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 September 1, 2006, and January 31, 2007. 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 this list, it means that the editors did not identify any cases from that circuit for the specified time period that presented an issue of First Impression.

FIRST CIRCUIT

Maine People's Alliance v. Mallinckrodt, Inc., 471 F.3d 277 (1st Cir. 2006)

QUESTION: Whether the citizen suit provision in the Resource Conservation and Recovery Act ("RCRA") § 7002(a)(1)(B), which "allows citizens to sue persons or firms whose handling of solid or

hazardous waste 'may present an imminent and substantial endangerment to health or the environment,'" should be construed broadly to provide a cause of action for claims based on a reasonable prospect of "medical or scientific concerns." *Id*. at 286.

ANALYSIS: The 1st Circuit first acknowledged that "at least four of our sister circuits have construed [the relevant] provision expansively," and approvingly noted that the district court's analysis "follow[ed] the interpretive trail blazed by the four above-mentioned courts of appeals." *Id*. at 288-89. The court cited legislative history of the RCRA, which stated that the relevant section was passed "with the avowed intention of closing 'the last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous waste.'" *Id*. at 287. The court analyzed the decisions of its sister circuits and found convincing the legislative history arguments that those decisions were based upon. *Id*. The court considered the defendant's textual argument that the plain meaning should control the day but concluded that "the interpretive question before us cannot be resolved favorably to Mallinckrodt on the basis of plain meaning alone." *Id*. at 290. The court also disposed of defendant's separation of powers argument which argued that the court was overstepping the Environmental Protection Agency's ("EPA") powers by providing a judicial remedy for merely speculative damages. *Id*. The court reasoned that "this is not a situation in which a court has presumed to grant relief that flies in the face of an express EPA authorization of certain conduct" because the EPA has never "so much as hinted that correction of the Plant's effects on downriver pollution is bad policy." *Id*. at 292.

CONCLUSION: The court found that the probabilistic language of the section "leads us to conclude that a reasonable prospect of future harm is adequate to engage the gears of RCRA § 7002(a)(1)(B) so long as the threat is near-term and involves potentially serious harm. The language, structure, purpose, and legislative history of the provision will not comfortably accommodate the more restricted reading that Mallinckrodt espouses." *Id*. at 296.

Rucker v. Lee Holding Co., 471 F.3d 6 (1st Cir. 2006)

QUESTION: "[W]hether and under what circumstances an employee who has had a break in service may count previous periods of employment with the same employer toward satisfying this 12-month requirement" to qualify for protection under the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 et seq. *Id*. at 7-8.

ANALYSIS: The 1st Circuit first looked to the statutory language of the FMLA and determined that "there is no such statutory clarity expressing unambiguous intent" to define the meaning of 'has been employed . . . for at least 12 months by the [relevant] employer.'" *Id*. at 10. The court considered various canons of statutory interpretation as well as the legislative history of the FMLA and determined that "'Congress has not directly addressed the precise question at issue,' and . . . deference to a reasonable agency interpretation is appropriate." *Id*. at 11. The court found that Congress had "specifically instructed the D[epartment] O[f] L[abor] to 'prescribe such regulations as are necessary to carry out [the FMLA].'" *Id*. Then the court turned to the DOL regulations for guidance, noting that "if the DOL regulation at 29 C.F.R. § 825.110(b) clearly resolves this case, and is reasonable, that would be the end of the matter." *Id*. The court noted that "[w]hen interpreting an agency regulation, courts must give substantial deference to the agency's own interpretation of its regulations, so long as that interpretation is consistent with the regulation and 'reflect[s] the agency's fair and considered judgment on the matter in question.'" *Id*. at 12. The court found that "the DOL did not believe its regulation would prevent employees from relying on previous periods of employment even after a break measured in years." *Id*. Furthermore, the court found "the DOL's interpretation of its regulation [to be] reasonable, and that [the] regulation, so interpreted, is a reasonable exercise of the DOL's statutory authority." *Id*. at 13.

CONCLUSION: The 1st Circuit held that "consistent with the DOL regulation . . . we hold that the complete separation of an employee from his or her employer for a period of years, here five years, does not prevent the employee from counting earlier periods of employment toward satisfying the 12-month requirement." *Id*.

Velez v. Janssen Ortho, L.L.C., 467 F.3d 802, 803 (1st Cir. 2006)

QUESTION: "[W]hat prima facie showing is necessary to establish an adverse employment action, within the meaning of Title VII, when a plaintiff alleges a retaliatory failure-to-hire." *Id*. at 803.

ANALYSIS: The court began its analysis with the language of "Title VII, which prohibits an employer from 'discriminat[ing] against any of [its] employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has . . . participated in any manner in an investigation, proceeding, or hearing under this subchapter.'" *Id*. at 806.

In surveying the opinions of other circuits regarding the elements of a prima facie case for adverse employment action in the retaliatory failure-to-hire context, the court found those circuit required the plaintiff to prove "'that he applied for an available job; and . . . that he was qualified for that position.'" *Id*. at 807. The court recognized that "[p]recedent in the analogous context of failure-to-promote claims also reflects the requirement that plaintiffs asserting discriminatory retaliation must show that they applied for a specific vacant position for which they were qualified, and that they did not get the job." *Id*. Finally, the court concluded its analysis by noting that the sensibility and fairness of this rule. *Id.* "A failure-to-hire claim obviously depends on the availability of a job opening. It is not unfair or unduly burdensome to expect a plaintiff to submit an application for that vacancy as a prerequisite for stating a failure-to-hire claim." *Id*. at 808.

CONCLUSION: "[A] plaintiff asserting a Title VII claim of retaliatory discrimination based on a failure-to-hire must, in order to establish an adverse employment action, make a prima facie showing that (1) she applied for a particular position (2) which was vacant and (3) for which she was qualified . . . [and] that she was not hired for that position." *Id*. at 809.

***Subsalve USA Corp. v. Watson Mfg., Inc.*, 462 F.3d 41 (1st Cir. 2006)**

QUESTION: Whether a court charged with determining whether an order is for a dismissal or a 28 U.S.C.S. § 1631 transfer can also decide the substance of the order. *Id*. at 47.

ANALYSIS: The court noted that all other circuits have decided that this type of transfer order cannot be immediately appealed. *Id*. The court explained that, with few exceptions, the final judgment rule applies. *Id*. The court then described the standard for that rule as a decision that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Id*. A transfer order, on the contrary, allows the matter to continue in another forum. *Id*.

CONCLUSION: The appellate court lacked jurisdiction to review the substantive claim that the district court erred in its conclusion that it could not exercise personal jurisdiction over the defendants. *Id*.

***McKenna v. First Horizon Home Loan Corp.*, 475 F.3d 418 (1st Cir. 2007)**

QUESTION: "[W]hether [Truth in Lending Act, 15 U.S.C. § 1601 et seq.] claims focused on rescission are maintainable in a class-action format." *Id*. at 423.

ANALYSIS: The 1st Circuit started its analysis by describing the purpose of the Truth in Lending Act ("TILA") and the various remedies available pursuant to it. *Id*. at 421. The court noted that "TILA requires creditors to disclose, clearly and accurately, all the material terms of consumer credit transactions." *Id*. Failure to comply with TILA will result in liability requiring the lender to pay damages or grant rescission. *Id*. Next, the 1st Circuit looked to the legislative intent behind TILA and determined that "Congress did not intend rescission suits to receive class-action treatment." *Id*. at 423. The court analyzed the structure and language of TILA and pointed out that class actions were "specifically addressed in the section of the TILA relating to damages . . . however, no comparable mention of the class-action mechanism [exists] in the section that deals with rescission." *Id*. The court found this strongly suggestive that "Congress did not intend to include a class-action mechanism within the compass of section 1635 [which deals with rescission]." *Id.* Additionally, the court recognized the potentially devastating financial effect on a creditor faced with rescission as a remedy in a class action: "Congress made manifest that although it had designed the TILA to protect consumers, it had not intended that lenders would be made to face overwhelming liability for relatively minor violations." *Id*. at 424. Finally, the court found that the "personal nature of the rescission remedy gives this legislative history a compelling quality. . . . [T]he range of variations that may occur render rescission largely incompatible with a sensible deployment of the class action mechanism." *Id*. at 424-25.

CONCLUSION: The 1st Circuit sided with the 5th Circuit on this issue and held that "class certification is unavailable as a matter of law for TILA rescission claims." *Id*. at 427.

SECOND CIRCUIT

Islander E. Pipeline Co., L.L.C. v. Conn. Dep't of Envtl. Prot., 467 F.3d 295 (2d Cir. 2006)

QUESTION: Whether the "order of the State of Connecticut Department of Environmental Protection (CTDEP) denying Islander East Company's application for a Water Quality Certificate (WQC) for discharge into the waters of the Long Island Sound[]" should be overturned "pursuant to . . . [the 2005 amendment to section 19(d) of] the Natural Gas Act of 1938 (NGA), 15 U.S.C. § 717 (2000)." *Id*. at 299.

ANALYSIS: The court found that section 19(d) of the NGA provided natural gas companies such as Islander East Company "with a cause of action in federal court to challenge an agency's order, action, or failure to act with respect to permits necessary for the construction or operation of natural gas projects." *Id*. at 300. The court rejected CTDEP's claims that section 19(d) violated the Tenth and Eleventh Amendments' guarantees of state sovereignty, and ruled that section 19(d) applied retroactively to CTDEP's actions. *Id*. at 304-09. The court determined that under section 19(d), a federal court's review of an action by a state agency should use a two tiered standard. *Id*. at 309-10. The court held that the first step should be to ascertain that "the state agency complied with the requirements of the relevant federal law." *Id*. at 309. The court next found that aid that if the first tier is satisfied, the second tier should be to review the state action "under the arbitrary and capricious standard." *Id*. at 310.

CONCLUSION: The court found that although it complied with relevant federal law, CTDEP's denial of Islander East Company's application was arbitrary and capricious because CTDEP "failed to articulate rational connections between the facts in the record and the bases for its decision." *Id*. at 311.

Official Comm. of Unsecured Creditors of WorldCom, Inc. v. SEC, 467 F.3d 73 (2d Cir. 2006)

QUESTION: Whether "the 'fair and reasonable' standard for disgorgement plans . . . adopted in *SEC v. Wang*, 944 F.2d 80 (2d Cir. 1991)," should be applied to Fair Fund distribution plans created pursuant to "Sarbanes-Oxley's Fair Fund provision," and whether the circuit court should apply the abuse of discretion standard to the district court's application of the "fair and reasonable" standard. *Id*. at 82, 84.

ANALYSIS: The court "explained that the SEC is charged by statute with enforcing the securities laws, and therefore we would defer to its 'experience and expertise' in determining how to distribute the funds." *Id*. at 82. The court reasoned that a "fair and reasonable" standard was appropriate for SEC-administered Fair Fund distribution plans because "[w]e have long understood that the SEC's charge to enforce the securities laws carries with it the discretion to determine how to distribute recovered profits among injured investors." *Id*. at 84. The court held that since it had established an abuse of discretion standard of appellate review for district court applications of the "fair and reasonable" standard in the analogous situation of disgorgement plans, it would use an abuse of discretion standard for Fair Plan distributions as well. *Id*.

CONCLUSION: "[T]he same 'fair and reasonable' standard of review that applies to the SEC's distribution of disgorged profits applies to its distribution of civil penalties pursuant to the Fair Fund provision[,]" and the 2nd Circuit's "review of the district court's exercise of its equitable powers in approving the plan is for abuse of discretion." *Id*. at 82, 84.

United States v. Sloley, 464 F.3d 355 (2d Cir. 2006)

QUESTION: "On what basis can a defendant [convicted of crime] challenge a prosecutor's refusal to file a § 3E1.1(b) motion [under the United States Sentencing Guidelines (U.S.S.G.)]" to reduce the defendant's sentence. *Id*. at 360.

ANALYSIS: The 2nd Circuit turned to "case law governing [U.S.S.G.] § 5K1.1 that grants analogous discretion to prosecutors in filing motions that permit a court to decrease a sentence" for guidance in determining when a prosecutor may withhold the motion to decrease a sentence under § 3E1.1(b). *Id*. The court found that "[i]t is subject, . . . to the same limits to which a prosecutor's discretion under § 5K1.1 is subject. That is in all cases, a prosecutor cannot refuse to move on the basis of an unconstitutional motive, such as a defendant's race or religion." *Id*. The court also stated that since the discretion to file the motion is "solely in the hands of the government, . . . we may review the plea agreement to see if the government has 'made its determination in good faith." *Id*. at 361.

CONCLUSION: The court found that there was no unconstitutional motive behind the prosecutor's decision. "The record shows that [defendant's] reneging on his admission to perjury . . . is what led the

government to conclude that he had not accepted responsibility to the prosecutor's satisfaction." *Id*. The court also found that "the government's refusal to file was made in good faith. The record shows that the prosecutor was honestly dissatisfied with appellant's acceptance of responsibility." *Id*.

***Moreno-Bravo v. Gonzales*, 463 F.3d 253 (2d Cir. 2006)**

QUESTION: "[W]hether the [REAL ID] Act compels this Court, as a matter of jurisdiction, to transfer the case to the circuit where the alien's immigration proceedings were held—here the Fifth Circuit." *Id*. at 255.

ANALYSIS: The 2nd Circuit found that the answer would turn on "whether [8 U.S.C.] § 1252(b)(2) is a venue provision or a jurisdictional mandate." *Id*. at 257. The court explained that "[w]hereas issues of jurisdiction relate to the basic authority of a court to hear and decide a case, venue, by contrast, is in the nature of a convenience to litigants and subject to their disposition." *Id*. at 258. Thus, if § 1252 were merely a venue provision, transfer is not compelled by the statute. *Id*. Using principles of statutory interpretation, the court found it hard "to believe that the legislature would then neglect to express a similarly clear intent—or any intent at all—to circumscribe jurisdiction when it came to defining the circuit locality of filing such petitions as set forth by § 1252(b)(2)." *Id.* at 259.

CONCLUSION: The court found that "§ 1252(b)(2) is a venue provision, not a jurisdictional one. We therefore are not compelled to dismiss or transfer the petition, and in the circumstances here presented, we decline to do so." *Id*. at 262.

***DiTolla v. Doral Dental IPA, L.L.C.*, 469 F.3d 271 (2d Cir. 2006)**

QUESTION: Whether by the enactment of the Class Action Fairness Act of 2005 ("CAFA"), Congress intended to change the long-standing tradition that the party asserting federal jurisdiction bears the burden of proving that the case is properly in federal court. *Id*. at 275.

ANALYSIS: The court noted that, absent an explicit direction by Congress to the contrary, "it would be thoroughly unsound for [the c]ourt to reject a longstanding rule." *Id*. The court explained that Congress knew at the time it enacted CAFA where the burden of proof lay and from its silence it can be inferred that Congress chose not to alter the rule. *Id*.

CONCLUSION: The enactment of CAFA does not alter the rule that the party asserting federal jurisdiction bears the burden to prove that the case is properly in federal court. *Id*.

***Atsilov v. Gonzales*, 468 F.3d 112 (2d Cir. 2006)**

QUESTION: Whether the circuit court has jurisdiction to review the Attorney General's decision to deny a hardship waiver to an alien who has established one of the three grounds for relief under § 1186a(c)(4). *Id*. at 115.

ANALYSIS: Under 8 U.S.C. § 1252(a)(2)(B)(ii), the court noted, courts do not have jurisdiction to review any decision or action that is under the discretion of the Attorney General granted by subchapter II of chapter 12 of Title 8 of the United States Code. *Id*. Congress, under § 1252(a)(2)(D), reserved for the courts jurisdiction to review constitutional claims or questions of law, including whether the Attorney General failed to grant a request if one was required by § 1186a(c)(4). *Id*. The court noted that "the statute provides that if certain conditions are established, the Attorney General 'in [his] discretion' 'may'—not 'shall'—grant the waiver. . . . [Such language] specifies that an ultimate decision whether to grant relief is entrusted to the discretion of the Attorney General, thus invoking the jurisdictional bar of § 1252(a)(2)(B)(ii)." *Id*. at 116.

CONCLUSION: The court held that "§ 1252(a)(2)(B)(ii) deprives [the court] of jurisdiction to review the Attorney General's discretionary decision under § 1186a(c)(4) to deny relief to an alien who is eligible for relief under the terms of that subsection." *Id*. at 116.

***Augustin v. Jablonsky*, 461 F.3d 219 (2d Cir. 2006)**

QUESTION: "Whether a court may employ Rule 23(c)(4)(A) to certify a class as to a specific issue where the entire claim does not satisfy Rule 23(b)(3)'s predominance requirement." *Id*. at 226.

ANALYSIS: The court held that the plain language and structure of the statute support that "[e]ven if the common questions do not predominate over the individual questions so that class certification of the entire action is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of these particular issues." *Id*. The court further determined that the Advisory Committee Notes support this conclusion, "[f]or example, in a fraud or similar case the action may

retain its 'class' character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims." *Id*.

CONCLUSION: The 2nd Circuit held "that a court may employ subsection (c)(4) to certify a class as to liability regardless of whether the claim as a whole satisfies Rule 23(b)(3)'s predominance requirement." *Id*. at 227.

***Thapa v. Gonzales*, 460 F.3d 323 (2d Cir. 2006)**

QUESTION: Whether the court has "jurisdiction under the Immigration and Nationality Act, 8 U.S.C. § 1101 to stay an order of voluntary departure issued by an immigration judge or the Board of Immigration Appeals." *Id*. at 324.

ANALYSIS: The court noted that "in reviewing orders of federal agencies, 'the court of appeals in its discretion may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the petition.'" *Id*. at 329.

CONCLUSION: The 2nd Circuit held that under 28 U.S.C. § 2349(b), as incorporated by reference in 8 U.S.C. § 1252(a)(1), the court has the authority to stay an agency order pending consideration of a petition for review on the merits, and that nothing in the Immigration and Nationality Act or its implementing regulations strips the court of this authority with respect to orders of voluntary departure. *Id*. at 332..

***Ofori-Tenkorang v. Am. Int'l Group Inc.*, 460 F.3d 296 (2d Cir. 2006)**

QUESTION: Whether Congress extended the coverage of 42 U.S.C. § 1981 beyond the territorial jurisdiction of the United States. *Id*. at 297-98.

ANALYSIS: The court began with the legal presumption that Congress makes laws for domestic purposes, not extraterritorial ones. *Id*. at 301. The court then reasoned that the plain language of § 1981 unambiguously conferred these rights only within the borders of the United States. *Id*. The court also looked to the legislative history and structure in determining that nothing existed that conferred these rights outside of the United States. *Id*.

CONCLUSION: The 2nd Circuit affirmed the holding of the district court dismissing plaintiff's § 1981 claims to the extent that those claims

arose from alleged discriminatory conduct that occurred while plaintiff was living and working in South Africa. *Id*. at 227.

***Pritchard v. County of Erie*, 473 F.3d 413, 416 (2d Cir. 2007)**

QUESTION: Whether the attorney-client privilege protects communications that pass between a government lawyer having no policymaking authority and a public official, where those communications assess the legality of a policy and propose alternative policies in that light. *Id*. at 417.

ANALYSIS: The court found that "[]when a lawyer has been asked to assess compliance with a legal obligation, the lawyer's recommendation of a policy that complies (or better complies) with the legal obligation—or that advocates and promotes compliance, or oversees implementation of compliance measures—is legal advice." *Id*. at 422.

CONCLUSION: Communications between a government lawyer and a policy-maker can be privileged, where the lawyer is advising how to bring a certain policy into compliance with the law. *Id*.

***Glatzer v. Enron Corp.*, 475 F.3d 131 (2d Cir. 2007)**

QUESTION: Whether "the docketing of a bankruptcy appeal that does not comply with Bankruptcy Rule 8007 ("Rule 8007") trigger[s] the fifteen-day deadline for an appellant to file an opening brief set forth in Bankruptcy Rule 8009 ("Rule 8009")." *Id.*

ANALYSIS: The 2nd Circuit joined the 3rd and 4th Circuits, finding that "[t]he notice requirement is an integral part of limitations periods found throughout our rules of procedure and the bankruptcy code . . . ." *Id*. The court further stated that "[a]s we will not condone an appellant's dilatory tactics in filing an appeal, we will not hold an appellant accountable for a third party's oversight that was beyond the appellant's knowledge and control." *Id*.

CONCLUSION: The court held that "the fifteen-day period of Rule 8009(a)(1) is only triggered once the appeal has been docketed in the district court and notice of the docketing of the appeal has been sent to all parties." *Id*.

***United States v. Mon-Leang Mui*, No. 05-3512-cr, 2007 U.S. App. LEXIS 1166 (2d Cir. Jan. 18, 2007)**

Editor's Note—The Appellant's "first three arguments present issues of first impression in this Court." *Id*. at *2.

QUESTION: Whether "the district court exceeded its jurisdiction in submitting certain Sentencing Guidelines enhancements to the jury." *Id*.

ANALYSIS: The court stated that "[t]here is . . . no jurisdictional bar to the use of special verdicts to obtain from a jury advisory findings relevant to sentencing." *Id*. at *3-4.

CONCLUSION: The court held that "it is undisputed that the district court ultimately treated the jury's Guidelines findings as advisory rather than binding, consistent with the remedy decision in *Booker*." *Id*. at *4.

QUESTION: Whether "the inclusion of Sentencing Guidelines factors in [defendant's] indictment, and the submission of that indictment and those sentencing factors to the jury, constituted structural error violative of his constitutional rights to due process and a fair trial." *Id*.

ANALYSIS: The court reasoned that "[t]he Guidelines factors pleaded in the indictment and submitted to the jury as part of the charged offenses are essentially surplusage." *Id*. at *5. The court opined that "[s]urplus pleadings do not alter the fundamental framework of the trial. Certainly, they do not relieve the government of its critical obligation to prove beyond a reasonable doubt each element of the charged offenses." *Id.* at *5-6. Furthermore, the court stated that "there could be no confusion as to the government's burden of proof with respect to the actual elements of the charged offenses because the indictment distinguished between those elements and the specified Guidelines factors." *Id*. at *6. The court continued by noting that "[f]urther, the court's charge instructed the jury to reach the issue of [the] Guidelines factors only if it found the traditional elements proved." *Id*.

CONCLUSION: The court held that "[t]he alleged pleading and submission error [could] not be deemed structural because it [did] not cast doubt on the reliability of the jury findings with respect to the actual elements of the charged offenses or otherwise impugn[e] the integrity of the ultimate verdict of guilty." *Id*.

QUESTION: Whether the defendant's "trial counsel was constitutionally ineffective." *Id*. at *2.

ANALYSIS: The court reasoned that the defendant "cannot show that counsel's failure to object to the Guidelines pleadings or charge was objectively unreasonable given that . . . the Supreme Court in *United States v. Booker* . . . conclude[d] that the Sixth Amendment required [the] Guidelines 'enhancing facts [to] be alleged in indictments and proved to the jury beyond a reasonable doubt.'" *Id*. at *11. Furthermore, the defendant did not "point to any evidence that would have been excluded if counsel had successfully objected to the challenged pleading or submission of Guidelines factors to the jury. *Id*. at *13. The court also noted that the defendant could not "demonstrate that an objection by counsel to prosecution Guidelines arguments in summation would have resulted in a different jury verdict or court sentence." *Id*.

CONCLUSION: The court held that "counsel's failure to object to the Guidelines pleading or submission was [not] objectively unreasonable" and that the defendant "fail[ed] to demonstrate the requisite prejudice." *Id*. at *12-13.

Tafari v. Hues, 473 F.3d 440 (2d Cir. 2007)

QUESTION: "[W]hether an interlocutory appeal brought by a pro se litigant prior to the entry of a final judgment below is 'frivolous' for the purposes of revoking in forma pauperis status under 28 U.S.C. § 1915(g), the 'three strikes' rule of the Prison Litigation Reform Act ("PLRA")." *Id*. at 441.

ANALYSIS: The court reasoned that "a premature appeal is not irremediably defective, and dismissal of such an appeal is not based on a determination that it ultimately cannot succeed. Thus, [the court could not] consider it 'frivolous' within the meaning of § 1915(g)." *Id*. at 443. The court was "further convinced by the structure of the PLRA that § 1915(g) does not cast so broad a net as the district court held below." *Id*. The court also found that "designating a dismissal of this ilk as 'frivolous' fundamentally conflicts with the purposes of § 1915(g)." *Id*. Finally, the court noted that "[s]tatements of the PLRA's sponsors further illustrate that it was designed to stem the tide of egregiously meritless lawsuits, not those temporarily infected with remediable procedural or jurisdictional flaws." *Id*.

CONCLUSION: The court held that "that the PLRA's 'three strikes' provision does not encompass a dismissal for filing a premature notice of appeal." *Id*. at 444.

THIRD CIRCUIT

Fowler-Nash v. Democratic Caucus of the Pa. House of Representatives, 469 F.3d 328 (3d Cir. 2006)

QUESTION: Whether the "alter ego" or functional test should be applied "to claims of absolute legislative immunity" when a state political caucus is sued after the firing of a legislative assistant. *Id*. at 329.

ANALYSIS: The court recognized that the "'alter ego' test lacks precedential support from the Supreme Court, from our own Court, [and] from other courts of appeals. Its adoption would open a circuit split." *Id*. Additionally, the court noted that the "'alter ego' approach is also a poorer reflection of the purposes of legislative immunity than the functional approach." *Id*. The court also noted that its "own jurisprudence regarding municipal personnel actions strongly suggests that the Caucus should not be shielded by legislative immunity." *Id*.

CONCLUSION: The court held that a functional test applies "to claims of absolute legislative immunity." *Id*.

Hooven v. Exxon Mobil Corp., 465 F.3d 566 (3d Cir. 2006)

QUESTION: Whether "an employee's severance benefit can be grounded in, and enforceable based on, a unilateral contract outside of ERISA's remedial scheme." *Id*. at 572-73.

ANALYSIS: In disagreeing with the district court's analysis, the 3rd Circuit held that "every claim for relief involving an ERISA plan must be analyzed within the framework of ERISA." *Id*. at 573. "ERISA requires 'that any contractually accrued rights be discernible from the written terms of the formal ERISA plan documents themselves.'" *Id*. The court recognized that they may "occasionally employ unilateral contract concepts in ERISA cases . . . ," but that "[u]nilateral contract principles may not operate to create extra-ERISA causes of action for plan benefits." *Id*.

CONCLUSION: In concluding that "[u]nilateral contract principles may not operate to create extra-ERISA causes of action for plan benefits," the court observed that this holding "is consistent with the case law on this issue." *Id*.

***United States v. Gunter*, 462 F.3d 237 (3d Cir. 2006)**

QUESTION: Whether a district court can "sentence below the applicable Guidelines range for offenses involving crack cocaine." *Id*. at 247.

ANALYSIS: "[A] sentencing court could err by applying the Guidelines mandatorily (even though the resulting sentence was calculated solely upon facts that were admitted by the defendant, found by the jury, or based upon a prior conviction), as *Booker* makes them no more than advisory." *Id*.

CONCLUSION: "Post-*Booker* a sentencing court errs when it believes that it has no discretion to consider the crack/powder cocaine differential incorporated in the Guidelines—but not demanded by 21 U.S.C. § 841(b)—as simply advisory at step three of the post-*Booker* sentencing process . . . ." *Id*. at 249.

***Scarborough v. Chase Manhattan Mortgage Corp.*, 461 F.3d 406 (3d Cir. 2006)**

QUESTION: "[W]hether a claim secured by an interest in real property that includes the debtor's principal residence as well as other income-producing rental property is 'a claim secured only by a security interest in real property that is the debtor's principal residence.'" *Id*. at 410-11.

ANALYSIS: The court noted that "by using the word 'is' in the phrase 'real property that is the debtor's principal residence,' Congress equated the terms 'real property' and 'principal residence.'" *Id*. at 411. The court explained that, "put differently, this use of "is" means that the real property that secures the mortgage must *be only* the debtor's principal residence in order for the anti-modification provision to apply." *Id*. at 411.

CONCLUSION: The court held that "a claim secured by real property that is, even in part, *not* the debtor's principal residence does not fall under the terms of §1322(b)(2)." *Id*.

***Morgan v. Gay*, 466 F.3d 276 (3d Cir. 2006)**

QUESTION: Whether the Class Action Fairness Act ("CAFA") provision codified at 28 U.S.C. § 1453(c)(1) stating that "a federal appellate court 'may accept an appeal' from a remand order 'if application is made . . . not less than 7 days after entry of the order,'

should be interpreted . . . to mean 'not more than 7 days after entry of the order.'" *Id*. at 277.

ANALYSIS: The court stated that "in that rare instance where it is uncontested that legislative intent is at odds with the literal terms of the statute, then a court's primary role is to effectuate the intent of Congress even if a word in the statute instructs otherwise." *Id*. at 278. The court first turned to the legislative history of § 1453 which stated that the "[n]ew subsection 1453(c) provides discretionary appellate review of remand orders under this legislation but also imposes time limits . . . [and] parties must file a notice of appeal *within seven days* after entry of a remand order." *Id*. The court further noted that § 1453(c)(2) "instructs an appellate court that it must dispose of the appeal within 60 days." *Id*. The court then extrapolated the effect of the statute as written, noting that § 1453(c)(1) "would grant [parties] the ability to . . . abuse the litigation process because the party who loses on the district court's remand ruling could strategically wait to appeal the remand decision at any time pre-trial." *Id*. Observing the "pre-trial stage of class action cases usually lasts many months or even years," the court opined that so extending parties' ability to appeal under § 1453 "contravenes the uncontested intent of the statute." *Id*. The court noted that the only other circuits to have considered the question, the 9th, 10th, and 11th Circuits, held that imposing a "seven-day waiting period followed by a limitless window for appeal" ran contrary to Congressional intent. *Id*. at 279. The 3rd Circuit concluded the statute "needs common sense revision that accurately reflects the uncontested intent of Congress," and announced it would therefore read § 1453(c)(1) to limit the time for appeal to seven court days. *Id*.

CONCLUSION: The 3rd Circuit held that, "in accord with the intent of Congress, " it would read § 1453(c)(1) of the Class Action Fairness Act to require an application to appeal from a remand order be made "not more than" 7 days after the entry of the order. *Id*.

***Chao v Cmty. Trust Co.*, 474 F.3d 75 (3d Cir. 2007)**

QUESTION: Whether the definition of "person" under § 3401(4) of the federal Right to Financial Privacy Act ("RFPA") applies to trusts. *Id*. at 81.

ANALYSIS: The court noted that a trust differs from corporations, L.L.C., and other business structures. *Id*. at 81. The court further noted that "[l]ooking to the equitable beneficiaries of a trust—the real parties in interest—rather than to its legal owner is hardly a novel principle in trust

law." *Id*. at 81-82. The court rejected the argument that reading § 3401 to include trusts presented a slippery slope; however, the court stated it was "not inclined to carve out a 'trust exception' to the RFPA's definition of 'person' solely on the principles the common law of trusts." *Id*. The court also indicated the argument for considering a trust a "person" under the RFPA has no support in case law, and that the 3rd Circuit had previously held itself bound by the RFPA's unambiguous definition of "customer" in holding that a corporation is not a "person." *Id*. The court further noted that the RFPA "requires a customer to hold both legal and equitable title," therefore disqualifying an entity that manages funds for trusts beneficiaries without maintaining accounts in those beneficiaries' names. *Id*.

CONCLUSION: The 3rd Circuit held that a trust is not a "person" under the definition in § 3401(4) of the Right to Financial Privacy Act. *Id*. at 82.

FIFTH CIRCUIT

Seiferth v. Helicopteros Atuneros, Inc., 472 F.3d 266 (5th Cir. 2006)

QUESTION: Whether "specific personal jurisdiction [is] a claim-specific inquiry." *Id*. at 274.

ANALYSIS: The court indicated that the difference that exists "between general and specific jurisdiction" clearly indicates that specific jurisdiction only arises when a defendant's forum contacts are related to the plaintiff's claim. *Id*. at 274-75. Allowing for specific jurisdiction to be created, when forum contacts are not sufficient to establish general jurisdiction, by forum contacts unrelated to the claim would be a violation of the Due Process Clause. *Id*. at 275. When a plaintiff brings multiple claims related "to different forum contacts of the defendant, specific jurisdiction must be established for each claim." *Id*.

CONCLUSION: Specific personal jurisdiction must be established by forum contacts specific to each claim brought by a plaintiff. *Id*. at 274.

Darby v. Time Warner Cable, Inc., 470 F.3d 573 (5th Cir. 2006)

QUESTION: Whether a cable service is classified as a utility for purposes of 11 U.S.C. § 366, part of the Bankruptcy Code, which would provide debtors with protection from having the service cut-off when the debtor has filed for bankruptcy. *Id*. at 574.

ANALYSIS: The court drew upon the decision of the bankruptcy court in *In re Moorefield*. *Id*. The court agreed with the bankruptcy court "that cable television is not a necessity as it is not necessary to a minimum standard of living" and not within the scope of the services that Congress sought to protect in passing § 366. *Id*. at 575.

CONCLUSION: The Fifth Circuit held that cable services are not a utility under § 366. *Id*.

***Lee v. Cytec Indus., Inc.*, 460 F.3d 673 (5th Cir. 2006)**

QUESTION: Whether, in order for the statute of limitations to be equitably tolled in a hybrid section 301 lawsuit under the Labor Management Relations Act, the plaintiff, within six months of displacement, must file a grievance with the union. *Id*. at 676.

ANALYSIS: The court explained that "because some plaintiffs must exhaust internal contractual remedies (e.g. the grievance process) before suing, it would be unfair to say that the plaintiffs' claim is barred by limitations if, while the grievance is pending, the six-month federal statute of limitations expires." *Id*. However, the court instructed that plaintiffs must first exhaust internal remedies and "cannot wait until the statute of limitations for a federal lawsuit has passed and then file a grievance to circumvent the applicable six-month statute." *Id*. The court further added that "tolling is applicable only for a 'good faith' attempt to pursue non-judicial remedies" in order to resolve labor disputes. *Id*.

CONCLUSION: The court held that in order "to invoke equitable tolling [in a hybrid section 301 lawsuit], an employee must file a grievance with the union within six months of the adoption of a new seniority system" *Id*. at 676.

***Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188 (5th Cir. 2006)**

QUESTION: Whether a school board that opens its meetings with prayers under the legislative-prayer exception interpreting the Establishment Clause of the U.S. Constitution nevertheless engages in activities that are constitutionally impermissible. *Id*. at 191.

ANALYSIS: The 5th Circuit surveyed decisions from the United States Supreme Court and other circuits in their treatment of deliberative bodies that were allowed to conduct legislative prayers. *Id.* at 195-202. Adopting the standard set forth in *Marsh v. Chambers*, 463 U.S. 783 (1983), the court held that the school board violated the Establishment

Clause because it did not fit *Marsh*'s "narrow exception for nonsectarian legislative invocations." *Id.* at 199. The court found the opening prayers constitutionally impermissible, notwithstanding case law that allowed opening prayers by legislative bodies, because the school board at issue selected only members of the Christian faith to lead prayers that demonstrated "a clear preference for Christianity." *Id*. at 204-05.

CONCLUSION: The 5th Circuit affirmed the school board's violation of the Establishment Clause but vacated the permanent injunction against all prayer and remanded the case back to the district court for entry of an injunction consistent with the narrow quality of its holding. *Id*. at 205.

***Stanley v. Foster*, 464 F.3d 565 (5th Cir. 2006)**

QUESTION: Whether a reinstatement of a case pursuant to FED. R. CIV. PROC. 60(b) has an effect on the running of the statute of limitations. *Id*. at 568.

ANALYSIS: The court explained that "when a case is reinstated the applicable date for calculating the statute of limitations is the date of the initial filing." *Id*. at 568-69. The court noted that "this is not a new action . . . the district court merely reopened the original case." *Id*. at 569.

CONCLUSION: The court concluded that when a case is reinstated pursuant to FED. R. CIV. PROC. 60(b), the running of the statute of limitations "should be calculated backward from the time the original complaint was filed." *Id*.

***United States v. Jenson*, 462 F.3d 399 (5th Cir. 2006)**

QUESTION: "[W]hether taking an unusual amount of time to pull over, coupled with nervous behavior by the driver, amounts to reasonable suspicion to justify prolonged detention." *Id*. at 404.

ANALYSIS: The court stated that "modest delay in stopping time does not by itself . . . give rise to reasonable suspicion." *Id*. at 405. However, "there may be cases . . . in which further context, such as erratic driving, acceleration, or passenger movement inside the vehicle further suggest criminal behavior." *Id*. In this case, the court found that the government failed to prove that there was a reasonable suspicion to justify prolonged detention because the defendant's actions did not "amount to 'an *articulable* suspicion that a person has committed or is about to commit a crime' as opposed to a mere hunch." *Id*.

CONCLUSION: The court found that absent "evidence of a nexus between [the defendant]'s allegedly suspicious behavior and any specific criminal activity," taking an unusual amount of time to pull over, coupled with nervous behavior by the driver does not present a reasonable suspicion to justify prolonged detention. *Id*.

***United States v. Hodges*, 460 F.3d 646 (5th Cir. 2006)**

QUESTION: "[W]hether, and to what extent [the court should] apply the Sixth Amendment standards to a waiver of the Rule 32.1(b) right to counsel in the context of a revocation proceeding." *Id*. at 650.

ANALYSIS: The court explained that "Rule 32.1(b) guarantees a defendant in a proceeding to revoke parole, probation, or supervised release, certain procedural protection—including the right to notice of the right to counsel." *Id*. at 651. However, the Rule is silent as to the "appropriate standard by which to measure a defendant's waiver of the Rule's protections." *Id*. The court noted that the 1st, 2nd, 7th, and 9th Circuits have all determined that the waiver of Rule 32.1(b) protections must be "knowing and voluntary" as determined by a "totality of the circumstances" analysis. *Id*.

CONCLUSION: The court adopted the "knowing and voluntary" approach taken by the 1st, 2nd, 7th, and 9th Circuits and held that "the waiver of a defendant's Rule 32.1(b) rights is knowing and voluntary (1) where there is a sufficient colloquy by the district court to assure an understanding or freely made waiver; or (2) where the colloquy leaves some uncertainty, the totality of the circumstances assures that the waiver is knowing and voluntary." *Id*. at 652.

SIXTH CIRCUIT

***Kellici v. Gonzales*, 472 F.3d 416 (6th Cir. 2006)**

QUESTION: "Whether an alien's habeas petition necessarily challenges the merits of the underlying administrative order of removal for purposes of jurisdiction under the REAL ID Act . . . ." *Id*. at 419.

ANALYSIS: The court noted that "[w]here a habeas case does not address the final order, it is not covered by the plain language of the Act." *Id*. The court recognized that the 1st Circuit addressed this issue in *Hernandez v. Gonzales*, holding that "where a petitioner challenged only his continued detention in a habeas petition, rather than his removal, the

case could not be transferred to the court of appeals pursuant to Section 106(c)." *Id*.

CONCLUSION: The court agreed with the reasoning of the 1st Circuit and held that an alien's habeas petition does not necessarily challenge the merits of the administrative order of removal under the REAL ID Act. *Id*.

***Kline v. Gulf Ins. Co.*, 466 F.3d 450 (6th Cir. 2006)**

QUESTION: "[W]hether a federally-prescribed form endorsement attached to a trucking company's insurance contract modifies the attachment point of an umbrella policy when the endorsement was not legally required in the first place." *Id*. at 451.

ANALYSIS: At the outset, the court noted that the content of the curiously, perhaps mistakenly attached federal endorsement form "is ambiguous in the context of the umbrella policy to which it was allegedly attached, and the form is best interpreted in light of the policies for which it was created." *Id*. After reviewing the language of the completed endorsement form, the court concluded that "[t]he language of [the form] as a whole . . . leads to the conclusion that Gulf did not change its coverage when filling out the government-prepared form," but "suggests that Gulf intended to offer [the minimum] coverage only if the law required such coverage." *Id*. at 454-55. Recognizing that this was not the only possible interpretation of the completed endorsement form, however, the court buttressed its opinion on policy grounds: "Moreover, public policy considerations do not warrant additional compensation, as [the plaintiff] already received . . . more than the minimum federal requirement. The 'purpose of the [MCS-90] endorsement is to give full security for the protection of the public (up to the limits prescribed).'" *Id*. at 455. The court further explained that "[t]he federal government balanced the need to compensate victims with the needs of industry and determined the appropriate minimum compensation for members of the public," and thus the court should not entertain a reading of the endorsement form that would disturb that balance and essentially "rewrite the minimum compensation provisions." *Id*. at 456.

CONCLUSION: The court concluded that the attachment of "the [federal endorsement] form did not require that the defendant insurance company pay more than what was required under the original umbrella insurance contract." *Id*. at 451.

***United States v. Carter*, 463 F.3d 526 (6th Cir. 2006)**

QUESTION: Whether sexual offenses committed in 1988 "were too remote in time to justify the imposition of a sex-offender-treatment condition in 2005" as a supervised-release condition. *Id*. at 531.

ANALYSIS: The court looked to the 8th and 9th Circuits to formulate a stance of its own. *Id*. The court noted that where the "government presented no evidence that [the defendant] has a propensity to commit any future sexual offenses, or that [he] has repeated this behavior in any way since his . . . conviction [fifteen years prior]" special conditions are not likely "to serve the goals of deterrence or public safety, since the [sexually-offensive] behavior on which the special conditions are based . . has ceased" *Id*. The court adopted the view that "[s]upervised release conditions predicated upon twenty-year-old incidents, [without evidence of any sexual misconduct since then], do not promote the goals of public protection and deterrence" *Id*. at 531-32.

CONCLUSION: The court refused to dictate "precisely how much time must elapse before a sex offense becomes too remote in time to be reasonably related to a sex-offender condition" but held that in the present case seventeen years was too remote. *Id*. at 532.

***United States v. Allison Engine Co.*, 471 F.3d 610 (6th Cir. 2006)**

QUESTION: Whether "a claim must have been paid or approved to establish a violation" of the False Claims Act, 31 U.S.C. § 3729(a)(2). *Id*. at 618.

ANALYSIS: The 6th Circuit explained that to the knowledge of the court, "no authority exists either supporting the proposition that a claim must have been paid or approved to establish a violation of subsection (a)(2) or rejecting it." *Id*. The court held that the language of the statute required that the claim must have already been paid by the government before "an individual can be liable under the FCA for presenting a fraudulent claim to the government." *Id*. at 617.

CONCLUSION: The 6th Circuit concluded that based on the language of the statute, 31 U.S.C. § 3729(a)(2) requires that a claim must have already been paid by the government. *Id*. at 622.

***United States v. Magouirk*, 468 F.3d 943 (6th Cir. 2006)**

QUESTION: "[W]hether a defendant who, through a valid plea agreement . . . stipulates that the Guidelines will govern his sentence

despite *Booker*, but . . . does not explicitly waive his general right to appeal his sentence, nonetheless effectuates a waiver of his specific right to appeal his sentence on the grounds of a *Booker* violation." *Id*. at 950.

ANALYSIS: The 6th Circuit explained that "[a]t a very basic level, the Guidelines afford defendants a degree of predictability that the *Booker* discretionary scheme by definition cannot." *Id*. at 951. The court noted that a district court, moreover, will not necessarily impose a more lenient sentence simply because the Guidelines are no longer mandatory." *Id*. The court noted that "[a]llowing the waiver of *Booker* rights will give *defendants* an additional 'tool,' providing them with another plea option that they will now be able to pursue with the government." *Id*. Accordingly, the 6th Circuit held that "a defendant may voluntarily waive his or her *Booker* rights, provided that the waiver is made 'knowingly, intelligently, and with sufficient awareness of the relevant circumstances and likely consequences.'" *Id*. at 948. However, the court also held that this would effectively waive a defendant's "right to appeal his sentence on the ground that the district court should have considered the Guidelines as advisory only." *Id*. at 951.

CONCLUSION: The 6th Circuit concluded that a defendant may voluntarily waive his or her *Booker* rights, but in doing so, the defendant also waives his or her right to appeal a sentence on the ground that the lower court "should have considered the Guidelines as advisory." *Id*. at 951.

***Pittsburgh & Conneaut Dock Co. v. Dir.*, 473 F.3d 253 (6th Cir. 2007)**

QUESTION: "Whether the lack of a written recommendation (or any recommendation at all) for the disposition of [a disability compensation] controversy precludes fee liability under [33 U.S.C. § 928(b)]." *Id*. at 265.

ANALYSIS: The court noted that "[s]ubsection (b) sets forth the requirements for fee liability when an employer voluntarily pays some compensation but a dispute arises concerning additional compensation." *Id*. at 264. The court explained that subsection (b) requires the following "in order for an employer to be liable for attorney's fees: (1) an informal conference addressing the disputed additional compensation; (2) a subsequent written recommendation suggesting a disposition of the controversy; (3) the employer's rejection of the recommendation; and (4) the claimant's use of an attorney to secure an award of compensation greater than the amount the employer was willing to pay." *Id*. at 264-65. The court found that "[t]he language of subsection (b) plainly states that

in order for fees to be assessed under its terms there must be a written recommendation containing a suggested disposition of the controversy." *Id*. at 266.

CONCLUSION: The court held that under 33 U.S.C. § 928(b), a plaintiff "is not entitled to attorney's fees . . . [if] there was no written recommendation regarding the disposition of the controversy." *Id*.

***Van v. Jones*, 475 F.3d 292 (6th Cir. 2007)**

QUESTION: "Whether the [defendant]'s Sixth Amendment rights to counsel and a fair trial were violated when the state court consolidated his criminal trial with that of his co-defendants at a hearing . . . at which [the defendant]'s attorney was not present."

Id. at 293.

ANALYSIS: Noting its jurisdiction to review habeas appeals claims de novo, where state courts have not addressed the issue involved, the 6th Circuit determined that the hearing did not constitute a "critical stage" of the trial, since absence of counsel at the procedural step in question did not prevent incurable prejudice to the defendant. *Id*. at 293, 315.

CONCLUSION: The 6th Circuit affirmed the judgment of the district court and held that "a Michigan consolidation hearing is not a critical stage and that the total absence of counsel at such a hearing does not require that a writ of habeas corpus issue." *Id*. at 293.

***United States v. Wells*, 473 F.3d 640 (6th Cir. 2007)**

QUESTION: "[W]hether for purposes of recidivist sentencing under the Armed Career Criminal Act, 18 U.S.C. § 924(e), a prior adjudication of juvenile delinquency is subject to characterization under the 'categorical approach' mandated for the review of prior adult convictions by [Supreme Court precedent]." *Id*. at 642.

ANALYSIS: The court rejected the government's stance that the defendant's two prior adjudications of juvenile delinquency were "violent felonies," and consequently refused to consider the defendant as an armed career criminal. *Id*. at 645, 649. The court favored a categorical approach instead of a factual approach, because "district courts will eliminate the need to examine facts relating to crimes sometimes committed in the far distant past." *Id*. at 649.

CONCLUSION: The 6th Circuit adopted the 3rd Circuit categorical approach when considering prior juvenile convictions during sentencing for new crimes. *Id*.

***United Steelworkers of America v. Cooper Tire & Rubber Co.*, 474 F.3d 271 (6th Cir. 2007)**

QUESTION: "[W]hether a dispute over a side agreement that does not provide for arbitration falls within the CBA's arbitration clause." *Id*. at 278.

ANALYSIS: The court first recognized the circuit split that exists over this issue. *Id*. The court noted then that the 2nd, 4th, and 8th Circuits all utilize a collateral test to determine if a dispute concerning a side agreement is arbitrable. *Id*. The court stated that "[u]nder the collateral test, courts consider the similarity of the side agreement's subject matter to the subject matter of the CBA. If the subject matter is dissimilar, the side agreement is deemed collateral to the CBA. However, where the side agreement is 'integral' to the CBA, courts permit arbitration of disputes over its provisions." *Id*. The court then described the "scope" test adopted by the 3rd, 7th, and 9th Circuits, that states "unless the parties indicate otherwise, disputes over a side agreement are arbitrable if the subject matter of the side agreement is within the scope of the CBA's arbitration clause." *Id*. at 278-79.

CONCLUSION: The court adopted the "scope test as applied by the Ninth Circuit." *Id*. at 279.

***Metro. Life Ins. Co. v. Conger*, 474 F.3d 258 (6th Cir. 2007)**

QUESTION: Whether de novo is "[t]he appropriate standard of review to apply to a district court's judgment on the administrative record in an LTCSA [Long-Term Care Security Act, 5 U.S.C.S. §§ 9001-9009] eligibility dispute." *Id*. at 263.

ANALYSIS: The court noted at the outset that, "[i]n the related arena of ERISA benefit disputes, we review de novo a district court's judgment on the administrative record." *Id*. Furthermore, "[n]either party offers an argument for deviating from the de novo standard, nor do we see any reason to do so." *Id*.

CONCLUSION: Therefore, the court concluded, "we adopt the ERISA standard and hold that we review de novo a district court's

judgment on the administrative record in an LTCSA eligibility dispute." *Id*.

SEVENTH CIRCUIT

United States v. Davis, 471 F.3d 783 (7th Cir. 2006)

QUESTION: Whether the term "provided" in 18 U.S.C. § 1347 means that services must be administered personally by the "Health Service Provider in Psychology" ("HSPP") or whether an HSPP may delegate duties to any low level unlicensed clinic employee. *Id*. at 787.

ANALYSIS: The court first looked at the plain meaning of the statute and deemed it to be clear and unambiguous. *Id*. Further, the court noted that to find otherwise would produce an absurd result, allowing practitioners to delegate the "lion's share" of their work to unlicensed, unqualified individuals. *Id*. at 787-88. The court added that Indiana obviously knows how to authorize others to perform the services because they have done so in other statutes. *Id*. at 787. The court stressed that in all of those instances, the authorized employees were required to hold specific qualifications and procure pre-approval from Medicaid. *Id*. at 788. Thus, the court found that had 18 U.S.C. § 1387 meant to include employees other than the HSPP, it would have specified as much. *Id*.

CONCLUSION: "[T]he plain meaning of the words—that 'Medicaid will reimburse for . . . testing when provided by . . . an HSPP'—is that the HSPP must be the person who is actually engaged in the conduct of performing the tests." *Id*. at 787.

Doe v. Smith, 470 F.3d 331 (7th Cir. 2006)

QUESTION: Whether solicitation of a minor for sex establishes the attempt to commit sexual assault or molestation of a child. *Id*. at 344.

ANALYSIS: The court first defined attempt as requiring intent and a substantial step toward committing the crime. *Id*. The court then stated that most federal courts have construed attempt liberally, using discretion on a case by case basis. *Id*. The court pinpointed how this circuit has deemed solicitation of a minor to constitute a sexual act when construing the Immigration and Nationality Act. *Id*. at 343. The court added that it has also held in other contexts that solicitation can be a substantial step toward committing the crime if strongly corroborative of the requisite intent of the crime, or more than mere asking. *Id*. at 344. The court then

addressed the fact that the 3rd and 8th Circuits have held that solicitation is not a substantial step for purposes of attempt in sexual assault cases. *Id*. at 344-45. On the contrary, the 6th, 10th and 11th Circuits have consistently found the opposite in cybermolester cases. *Id*. at 345. Ultimately, this circuit found persuasive the principle set forth in its Immigration and Nationality Act cases that "there is an inherent risk of exploitation when an adult solicits sex from a minor who, due to his or her under-developed sense of judgment and susceptibility to coercion, lacks the capacity to consent." *Id*.

CONCLUSION: When a defendant solicits a child's involvement in a sex act, he takes a substantial step, and therefore, attempts to commit a sexual assault on a minor. *Id*.

United States v. Davis, 471 F.3d 783 (7th Cir. 2006)

QUESTION: "[W]hether substitute-billing is illegal under Indiana's Medicaid regulations," or, more specifically, whether a requirement that services be "'provided' [by the health service provider in psychology (HSPP)] must be read to require that the services be 'personally' provided by the HSPP." *Id*. at 786.

ANALYSIS: The court stated that, under Indiana law, "Medicaid will reimburse for neuropsychological and psychological testing when *provided* by a physician or an HSPP." *Id*. at 787. Applying the well-settled canon of statutory construction that "words [should be given] their plain meaning unless doing so would frustrate the overall purpose of the statutory scheme, lead to absurd results, or contravene clearly expressed legislative intent," the court found that the plain language of the statute dictates "that the HSPP must be the person who is actually engaged in the conduct of performing the tests." *Id*. As such, the court declined the defendant's invitation "to read the word 'provided' as synonymous with 'furnished.'" *Id*. Furthermore, the court provided a contextual basis for its conclusion, noting that "[t]he Indiana legislature has demonstrated that when it chooses to allow so-called 'mid-level practitioners' to perform some of the tasks that are billed by a supervising provider it knows how to make this clear in the law." *Id*.

CONCLUSION: The court held that the practice of substitute-billing is illegal under Indiana's Medicaid regulations on the basis of the plain meaning of the word "provided" and the specificity with which the legislature delegated similar authority "[i]n those few instances where Indiana is willing to allow mental health services to be administered by third-parties under the direct supervision of the HSPP . . . ." *Id*. at 788.

***United States v. Haddad*, 462 F.3d 783 (7th Cir. 2006)**

QUESTION: Whether a defendant charged under 18 U.S.C. § 1957 (engaging in monetary transactions in property derived from specified unlawful activity) can be shown to have reached the threshold amount of $10,000 or more in illegitimate funds when those illegitimate funds were commingled with legitimate revenue. *Id*. at 791.

ANALYSIS: The court noted that it has dealt with the issue of commingling of funds in similar cases involving money laundering. *Id*. at 791-92. In those cases, the court held that it would be counterintuitive to assume that Congress intended for a defendant to escape liability by simply commingling his illegitimate funds with his legitimate funds. *Id*. After reviewing other circuits' approaches to the issue, the court adopted the 4th and 5th Circuits' determination that because it is virtually impossible to distinguish tainted from untainted funds, "the government is not required to prove that no 'untainted' funds were involved, or that the funds used in the transaction were exclusively derived from the specified unlawful activity." *Id*. at 792.

CONCLUSION: The court held that commingled funds can be sufficient to establish the minimum $10,000 requirement for proving "engagement in monetary transactions in property derived from specified unlawful activity" cases. *Id*.

***United States v. Lock*, 466 F.3d 594 (7th Cir. 2006)**

QUESTION: "[H]ow and whether to count 'loitering plus' offenses in a defendant's criminal history score." *Id*. at 598.

ANALYSIS: The court rejected the claim that the offense labeled "Loitering-Illegal Drug Activity is not similar to—and is fundamentally more serious than—'simple loitering,'" and reasoned that "similarly named offenses are in fact similar." *Id*. at 602. The court added that both target the same behavior and that the labels do "not change the fact that the ordinances primarily prohibit loitering." *Id*.

CONCLUSION: The court concluded that "convictions for Loitering-Illegal Drug Activity should be excluded from [a defendant's] criminal history score." *Id*.

EIGHTH CIRCUIT

United States v. Kerr, 472 F.3d 517 (8th Cir. 2006)

QUESTION: Whether the recommendations of sex offender treatment during incarceration made by a district court, as part of sentencing, are to be considered "final decisions" under 28 U.S.C. § 1291 for purposes of jurisdiction on appellate review. *Id*. at 520.

ANALYSIS: Defendant pleaded guilty to distribution and possession of child pornography in violation of federal statute 18 U.S.C. §§ 2252A(a)(1) and 2252A(a)(5)(B), respectively. *Id*. at 519. The district court sentenced the defendant to 151 months in prison and ten years of supervised release. *Id*. The district court imposed certain special conditions on the supervised release as well as recommended sex offender treatment while defendant is incarcerated. *Id*. The defendant argued that the recommendations for treatment made by the district court to the Bureau of Prisons ("BOP") should be vacated. *Id.* at 520. The court noted that the recommendations of the district court to the BOP are not binding and the issue of first impression is whether such recommendations are "final decisions" under 28 U.S.C. § 1291, and thus whether they are reviewable on appeal. *Id*.

CONCLUSION: The 8th Circuit joined with the 2nd, 3rd, and 5th Circuits and held that "a non-binding recommendation to the BOP is not reviewable as it is not a final decision of the district court." *Id*.

United States v. Urqhart, 469 F.3d 745 (8th Cir 2006)

QUESTION: Whether the admission at trial of a Certificate of Nonexistence of Record ("CNR") violates a defendant's Sixth Amendment right to confrontation in light of *Crawford v. Washington*, 541 U.S. 36 (2004). *Id*. at 746.

ANALYSIS: The court noted that the defendant illegally reentered the United States from Canada after a prior deportation. *Id*. at 747. The court acknowledged that during his encounter with law enforcement authorities, a Special Agent of the Bureau of Immigration and Customs Enforcement obtained the defendant's "alien file." *Id*. The court noted that after a thorough review of the file itself, and the requisite databases, the Acting Chief in the Records Services Branch issued a CNR "stating that 'after a diligent search' of three databases, 'no record was found to exist indicating that [defendant] obtained consent . . . for re-admission in the United States.'" *Id*. The court found, as a general principle, the

admission of a CNR does not violate the constitutional right of confrontation because the record is admissible under Federal Rule of Evidence 803(1) as an exception to the hearsay rule. *Id*. at 748. Recently, however, the Supreme Court found in *Crawford* that the laws of evidence do not define the scope of the Confrontation Clause of the Sixth Amendment. *Id*. The court pronounced that "where testimonial evidence is at issue . . . the Sixth Amendment demands [a showing of] unavailability and a prior opportunity for cross-examination." *Id*. The Supreme Court left unanswered the question of what qualifies as "testimonial" evidence. *Id*.

CONCLUSION: The 8th Circuit joined all other circuits in findings that a CNR is "nontestimonial" evidence under *Crawford* and therefore it does not trigger the protections of the Sixth Amendment and is properly admissible. *Id*. at 749.

NINTH CIRCUIT

CreAgri, Inc. v. USANA Health Sciences, Inc., 474 F.3d 626 (9th Cir. 2007)

QUESTION: Whether trademark priority requires not only use in commerce, but also that such use in commerce is lawful. *Id*. at 630.

ANALYSIS: The 9th Circuit acknowledged that "[i]t has long been the policy of the PTO's Trademark Trial and Appeal Board that use in commerce only creates trademark rights when the use is *lawful*." *Id*. The court noted two prevailing reasons for the lawful use requirement. *Id*. First, "to hold otherwise would be to put the government in the 'anomalous position' of extending the benefits of trademark protection to a seller based upon actions the seller took in violation of that government's own laws." *Id*. Second, "as a policy matter, to give trademark priority to a seller who rushes to market without taking care to carefully comply with the relevant regulations would be to reward the hasty at the expense of the diligent." *Id*.

CONCLUSION: The 9th Circuit "agree[d] with the PTO's policy and h[e]ld that only *lawful* use in commerce can give rise to trademark priority." *Id*. at 10.

***United States v. Lee*, 472 F.3d 638 (9th Cir. 2006)**

QUESTION: "[W]hether a person arrested in American Samoa for allegedly committing federal crimes in American Samoa may be tried and convicted in the United States District Court for the District of Hawaii." *Id*. at 639.

ANALYSIS: The 9th Circuit examined 18 U.S.C. § 3238, which mandates that "[t]he trial of all offenses . . . committed . . . out of the jurisdiction of any particular state or district, shall be in the district in which the offender . . . is first brought . . . ." *Id*. at 641. The court stated that if American Samoa was a district for the purposes of § 3238, then venue would be proper there, and not in Hawaii, but if American Samoa was not a district, venue was proper in Hawaii, because that was the district where the defendant was first brought after his arrest in American Samoa. *Id*. at 644. The court found that "[a]lthough the term 'district' is not defined in § 3238, Title 28 establishes the federal judicial 'districts' [and] American Samoa is not enumerated as a judicial 'district' among those listed in Title 28. *Id*. Thus, it follows that American Samoa is not a district pursuant to § 3238." *Id*.

CONCLUSION: "We conclude that [defendant] was properly tried and convicted in the Hawaii District Court for committing federal crimes in American Samoa because . . . venue was proper in the District of Hawaii under § 3238." *Id*. at 645.

***United States v. Combs*, 470 F.3d 1294 (9th Cir. 2006)**

QUESTION: "By what standard do we review a district court's determination, made during the course of an *Ameline* remand, that it would have imposed the same sentence under an advisory Guidelines system." *Id*. at 1296.

ANALYSIS: The 9th Circuit observed that "[t]he only guidance *Ameline* gives is that, when the district judge determines that defendant's sentence would not have been materially different [than it would have been if imposed after the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005)], 'the original sentence will stand, subject to appellate review for reasonableness.'" *Id*. The court announced that "there is an issue we can consider that bears on the reasonableness of the sentence: Whether the district judge properly understood the full scope of his discretion in a post-*Booker* world." *Id*. at 1297.

CONCLUSION: "The record here discloses that the judge understood his post-*Booker* authority to impose a non-Guidelines sentence and that

his ultimate determination was therefore not infected by ignorance or a misapprehension of the law." *Id*.

***United States v. Tuff*, 469 F.3d 1249 (9th Cir. 2006)**

QUESTION: Whether "an employee [who] exercises a non-qualified stock option granted by the employer to purchase shares with money borrowed from a third party, pledging the shares as collateral for the loan, [has] 'transferred' and 'substantially vested' [the property] for tax purposes at the time the option is exercised, or at the time the shares are later liquidated." *Id*. at 1251.

ANALYSIS: The court began its analysis with an "overview of the statutory and regulatory provisions governing the taxation of stock options. . . ." *Id*. These provisions provide that the receipt of a non-qualified stock option with no "readily ascertainable fair market value" to an employee "generally is not taxable." *Id*. However, the provisions further provide that this will become a taxable event upon the satisfaction of two conditions: "First, the shares must be transferred to the employee," and "[s]econd, they must be substantially vested in the employee." *Id*. at 1251-52. In addition, these provisions include an exception that allows the income to not be "recognized when a 'transfer' of property occurs by treating the exercise of some stock options as the grant of another option, rather than a transfer of shares." *Id*. at 1252. The court rejected appellant's argument to apply this exception, and observed these arguments to be "nonsense." *Id*. at 1253. Because appellant had satisfied the two conditions requiring the taxation of a non-qualified stock option and because no exceptions were available, the court affirmed the lower court's decision holding that this was a taxable event. *Id*. at 1250.

CONCLUSION: The court held that "a taxable transfer of property within the meaning of I.R.C. § 83 occurred each time [appellant] exercised his [non-qualified stock] options" and not when the shares are later liquidated. *Id*. at 1255.

***ACLU v. City of Las Vegas*, 466 F.3d 784 (9th Cir. 2006)**

QUESTION: "[W]hether the use of portable tables to distribute literature is protected by the First Amendment." *Id*. at 798.

ANALYSIS: The court found that "use of portable tables is analogous to access to newsracks—similarly temporary structures used

to disseminate speech-related materials —which is protected by the First Amendment." *Id*. at 799.

CONCLUSION: "[T]he erection of tables in a public forum is expressive activity protected by our Constitution to the extent that the tables facilitate the dissemination of First Amendment speech." *Id*.

***Quicksilver, Inc. v. Kymsta Corp.*, 466 F.3d 749 (9th Cir. 2006)**

QUESTION: "Whether tacking [an earlier trademark to a subsequent one] is an issue of law or fact . . . ." *Id*. at 759.

ANALYSIS: In a trademark dispute that applies the tacking doctrine, "a mark owner 'essentially seeks to 'tack' his first use date in the earlier mark onto the subsequent mark.'" *Id*. at 758. The 9th Circuit noted that only the Federal and 6th Circuits have addressed this issue of tacking, "and both consider tacking a legal question for the court." *Id*. The other circuits arrived at this conclusion by analogizing tacking to the "likelihood of confusion" doctrine, which has been treated as a question of law. *Id*. The court noted that "in contrast, [the 9th Circuit has] analyzed likelihood of confusion as a question of fact." *Id*. Therefore, the issue of tacking "should also be analyzed as a question of fact." *Id*.

CONCLUSION: "[B]ecause [the 9th Circuit has] analyzed the analogous consideration of likelihood of confusion as a factual question, whether tacking applies should also be analyzed as a question of fact." *Id*.

***United States. v. Rowland*, 464 F.3d 899 (9th Cir. 2006)**

QUESTION: "[W]hether methamphetamine arriving in Guam on a flight originating in Hawaii is 'imported into Guam' with the meaning of the [Guam Customs officer] statutory scheme." *Id*. at 904.

ANALYSIS: The court was presented with defendant's argument that "drugs 'imported into Guam' must arrive in Guam from a foreign country," and that because defendant's "flight was a nonstop, *domestic* flight . . . the Guam Customs officers lacked statutory authority to stop and question him . . . ." *Id*. "When a word is defined in a statute, 'courts are not at liberty to look beyond the statutory definition.'" *Id*. at 905. The court reasoned that since the statute in question defined the term "import," the statute, then, "prohibits bringing any controlled substance into Guam, regardless of whether the substance comes from a foreign country or from the United States." *Id*. The court continued, "even if we

were not convinced by the plain language of the statute, we would reach the same conclusion based on the structure of Guam customs law." *Id*.

CONCLUSION: The court concluded that "it is clear that Guam Customs officers have the statutory authority to stop and question an individual suspected of smuggling drugs into Guam, so long as the person is arriving from outside of Guam." *Id*. at 907.

***United States v. Ressam*, 474 F.3d 597 (9th Cir. 2007)**

QUESTION: Whether 18 U.S.C. § 844(h)(2) "criminalize[s] carrying an explosive during the commission of another felony, or . . . criminalize[s] carrying an explosive during and in relation to that other felony." *Id*. at 601.

ANALYSIS: The 9th Circuit noted that it "interpreted a similar provision in the firearms statute, 18 U.S.C. § 924(c), in *United States v. Stewart*." *Id*. at 602. In *Stewart*, the court determined that the addition of the language "during and in relation to" to § 924(c) implied that "a relation between the firearm and the underlying felony was required." *Id.* at 11. The *Stewart* court further stated that "the evident purpose of the . . . statute was to impose more severe sanctions where firearms facilitated, or had the potential of facilitating, the commission of a felony. That purpose necessarily implies some relation or connection between the underlying criminal act and the use or possession of the firearm." *Id.* at 12.

CONCLUSION: The court applied this interpretation to § 844(h)(2) and determined that the omission of the language "in relation to" did not preclude a relational element because, like § 924(c), § 844(h)(2) contained an implied relational element that the explosive was used in the commission of the underlying felony. *Id.* at 16.

***United States v. Hernandez-Castro*, 473 F.3d 1004 (9th Cir. 2007)**

QUESTION: "Whether, following the Supreme Court's decision in *United States v. Booker*, the United States Sentencing Guidelines are advisory for purposes of calculating criminal history points under § 3553(f)(1)." *Id*. at 1005.

ANALYSIS: The 9th Circuit stated that "[§] 3553(f)(1) is not, by virtue of its reference to the Sentencing Guidelines, rendered advisory by *Booker*." *Id*. at 1006. The 9th Circuit explained that the Supreme Court decided in *Booker* that mandatory sentencing guidelines were

unconstitutional under the Sixth Amendment, but held that "the remainder of the [Sentencing Guidelines] Act satisfies the Court's constitutional requirements" and therefore remained intact. *Id*. at 1007. Applying these principles, the court determined that "[§] 3553(f)(1) falls squarely within the 'remainder of the Act' that is unaffected by *Booker*" because "[i]n calculating criminal history points . . . the district court is simply ascertaining prior convictions, a determination that passes constitutional scrutiny." *Id*.

CONCLUSION: "[W]e join our sister circuits in holding that *Booker* left in tact the requirement of § 3553(f)(1) that a defendant 'not have more than 1 criminal history point.'" *Id*. at 1005.

United States v. Hicks, 472 F.3d 1167 (9th Cir. 2007)

QUESTION: First, "whether § 3582(c)(2) proceedings fall within the scope of *Booker*. Second, if they fall within *Booker*'s ambit, . . . whether policy statements by the Sentencing Commission nonetheless preclude the application of *Booker* to § 3582(c)(2). *Id*. at 1169.

ANALYSIS: The court explained that, after *Booker*, the sentencing system is no longer mandatory and therefore "district courts are necessarily endowed with the discretion to depart from the Guidelines when issuing new sentences under § 3582(c)(2)." *Id*. at 1170. Thus, the court stated that while § 3582(c)(2) proceedings fall within the scope of *Booker*, resentencing is not *because of Booker*, but instead the resentencing entitlement is based on § 3582(c)(2). *Id*. at 1171. The court acknowledged that the Guidelines may be unfavorable to a discretionary scheme, but declared that the Guidelines should be viewed in an advisory fashion. *Id*. at 1172. The court announced that "under *Booker*, to the extent that the policy statements would have the effect of making the Guidelines mandatory (even in the restricted context of § 3582(c)(2)), they must be void." *Id*.

CONCLUSION: The court held that "[b]ecause *Booker* abolished the mandatory application of the Sentencing Guidelines in all contexts, and because reliance on its holding is not inconsistent with any applicable policy statement, . . . [the court held] that *Booker* applies to § 3582(c)(2) proceedings" and that the policy statements do not preclude application of *Booker* to § 3582(c)(2). *Id.* at 1169.

***United States v. Fort*, 472 F.3d 1106 (9th Cir. 2007)**

QUESTION: Whether "local police reports . . . qualify for the Rule 16(a)(2) exemption and [if so, whether] they are, therefore, discoverable materials under FED. R. CRIM. P. 16(a)(1)(E)." *Id*. at 1110.

ANALYSIS: The court began by reviewing the text of Rule 16 and found that "written police reports . . . are 'documents' within the 'possession, custody, or control' of the federal prosecutor and that they are 'material to preparing the defense.'" *Id*. The court, therefore, held that "the reports are discoverable under Rule 16(a)(1)(E) unless exempted by Rule 16(a)(2)." *Id*. The court next found it necessary to ascertain "what is meant by 'government agent' and 'the case,'" and determined that the Advisory Committee notes suggested that "'government agent' includes non-federal personnel whose work contributes to a federal criminal 'case.'" *Id*. at 1110-13. Emphasizing a support for a symmetrical reading of the discovery obligations of Rule 16, the court stated that since the "federal prosecution is a direct outgrowth of investigations by local authorities," covering the same conduct that the defendants were charged with in the federal indictment, "[f]or all practical purposes, including the application of Rule 16(a)(2), this local investigation and federal prosecution should be considered one 'case.'" *Id*. at 1114, 1119. The court explained that holding otherwise, "thereby making underlying local or state investigatory files subject to pre-trial discovery by a subsequently federally indicted defendant, would in all likelihood inhibit cooperation between local and federal law enforcement agencies, to the benefit of criminals but to the detriment of the public good." *Id*. at 1119.

CONCLUSION: The court held that "Rule 16(a)(2) extends to . . . [local] police reports created prior to federal involvement but relinquished to federal prosecutors to support a unified prosecution of Defendants for the same criminal activity that was the subject of the local investigation." *Id*. at 1119-20. The court explained that "[t]hese types of documents have always been protected under federal law if compiled by federal officers" and therefore the court declared that there was no reason "why the law should be any different in a federal prosecution regardless of who gathered the statements." *Id*. at 1120.

***Zi-Xing Lin v. Gonzales*, 473 F.3d 979 (9th Cir. 2007)**

QUESTION: Whether "8 C.F.R. § 1003.23(b)(1) precludes an alien who has been removed from the United States from filing a motion to reopen those removal proceedings." *Id*. at 981.

ANALYSIS: The court examined the regulation and noted that it is "phrased in the *present* tense and so by its terms applies only to a person who departs the United States while he or she 'is the subject of removal . . . proceedings.'" *Id*. at 982. The court explained that "[b]ecause petitioner's original removal proceedings were completed when he was removed to China, he did not remain the subject of removal proceedings after that time." *Id*. Thus, the court determined that "[w]hile the regulation may have been intended to preclude aliens in petitioner's situation from filing motions to reopen their completed removal proceedings, the language of the regulation does not unambiguously support this result." *Id*.

CONCLUSION: The court construed the ambiguity in favor of the petitioner and against the government, holding that 8 C.F.R. § 1003.23(b)(1) does not preclude an alien who has been removed from the United States from filing a motion to reopen those removal proceedings. *Id*.

***Af-Cap Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080 (9th Cir. 2007)**

QUESTION: Whether, under 28 U.S.C.S. § 1610, the court can determine if the "property was used for a commercial activity in the United States by examining the entire underlying activity that generated the property in question." *Id*. at 1087.

ANALYSIS: The property of a foreign state is immune to attachment by courts in the United States, unless they are "used for a commercial activity in the United States". *Id*. The court chose to read the statute narrowly, agreeing with the 5th Circuit's ruling that "Subsection (a) regarding property belonging directly to a foreign state, permits execution only narrowly, when the property is 'in the United States' and 'used for a commercial purpose in the United States.'" *Id*. at 1088.

CONCLUSION: The court ruled "that property is 'used for a commercial activity in the United States' when the property in question is put into action, put into service, availed or employed for a commercial activity, not in connection with a commercial activity or in relation to a commercial activity." *Id*. at 1091.

***J&G Sales, Ltd. v. Truscott*, 473 F.3d 1043 (9th Cir. 2007)**

QUESTION: Whether the Bureau of Alcohol, Tobacco, Firearms, and Explosives has the statutory authority to send demand letters to

federal firearms licensees requiring them to provide specified record information. *Id*. at 1047.

ANALYSIS: The court found that the plain language of the statute clearly authorizes the Bureau to issue demand letters. *Id*. at 1048. Further, the court noted, the other parts of the statute did not generally limit the Bureau's right to issue demand letters, but instead restricted letters and investigations under certain circumstances. *Id*. at 1049-51.

CONCLUSION: The court found the statute to be clear and, with guidance from the 4th Circuit, accepted the plain reading of the statute that the Bureau has the authority to send demand letters to Federal firearms licensees. *Id*. at 1047-48.

***United States v. Combs*, 470 F.3d 1294 (9th Circuit 2006)**

QUESTION: "By what standard do we review a district court's determination, made during the course of an *Ameline* remand, that it would have imposed the same sentence under an advisory Guidelines system." *Id*. at 1296.

ANALYSIS: The 9th Circuit examined *Ameline* and found that the court would review for reasonableness, a district judge's determination, that a sentence under the advisory Guidelines would not be materially different. *Id*. However, because the sentencing was done under a limited *Ameline* remand, the court stated that the reasonableness review was very different than one conducted on post-*Booker* sentences. *Id*. The court noted that such a review only takes place if the district judge determines on his review that "the sentence would have been materially different under an advisory Guidelines system." *Id*. at 1296-97. The court stated that its reasonableness review is thus based on "[w]hether the district judge properly understood the full scope of his discretion in a post-*Booker* world." *Id*. at 1297.

CONCLUSION: The court found that the record indicated that the district judge did understand his authority under the post-*Booker* regime and therefore his decision to allow the original sentence to stand was reasonable under *Ameline*. *Id*.

***Snow-Erlin v. United States*, 470 F.3d 804 (9th Cir. 2006).**

QUESTION: "Whether a claim for negligent miscalculation of a release date arises out of false imprisonment for purposes of the [Federal Tort Claims Act ("FTCA")]." *Id*. at 808.

ANALYSIS: The 9th Circuit indicated that the sovereign immunity of the United States is waived under the FTCA for certain torts, but that claims "arising" from false imprisonment are exempt under the statute. *Id*. While the plaintiff in this case brought a claim of negligence, the court stated that "[t]his circuit looks beyond the labels used to determine whether a proposed claim is barred [under § 2680(h)]." *Id*. The plaintiff's only claim was that the United States held her deceased husband for longer than his sentence. *Id*. at 808-09. The court stated that the "exclusion of false imprisonment claims" cannot be avoided by raising another claim connected to that false imprisonment. *Id*.

CONCLUSION: The court held that a claim for negligent miscalculation of a release date arising out of false imprisonment is excluded under the FTCA, and thus barred under 28 U.S.C. § 2680(h). *Id*.

TENTH CIRCUIT

Lippoldt v. Cole, 468 F.3d 1204 (10th Cir. 2006)

QUESTION: "[W]hether an unincorporated association is a 'person' for the purposes of Section 1983." *Id*. at 1213.

ANALYSIS: The court considered "(1) the legislative history of Section 1983, (2) the general understanding, as of 1871, regarding the legal personality of unincorporated associations, and (3) the Dictionary Act of 1871." *Id*. The court found "no indication within the legislative history of Section 1983 that Congress considered the term 'persons' to include unincorporated associations," and noted that "there was no general understanding in 1871, when the precursor to Section 1983 was passed, that unincorporated associations should be treated as natural persons." *Id*. Lastly, the court proffered that "while the Dictionary Act of 1871 extended the meaning of 'person' to include corporations and municipalities, it did not do the same for unincorporated associations." *Id*. at 1214.

CONCLUSION: The court held an unincorporated association is not a "person" entitled to bring a claim under § 1983. *Id*. at 1216.

***United States v. Pettigrew*, 468 F.3d 626 (10th Cir. 2006)**

Editor's Note: This 10th Circuit opinion substituted the original opinion in Unite States v. Pettigrew, 455 F.3d 1164 (10th Cir. 2006), which was summarized in Issue Number 1 of this Volume.

QUESTION: "[W]hether a pre-warning confession, not itself a violation of *Miranda*, but obtained subsequent to two violations of *Miranda*, must be suppressed." *Id*. at 634.

ANALYSIS: The court noted that the "unwarned confession taken in violation of *Miranda* must be suppressed, but it does not necessarily follow that every subsequent voluntary statement made by a suspect must be suppressed as well." *Id*. at 635. Additionally, the court stated that "*Miranda* itself recognized that any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." *Id*.

CONCLUSION: The court joined "the Seventh and Ninth Circuits in holding that the admissibility of an unsolicited inculpatory statement, following a voluntary statement made in violation of *Miranda*, turns on whether the inculpatory statement was knowingly and voluntarily made. In the absence of coercion or improper tactics, a broader rule would undercut the twin rationales of *Miranda*'s exclusionary rule—trustworthiness and deterrence." *Id*. at 636.

***Yavuz v. 61 MM, Ltd.*, 465 F.3d 418 (10th Cir. 2006)**

QUESTION: Whether a court should apply the law of the forum or the law of the jurisdiction chosen by the parties to interpret a forum-selection clause in an international commercial agreement. *Id*. at 427.

ANALYSIS: The 10th Circuit examined the issue of what law should apply when interpreting a forum-selection clause in an international agreement that contains a choice-of-law clause. *Id*. at 427. The court observed, however, that "when a court interprets a contract, as a general matter it applies the law that the parties selected in their contract" in accordance with the RESTATEMENT (SECOND) OF CONFLICT OF LAWS. *Id*. The court noted that "two 'prime objectives' of contract law are 'to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract.'" *Id*. at 428. The court observed that "[w]e see no particular reason, at least in the international context, why a forum-selection clause . . . should be singled out as a provision not to be interpreted in accordance with the law chosen by the contracting parties."

Id. The court noted that "Supreme Court opinions in international disputes emphasize the primacy of the parties' agreement regarding the proper forum" and that "[t]he words [of a forum-selection provision] may take on different meanings depending on the law used to interpret them." *Id*. The court noted further that "when the contract contains a choice-of-law clause, a court can effectuate the parties' agreement . . . only if it interprets the forum clause under the chosen law." *Id*.

CONCLUSION: The 10th Circuit held that "when an international commercial agreement has both choice-of-law and forum-selection provisions, the forum-selection provision must ordinarily be interpreted under the law chosen by the parties." *Id*. at 421.

ELEVENTH CIRCUIT

United States v. Milkintas, 470 F.3d 1339 (11th Cir. 2006)

QUESTION: "[W]hether the government, having been provided notice that a defendant is willing to provide information about a crime, is under any obligation to solicit that information from a defendant." *Id*. at 1345.

ANALYSIS: Section 2D1.1(b)(7) of the Federal Sentencing Guidelines provide for a two-level reduction in a defendant's offense level for certain delineated offenses, if certain safety-valve criteria are met under 18 U.S.C. § 3553(f)(1)-(5). *Id*. at 1344. At issue in this case is the fifth criterion: the defendant must "truthfully provide[] to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan." *Id*. at 1345. The 11th Circuit has held that a defendant seeking to take advantage of this provision bears the burden of proving eligibility for safety-valve relief." *Id*. The court noted that "[a]ll circuits . . . have held [that] the government is under no obligation to solicit information from defendants who seek to satisfy [the statutory] requirement to provide information." *Id*. at 1345.

CONCLUSION: The court concluded that a mere willingness to provide information is insufficient to meet the criterion. *Id*. Further, the court ruled that "[a]cting in good faith is a necessary condition for satisfying the safety-valve criteria, not a sufficient one" and the defendant is required to "come forward and truthfully supply all the information that he possesses about his involvement in the offense." *Id*. at 1346.

***Stephens v. Tolbert*, 471 F.3d 1173 (11th Cir. 2006)**

QUESTION: "[W]hether a district court abuses its discretion when it accepts an argument that had not been presented to the magistrate judge." *Id*. at 1176.

ANALYSIS: In analyzing whether a district court can accept an argument not considered by a magistrate judge, the court emphasized the magistrate judge's subordinate position when rendering dispositive motions: "[w]hen a district court refers a dispositive motion to a magistrate judge for a report and recommendation, the district court retains, as a statutory and a constitutional matter, broad discretion over the report and recommendation." *Id*. The court further highlighted that "under the Federal Magistrates Act, 'the magistrate [judge] has no authority to make a final and binding' ruling on a dispositive motion," and that "[e]ven if no objections to the findings or recommendations have been filed, the district court may undertake 'further review . . . , sua sponte or at the request of a party, under a de novo or any other standard.'" *Id*. As such, the court ruled that "[i]n the light of [such] broad discretion, [a] district court [i]s not barred from considering an argument . . . that had not been presented to the magistrate judge." *Id*. Finally, the court rejected the argument that "the district court performed an appellate function . . . [by] considering an argument not raised before the magistrate judge," pointing out that "the relationship between district courts and magistrate judges differs significantly from the relationship between appellate courts and district courts." *Id*. The court opined that a "'magistrate judge has no authority to make a final and binding' ruling on a dispositive motion, and a district court 'may . . . receive further evidence' when it reviews the report and recommendation of a magistrate judge." *Id*. at 1176-77. The court recognized that this holding was at odds with those of the 1st and 9th Circuits. *Id*.

CONCLUSION: A "district court [does] not abuse its discretion by accepting [an] . . . argument" that was not brought before the magistrate judge. *Id*. at 1176.

***Gulfcoast Med. Supply v. Sec'y, Dep't. of Health and Human Servs.*, 468 F.3d 1347 (11th Cir. 2006)**

QUESTION: Whether the Secretary of the Department of Health and Human Services may require a durable medical equipment supplier to

submit additional evidence that its equipment is medically necessary under Part B of the Medicare Act. *Id*. at 1348.

ANALYSIS: The court noted that the auditing provisions of Part B within the Medicare Act indicated that "Congress unambiguously contemplated the Secretary's authority to require suppliers to submit medical documentation beyond a CMN [Certificate of Medical Necessity] to prove medical reasonableness and necessity." *Id*. at 1352. Furthermore, the court reasoned that not permitting additional evidence of medical necessity would deny the Secretary the power to refuse claims with certificates signed by dishonest or incompetent physicians. *Id*.

CONCLUSION: The 5th Circuit affirmed the judgment of the district court and held that "when the Medicare Act is read as a whole, it unambiguously permits carriers and the Secretary to require suppliers to submit evidence of medical necessity beyond a CMN." *Id*.

***Mingkid v. Att'y Gen.*, 468 F.3d 763 (11th Cir. 2006)**

QUESTIONS: **"[**W]hether the [Immigration Judge] may make a frivolity finding notwithstanding a determination that the asylum application is time-barred" and whether the circuit court had independent jurisdiction to review a [Board of Immigration Appeal]'s frivolity determination when the petitioner concede[d] both removability and a failure to establish eligibility for asylum." *Id*. at 766.

ANALYSIS: The court cited Section 240 of the Immigration and Nationality Act and specific agency regulations to conclude that the backdrop of statutes and regulations did not contain any prohibition to bar an Immigration Judge's authority to make a determination that the untimely application for asylum at issue was frivolous. *Id*. at 768. The 11th Circuit acknowledged Article III of the U.S. Constitution as the source of the court's power to determine if it had jurisdiction over the frivolity determination, and reasoned that it had jurisdiction since its opinion would not be advisory and could afford the petitioners immediate relief. *Id*.

CONCLUSION: The 11th Circuit declared that the Immigration Judge had jurisdiction to make a frivolity finding and the circuit court had jurisdiction to review such a determination. *Id*. at 766.

***United States v. Linh Pham*, 463 F.3d 1239 (11th Cir. 2006)**

QUESTION: Whether U.S. SENTENCING GUIDELINES § 1B1.8 prohibits the government's use of "statements and information obtained pursuant to [the defendant's] plea and cooperation or from sources provided by [the defendant] and previously unknown to the government" in determining the defendant's sentence. *Id*. at 1243.

ANALYSIS: The court looked to other circuits for guidance on this question and noted that the 3rd Circuit has held that "the use of information post-dating the agreement and obtained from independent sources is not barred." *Id*. Also, "[i]nformation separately gleaned from co-defendants is also fair game." *Id*. However, "the government may not evade U.S.S.G. § 1B1.8(a) where the evidence was elicited solely as a result of, or prompted by, the defendant's cooperation." *Id*. at 1243-44.

CONCLUSION: The court "conclude[d] that, so long as the information is obtained from independent sources or separately gleaned from codefendants, it may be used at sentencing without violating U.S.S.G. § 1B1.8." *Id*. at 1244.

***Tmesys, Inc. v. Eufaula Drugs, Inc.*, 462 F.3d 1317 (11th Cir. 2006)**

QUESTION: "Whether [the court] ha[s] jurisdiction to review an order remanding a case based on a finding that CAFA does not apply and what law controls as to when an action has 'commenced' for purposes of CAFA." *Id*. at 1319.

ANALYSIS: The court did not conduct any analysis in the opinion, but stated that it had "already received briefing from all parties on the jurisdictional issue and is ruling only on that threshold issue." *Id*. at 1319 n.1.

CONCLUSION: The court found that it had "jurisdiction to review a district court's order to remand when that order is based on a determination that CAFA does not apply, at least to the extent of reexamining that jurisdictional issue." *Id*. at 1319. The court noted that "as to the second issue, the consensus among circuits is that state law determines when an action is commenced for purposes of CAFA." *Id*.

***United States v. Williams*, 469 F.3d 963 (11th Cir. 2006)**

QUESTION: Whether, "in order to commit a violation of [21 U.S.C. § 841(b)(1)(A)] . . . after two or more prior convictions for a felony drug offense have become final, [defendant] must have been involved in

transactions totaling five kilograms or more of cocaine after his second prior conviction became final." *Id*. at 966.

ANALYSIS: The court noted that 21 U.S.C. § 841(b) states, in relevant part, that "[i]f any person commits a violation of this subparagraph . . . after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release." *Id*. The court agreed with the 6th Circuit's reasoning in a similar case in which the defendant was "charged with a single, ongoing conspiracy [which h]e committed . . . every day over the life of the agreement, and the timing of each separate overt act is not controlling." *Id*. The 6th Circuit concluded that "the violation involved more than 50 grams of cocaine base. Therefore, the district court properly applied the statutory sentence mandated by 21 U.S.C. § 841(b)(1)(A)." *Id*. at 966-67. The 11th Circuit then turned to "[t]he nature of a conspiracy" to support is holding. *Id*. at 967. The court noted that "[t]he gist of the crime of conspiracy . . . is the agreement or confederation of the conspirators to commit one or more unlawful acts," not "the commission of the crime which it contemplates." *Id*.

CONCLUSION: The 11th Circuit rejected the defendant's argument and held that the defendant's "continued participation in a single conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine after his second prior conviction became final triggered the mandatory minimum term of life imprisonment under 21 U.S.C. § 841(b)(1)(A)(ii)." *Id*.

***Odili v. U.S. Parole Comm'n*, 474 F.3d 1255 (11th Cir. 2007)**

QUESTION: What is the proper standard of review of a parole board's role assessment determination in a transfer treaty hearing. *Id*. at 1260.

ANALYSIS: The 11th Circuit noted that the court has "long and repeatedly held that a district court's determination of a defendant's role in the offense is a finding of fact to be reviewed only for clear error." *Id*. at 1260. The court held that a parole board's determination of role assessment in a transfer treaty hearing should similarly be reviewed for clear error. *Id*. The court recognized that the 5th, 7th, and 9th Circuits had reached similar conclusions. *Id*.

CONCLUSION: "Given that a transfer treaty hearing is the functional equivalent of a sentencing hearing, the 'clear error' standard

for review of a district court's role assessment determination applies with equal force to the review of such a determination made by the Parole Commission in [this] context." *Id*.