio* doctrine may be applied to an interim award.” *Id.* at 898 (emphasis in original).

ANALYSIS: The court considered the 8th Circuit’s interpretation. *Id.* The 8th Circuit “held that an interim award may be deemed final for *functus officio* purposes if the award states it is final, and if the arbitrator intended the award to be final.” *Id.* (emphasis in original).

CONCLUSION: The 9th Circuit held that it “adopt[s] the criteria used by the [8th] Circuit.” *Id.*

TENTH CIRCUIT

***Simplot v. Chevron Pipeline Co.*, 563 F.3d 1102 (10th Cir. 2009)**

QUESTION: Whether a defendant corporation “has a Seventh Amendment right to a jury trial to determine the amount of costs and attorneys’ fees [a plaintiff LLC] incurred in defending itself in [underlying] litigation, as damages for [the defendant corporation’s] breach of contract.” *Id.* at 1115.

ANALYSIS: The court began by explaining that the Seventh Amendment preserves the right to a jury trial for “suits at common law,” and that the Supreme Court has held that this phrase refers to “suits in which legal rights [are] to be ascertained and determined, in contradistinction to those where equitable rights alone [are] recognized, and equitable remedies [are] administered.” *Id.* (alterations in original). The court reasoned that “[t]he nature of the issues presented and the remedies sought determines whether an action qualifies as legal.” *Id.* Furthermore, the court explained that “the general rule is that monetary relief is legal. An ordinary breach of contract claim is no different.” *Id.* The court pointed out that the plaintiff LLC did “not seek the fees as an element of costs awarded to the prevailing party. Rather . . . as the measure of damages resulting from [the corporate defendant’s] breach, as an element of damages under a contract.” *Id.* at 1116 (internal quotations omitted). The court found an analogue in case law, reasoning that “[t]his case is like an insurance case where the insurer has breached its duty to defend a lawsuit against the insured by a third party and the insured sues the insurer for payment of the costs of its defense, particularly attorneys’ fees.” *Id.* at 1117.

CONCLUSION: The 10th Circuit held that the corporate defendant had “a Seventh Amendment right to a jury trial on the amount of attorneys’ fees due [the plaintiff LLC] as damages for [the corporate defendant’s] breach of its duty to defend [the plaintiff LLC] in the [underlying] litigation.” *Id.*

***United States v. Jacobs*, 579 F.3d 1198 (10th Cir. 2009)**

QUESTION: Whether “possession with intent to distribute constitute[s] an ‘offense consisting of the distribution of controlled substances’ within the meaning of [21 U.S.C.] § 862(a).” *Id.* at 1199.

ANALYSIS: The court noted that “[s]ection 862 . . . distinguishes offenses ‘consisting of the distribution of controlled substances’ from those ‘involving the possession of a controlled substance.’” *Id.* Because under 21 U.S.C. § 802(11), “‘distribute’ means to deliver (other than by administering or dispensing) a controlled substance or a listed chemical,” the court concluded that “the phrase ‘distribution of controlled substances,’ as used in § 862(a), reaches only those crimes that include distribution as an element.” *Id.* In contrast, possession with intent to distribute “does not require the element of distribution.” *Id.* at 1200.

CONCLUSION: The 10th Circuit held that “possession with intent to distribute is not an ‘offense consisting of the distribution of controlled substances’ for purposes of [21 U.S.C.] § 862(a).” *Id.*

ELEVENTH CIRCUIT

***United States v. Certain Real Prop.*, 579 F.3d 1315 (11th Cir. 2009)**

QUESTION: Whether “attorney fees incurred in the defense of a criminal action may be awarded in a related civil forfeiture action under the Civil Asset Forfeiture Reform Act of 2000 (“CAFRA”) . . . without regard for the stringent limitations on attorney-fee awards in criminal cases under the Hyde Amendment.” *Id.* at 1316.

ANALYSIS: The court first noted that its “interpretation of the CAFRA fee-shifting provision is guided by principles of sovereign immunity, which bar the award of attorney fees against the United States absent explicit congressional authorization.” *Id.* at 1320. The court then noted that the language of CAFRA’s fee-shifting provision facially appears to indicate only attorney fees incurred in the civil forfeiture action. *Id.* Thus, “[w]ithout an express waiver of the government’s sovereign immunity, [the court] cannot find that such a waiver exists.” *Id.*

CONCLUSION: The 11th Circuit held “that attorney fees incurred in the defense of a criminal action, even if related to a civil forfeiture action . . . cannot be awarded under CAFRA.” *Id.* at 1319.

***United States v. Bobb*, 577 F.3d 1366 (11th Cir. 2009)**

QUESTION: Whether the Double Jeopardy Clause prevents a defendant from being convicted of both the offense of receiving child pornography under 18 U.S.C. § 2252A(a)(2)(B) and the offense of possessing child pornography under 18 U.S.C. § 2252A(a)(5)(B). *Id.* at 1367–68.

ANALYSIS: The court noted that generally, “when a defendant has violated two different criminal statutes, the Double Jeopardy Clause is implicated when both statutes prohibit the same act or transaction or when one act is a lesser included offense of the other.” *Id.* at 1371. The court stated that where two statutory provisions proscribe the same offense and there is no clear indication that the legislature intended multiple punishments for the offense, the Double Jeopardy Clause protects a defendant from being punished under both provisions. *Id.* After looking at the text of the statutes, the court reasoned that “if a person takes ‘receipt’ of a thing, they necessarily must ‘possess’ the thing, and [the court] find[s] that these provisions, indeed, proscribe the same conduct.” *Id.* at 1373. Also, the court reasoned that the clear text of the statute and the legislative history shows no congressional intent to impose multiple convictions for both the receipt and possession of child pornography. *Id.* at 1373–74.

CONCLUSION: The 11th Circuit held that because possession of child pornography under 18 U.S.C. § 2252A(a)(5)(B) is a lesser included offense of the receipt of the pornography under 18 U.S.C. § 2252A(a)(2)(B), and there is no legislative intent to impose multiple punishments, the Double Jeopardy Clause prevents a defendant from being convicted under both statutes. *Id.*

***United States v. Moran*, 573 F.3d 1132 (11th Cir. 2009)**

QUESTION: Whether “a defendant is entitled to notice before a district court may impose special conditions of supervised release to address a defendant’s proclivity to sexual misconduct when the crime of conviction did not involve sexual activity.” *Id.* at 1134–35.

ANALYSIS: The 11th Circuit considered a recent Supreme Court decision that notice was required “only in the narrow category of cases that involved an upward departure for an aggravating or mitigating circumstance that had not been accounted for in formulating the [Sentencing Guidelines] . . . and was not identified as a reason to depart in either the presentence investigation report or a prehearing pleading.” *Id.* at 1138 (internal quotations omitted). The 11th Circuit noted the Supreme Court’s confidence that the protections provided in the Federal Rules of Criminal Procedure would “allow a defendant to anticipate and respond to facts that would affect the final sentence.” *Id.* The 11th Circuit further underscored that “[t]he Guidelines contemplate that a defendant will receive a term of supervised release” and such “[s]upervised release, by its nature, comes with conditions.” *Id.* When applying these conditions, the 11th Circuit stressed that “each is an independent consideration to be weighed” and “[a]lthough a condition of

supervised release should not unduly restrict a defendant's liberty, a condition is not invalid simply because it affects a probationer's ability to exercise constitutionally protected rights." *Id.* (internal quotations omitted).

CONCLUSION: The 11th Circuit concluded that the district court was not required to notify the defendant "before it imposed special conditions to address his proclivity for sexual misconduct" as defendant was not prejudiced by the district court's pronouncement, and defendant "knew the district court likely would consider his criminal history in determining an appropriate sentence." *Id.*

***United States v. Webb*, 565 F.3d 789 (11th Cir. 2009)**

QUESTION: Whether there is a mandatory right to counsel in an 18 U.S.C. § 3582(c)(2) hearing for a sentence reduction. *Id.* at 794.

ANALYSIS: The 11th Circuit noted that an indigent party has a right to appointed counsel from three sources: under the Fifth Amendment Due Process Clause, when "fundamental fairness" so requires; under the Sixth Amendment right to counsel "during those critical stages of a criminal prosecution where substantial rights of a criminal accused may be affected, including during the first appeal as of right"; or from a statutory right. *Id.* (internal quotations omitted). The 11th Circuit had held that counsel is not mandatory for post-conviction proceedings, but only in the context of habeas corpus proceedings. *Id.* The 5th Circuit previously held that a § 3582(c)(2) motion does not "challenge . . . the appropriateness of the original sentence" which would require counsel, but rather "is simply a vehicle through which appropriately sentenced prisoners can urge the court to exercise leniency to give certain defendants the benefits of an amendment to the Guidelines" *Id.* at 794. Persuaded by the 5th Circuit's reasoning and also siding with the 2nd, 4th, 7th, and 9th Circuits, the court determined that there are no issues of due process or fundamental fairness at stake in a 18 U.S.C. § 3582(c)(2) hearing, and no statute requires the appointment of counsel. *Id.* at 794–95.

CONCLUSION: The 11th Circuit held that there is no right to counsel for a hearing on a reduction of sentence as there are no issues of due process or fundamental fairness, nor does any statute so require. *Id.* at 794–95.

***Yi-Qin Chen v. United States Att'y Gen.*, 565 F.3d 805 (11th Cir. 2009)**

QUESTION: Whether a resident alien under a final order of removal must satisfy the requirements for a motion to reopen to be able to file a successive asylum application. *Id.* at 806.

ANALYSIS: The court considered the Board of Immigration Affairs' (BIA) ruling which held that "an alien who is subject to a final order of removal must satisfy the requirements for a motion to reopen under 8 U.S.C. § 1229a(c)(7)(C)(ii) in order to file a successive asylum application." *Id.* at 808. The court agreed with the BIA's reasoning that "to interpret the successive asylum application provision as an independent basis for filing an asylum application at any time, including when a final order of removal is in place . . . would negate the effect of regulations granting jurisdiction to [the BIA] and the Immigration Courts." *Id.* (internal quotations omitted). To allow an "alien who is subject to a final order of removal" to file a successive asylum application, the BIA has held that the alien must either do so "as part of a timely and properly filed motion to reopen or [as part of] one that claims the late motion is excused because of changed country conditions." *Id.* The court noted that the 2nd, 3rd, 6th, 7th, 8th, 9th and 10th Circuits have sided with the BIA's ruling. *Id.* at 810.

CONCLUSION: The 11th Circuit held that an alien ordered removed must timely and properly file a "motion to reopen to pursue a successive asylum application" or demonstrate that changed country conditions excuse a late filing. *Id.* at 806, 810.

***Picard v. Credit Solutions, Inc.*, 564 F.3d 1249 (11th Cir. 2009)**

QUESTION: Whether the Credit Repair Organizations Act (CROA) prohibits arbitration. *Id.* at 1254.

ANALYSIS: The court noted that the 3rd Circuit is the only circuit to have addressed the issue, whereby it found such claims to be arbitrable. *Id.* The court observed that CROA does not create a right to a judicial forum and a review of legislative history did not reveal an intent to exclude arbitration. *Id.* The court also noted that the language of CROA does not limit the right to arbitrate a claim and that the substantial rights of the act would be "entirely preserved in an arbitral forum." *Id.* at 1255.

CONCLUSION: The 11th Circuit held that the Credit Repair Organizations Act does not prohibit arbitration. *Id.*

***Brinson v. Raytheon Co.*, 571 F.3d 1348 (11th Cir. 2009)**

QUESTION: Whether a party may rely on "post-design, post-production evidence" as additional evidence to satisfy the first prong of the three-part *Boyle* test for determining whether state law is displaced by federal procurement law in establishing the military contract defense. *Id.* at 1352.

ANALYSIS: After noting the first prong of the *Boyle* test—"the United States approved reasonably precise specifications—the court

noted that the purpose of the test is to “identify those situations where there is a significant conflict between federal interests and state law in the context of Government procurement.” *Id.* at 1353 (internal quotations omitted). To outline an example of when there is a “significant conflict”, the court relied on the Federal Tort Claims Act, under which the government exempted from suit damages that arise from “the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government.” *Id.* at 1353 (internal quotations omitted). The court then noted, “the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this provision.” *Id.* The court reasoned that “[w]hen faced with a potentially failing or defective part, the military may make a discretionary decision concerning how to address the problem” and that it would be unwise to “second-guess that judgment through a state law tort suit.” *Id.* (internal quotations omitted).

CONCLUSION: The court held that a party may rely on post-design and post-production evidence as additional evidence to satisfy the first prong of the three-part *Boyle* test. *Id.*

FEDERAL CIRCUIT

***Cushman v. Shinseki*, 576 F.3d 1290 (Fed. Cir. 2009)**

QUESTION: Whether “a veteran alleging a service-connected disability has a due process right to fair adjudication of his claim for benefits” pursuant to the Due Process Clause of the Fifth Amendment. *Id.* at 1292.

ANALYSIS: The court first stated that “[i]n order to allege that the denial of [appellant’s] claim involved a violation of his due process rights, [appellant] must first prove that as a veteran alleging a service-connected disability, he has a constitutional right to a fundamentally fair adjudication of his claim.” *Id.* at 1296. The court held that “disability benefits are a protected property interest and may not be discontinued without due process of law.” *Id.* The court then noted that the 9th Circuit previously held that “both applicants for and recipients of [service-connected death and disability] benefits possess a constitutionally protected property interest in those benefits.” *Id.* at 1297 (alteration in original) (internal quotations omitted). The court further acknowledged that seven other circuits had addressed analogous issues regarding statutorily mandated benefits stating that “[e]very regional circuit to address the question . . . has concluded that applicants for benefits, no less than benefits recipients, may possess a property interest

in the receipt of public welfare entitlement.” *Id.* (internal quotations omitted). The Federal Circuit reasoned that veterans’ disability benefits are “nondiscretionary, statutorily mandated benefits.” *Id.* at 1298. The court stated that veterans, so long as they meet the statutory and regulatory requirements, are entitled to disability benefits. *Id.* Finally, the court aligned itself with a majority of circuits holding that “due process attaches in the context of nondiscretionary benefits.” *Id.*

CONCLUSION: The Federal Circuit held that nondiscretionary “entitlement to benefits is a property interest protected by the Due Process Clause of the Fifth Amendment to the United States Constitution.” *Id.*

***Arctic Slope Native Ass’n v. Sebelius*, 583 F.3d 785 (Fed. Cir. 2009)**

QUESTION: Whether “equitable tolling applies to the six-year time limitation set forth in [41 U.S.C. §] 605(a).” *Id.* at 798.

ANALYSIS: The court began by noting that in this case “the *Irwin* [v. *Dep’t of Veterans Affairs*, 498 U.S. 89 (1990)] presumption applies, which means that we must assume that Congress intended equitable tolling to be available unless there is a good reason to believe otherwise.” *Id.* The court noted that “Congress adopted that time limitation after the decision in *Irwin*, and it is therefore reasonable to construe the statute in light of the general presumption set forth in *Irwin*.” *Id.* Moreover, in a subsequent case, the Supreme Court “identified several factors as instructive in determining whether a particular time limitation is subject to equitable tolling” including “the statute’s detail, its technical language, its multiple iterations of the limitations period in procedural and substantive form, its explicit inclusion of exceptions, and its underlying subject matter.” *Id.* at 799 (internal quotations omitted). The court noted that § 605(a) is “a simple provision” which “provides in the simplest terms that each claim by a contractor ‘shall be submitted within 6 years of the accrual of the claim.’” *Id.* Further, § 605(a) does not “contain any explicit exceptions to the six-year period on claim submissions by contractors” which would infer that other exceptions should not apply, and that “[t]he language of the time limitation in section 605(a) is anything but emphatic. . . .” *Id.*

CONCLUSION: The Federal Circuit held that it did “not agree that the limitations period in [§] 605(a) is absolute and [thus] is not subject to equitable tolling.” *Id.* at 800.

D.C. CIRCUIT***Liberty Prop. Trust v. Republic Props. Corp.*, 577 F.3d 335 (D.C. Cir. 2009)**

QUESTION: Whether limited partnership units fit within the definition of securities in § 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b). *Id.* at 338.

ANALYSIS: The court first noted that, following the reasoning of its sister circuits, the legal rights and powers of the investor would be the touchstone of its analysis. *Id.* at 339. Next, the court noted that it must determine “whether it is dealing with an investment contract under the security laws” with the key analysis being whether expected profits are the result of others’ efforts. *Id.* at 340–41. The court also noted that when parties take advantage of the corporate form to purchase the limited partnership units, they may not then disregard that corporate form to avoid liability. *Id.* at 340.

CONCLUSION: The D.C. Circuit held that when parties exercise sufficient control over the limited partnership, their units in the partnership may be disqualified as securities. *Id.* at 340–41.

***Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009)**

QUESTION: In determining contractor liability, whether the district court’s test, “th[e] preemption defense [to tort claims] attaches only where contract employees are under the direct command and *exclusive* operational control of the military chain of command” *Id.* at 4 (emphasis in original) (internal quotations omitted).

ANALYSIS: The court reasoned that although the contractor’s “employees were expected to report to their civilian supervisors, as well as [to] the military chain of command, any abuses they observed and that the company retained the power to give advice and feedback to its employees”, these factors alone do not “detract meaningfully from the military’s operational control” *Id.* at 5. The court stated that “there is no dispute that [the contract employees] were in fact integrated and performing a common mission with the military under ultimate military command.” *Id.* at 7. Further, the “exclusive operational control test does not protect the full measure of the federal interest embodied in the combatant activities exception.” *Id.* at 8 (internal quotations omitted). Finally, the court rationalized that “[t]he district court’s test as applied to [the defendants]...creates a powerful (and perverse) economic incentive for contractors, who would obviously be deterred from reporting abuse to

military authorities if such reporting alone is taken to be evidence of retained operational control.” *Id.* at 9.

CONCLUSION: The court held that “the following formulation better secures the federal interest concerned: [d]uring wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor’s engagement in such activities shall be preempted.” *Id.*