

First Impressions

The following pages contain brief summaries of issues of first impression identified by federal court of appeals opinions announced between February 18, 2013 and September 4, 2013. This collection, written by the members of the *Seton Hall Circuit Review*, is organized by circuit.

Each summary briefly describes an issue of first impression, and is intended to give only the briefest synopsis of the issue, not a comprehensive analysis. This compilation makes no claim to be exhaustive, but aims to serve the reader well as a referential starting point.

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FIRST CIRCUIT

***Acosta-Ramirez v. Banco Popular de Puerto Rico*, 712 F.3d 14 (1st Cir. 2013)**

QUESTION ONE: Whether, under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), the failure of a plaintiff to “comply with the sixty-day requirement to seek judicial review of the denial of [its] administrative claim also deprives courts of jurisdiction.” *Id.* at 20.

ANALYSIS: The court reasoned that a number of courts “have held that failure to comply with the sixty-day limit operates as a jurisdictional bar.” *Id.* at 20. Moreover, “the only judicial review . . . is for suits filed within sixty days of the disallowance or the expiration of the decision period.” *Id.* The court further reasoned that “[t]he provision’s plain language makes it clear that Congress wanted the rule to be jurisdictional . . . [the sixty-day limit helps create] an efficient process.” *Id.*

CONCLUSION: The 1st Circuit held that the failure of a plaintiff to comply with the statutory time period causes a jurisdictional barring of his or her claim. *Id.* at 21.

QUESTION TWO: Whether the jurisdictional limitation applies to suits made against a successor to a company placed in receivership or conservatorship by the FDIC pursuant to FIRREA. *Id.* at 20.

ANALYSIS: The court determined that “the FIRREA administrative exhaustion requirement is based not on the entity named as defendant but on the actor responsible for the alleged wrongdoing.” *Id.* at 20 (internal quotation marks omitted). The court reasoned that if a bank is purchased by a new bank after becoming insolvent, a potential plaintiff cannot file a claim against the new bank, but must file a claim against the receiver who “succeeds as a matter of law to the rights, titles, powers and privileges of the failed bank, along with the responsibility to pay the failed bank’s valid obligations.” *Id.* at 18.

CONCLUSION: The 1st Circuit held that plaintiffs cannot sue the successor bank, but must instead file suit against the receiver. *Id.* at 21.

***Brown v. United Airlines, Inc.*, 720 F.3d 60 (1st Cir. 2013)**

QUESTION: Whether an action brought by airline-affiliated skycaps under the Airline Deregulation Act (ADA) preempts common-law claims of unjust enrichment and tortious interference “based on the airlines’ imposition and retention of baggage-handling fees for curbside service[.]” *Id.* at 62–63.

ANALYSIS: The court first looked to the text of the ADA preemption provision, 49 U.S.C. § 41713(b), and found that, given its language, the court must determine whether the claim is based on a state “law, regulation, or other provision having the force and effect of law” and “whether the claim is sufficiently related to a price, route or service of an air carrier.” *Id.* at 63 (internal quotation marks omitted). The court reasoned that a baggage-handling fee for curbside service is part of the “price” and “service” referred to in the ADA’s preemption provision. *Id.* at 64. The court found that Supreme Court precedent interpreting preemption provisions places an emphasis on function over form, and that a suit at common law is backed by the weight of the state judiciary enforcing the state law and can “effectively strong-arm regulated entities to alter their business practices.” *Id.* at 65. The court further noted that Congress previously used words such as “rule” and “standard,” which typically include common law to describe state law that could be preempted. *Id.* at 66.

CONCLUSION: The 1st Circuit held that, “to the extent that a state common law claim relates to a price, route, or service of an air carrier, it is preempted by the ADA.” *Id.*

***Pagan-Colon v. Walgreens of San Patricio, Inc.*, 697 F.3d 1 (1st Cir. 2012)**

QUESTION: Whether overtime pay should be included in an award of backpay under the Family and Medical Leave Act (FMLA).

ANALYSIS: The court noted that the FMLA provides that an employee may recover “any wages, salary, employment benefits, or other compensation denied or lost.” *Id.* at 11. The court reasoned that overtime “falls into the category of ‘other compensation.’” *Id.* The court stated that “for violations of other employment laws, . . . back-pay awards often include payment for overtime work that an employee would have performed but for her employer’s violation of employment laws.” *Id.* (internal quotation marks omitted).

CONCLUSION: The 1st Circuit held “that a back-pay award under the FMLA may include overtime compensation.” *Id.* at 5.

***Paolino v. JF Realty, LLC*, 710 F.3d 31 (1st Cir. 2013)**

QUESTION: Whether a “pre-suit notice [that] identifies the potential plaintiffs, provides basic contact information, and allows the putative defendants to identify and remedy the alleged violations” constitutes sufficient pre-suit notice . . . before a citizen enforcement action may be brought under the federal Clean Water Act (CWA).” *Id.* at 33.

ANALYSIS: The court noted that 40 C.F.R. § 135.3 prescribes the “required contents of pre-suit notice.” *Id.* at 34. The court stated that § 135.3(a) requires “that pre-suit notice must permit ‘the recipient’ to identify the listed information, i.e., the specific standard at issue, the dates on which violations of that standard are said to have occurred, and the activities and parties responsible for causing those violations.” *Id.* at 37. The court observed that the 7th and 9th Circuits have held that “the appropriate measure of sufficiency under § 135.3(a) is whether the notice’s contents place the defendant in a position to *remedy* the violations alleged.” *Id.* The court reasoned that “[t]he adequacy of the information contained in pre-suit notice will depend upon, inter alia, the nature of the purported violations, the prior regulatory history of the site, and the actions or inactions of the particular defendants.” *Id.*

CONCLUSION: The 1st Circuit adopted the standard of the 7th and 9th Circuits, and held that that pre-suit notice is sufficient when its “contents place the defendant in a position to *remedy* the violations alleged.” *Id.*

***United States v. Fiume*, 708 F.3d 59 (1st Cir. 2013)**

QUESTION: Whether a “two-level enhancement to the defendant’s guideline sentencing range (GSR) under USSG § 2A6.2(b)(1)(A), when superimposed upon a base offense level dictated by USSG § 2A6.2(a), constitutes an impermissible exercise in double counting.” *Id.* at 60.

ANALYSIS: The court first noted that it may be necessary to apply a single fact multiple times to sentencing guidelines because several sentencing adjustments routinely “derive from the same nucleus of operative facts while nonetheless responding to discrete concerns.” *Id.* at 61 (internal quotation marks omitted). The court reasoned that, given the guidelines’ “proclivity for indicating when double counting is forbidden,” the act is only considered impermissible if expressly prohibited therein. *Id.* at 62. The court found that, because a base level offense under USSG § 2A6.2(a) accounts only “for the general nature of the offense of conviction as one of stalking or domestic violence,” it may be necessary to employ a two-level upward adjustment pursuant to USSG § 2A6.2(b)(1)(A) in order to account for the enhanced violation of a protective order. *Id.*

CONCLUSION: The 1st Circuit held “that the use in tandem of a base offense level dictated by USSG § 2A6.2(a), and an upward adjustment under § 2A6.2(b)(1)(A), does not constitute impermissible double counting.” *Id.* at 60.

***United States v. Gates*, 709 F.3d 58 (1st Cir. 2013)**

QUESTION: Whether a defendant's express consent is required for continuances sought by the defendant's attorney which would entail a waiver of defendant's rights under the Speedy Trial Act (STA). *Id.* at 65.

ANALYSIS: The court found that the plain statutory language of the STA explicitly permits a defendant's counsel to request continuances. *Id.* In addition, the court looked to other circuits that have bound defendants to their counsel's actions in the STA context based upon the principle that it would be "impractical" to have the clients express consent in every instance of waiver. *Id.* at 66. The court found this principal to be especially true with regard to trial management and scheduling matters. *Id.* at 65.

CONCLUSION: The 1st Circuit held "that in the ordinary course and within the confines of the STA exclusion provisions, defense counsel has the power to seek an STA continuance without first informing his client or obtaining his client's personal consent." *Id.* at 66.

***United States v. Hogan*, 722 F.3d 55 (1st Cir. 2013)**

QUESTION: Whether a "[defendant], who received a criminal history category (CHC) reduction at his original sentencing, is entitled to the application of the same or a similar reduction at re-sentencing under [18 U.S.C.] § 3582(c) in light of the newly-amended sentencing guideline, [U.S.S.G. § 1B1.10(b)(2), and its commentary, Application Note 1." *Id.* at 59.

ANALYSIS: The court found that the plain language of § 1B1.10(b)(2)(A) instructs that "a court cannot reduce a defendant's sentence under 18 U.S.S.G. § 3582(c)(2) to a term that is less than the minimum of the amended guideline range determined under subdivision (1)." *Id.* at 62 (internal quotation marks omitted). The court noted that "[t]he only exception to this rule is found in § 1B1.10(b)(2)(B)," which states that "reductions comparably less than the amended guideline range are permitted only in cases where the original term of imprisonment was below the applicable guideline range pursuant to a government motion to reflect the defendant's substantial assistance to authorities." *Id.* (internal quotation marks omitted).

CONCLUSION: The 1st Circuit agreed with the 3rd, 7th, 8th, 9th, and 11th Circuits and held that based on the statute's plain language "§ 1B1.10(b)(2)(B) bars a district court from lowering a defendant's below-guideline sentence unless the departure at his original sentencing was based on his substantial assistance to the government." *Id.*

SECOND CIRCUIT

***Federal Treasury Enterprise Sojuzplodoimport v. SPI Spirits Ltd.*, 726 F.3d 62 (2d Cir. 2013)**

QUESTION: Whether the phrase “legal representative” as used in the Lanham Act, 15 U.S.C. § 1114(1)(b) “denotes not merely one whom an appointing entity designates its ‘legal representative,’ but requires in addition that the appointing entity to be legally unable to bring suit on its own behalf. *Id.* at 73.

ANALYSIS: The court noted that Section 32(1) of the Lanham Act explicitly restricts standing to the “registrant,” “which the Act expressly defines as the owner[] or . . . his legal representatives, predecessors, successors and assigns[,]” while Section 43 allows suits “by any person who believes that [he or she is] likely to be damaged by the defendant’s actions.” *Id.* at 80 (internal quotation marks omitted). The court reasoned that the phrase could not be read broadly, as that would “permit both the registrant of the trademark and [its] putative legal representative to file separate suits against the same defendant for the same infringing act[,]” a result that is inconsistent with the stated intention of Congress to limit standing under Section 32(1).” *Id.* (internal quotation marks omitted). The court further read the term “legal representative” as “requiring the trademark holder’s legally-recognized inability to assert a claim for infringement” in order for its interpretation to avoid a conflict with the requirements of Article III. *Id.* at 81.

CONCLUSION: The 2nd Circuit concluded that “to serve as a ‘legal representative’ entitled to bring suit under Section 32(1) on behalf of a trademark holder, a putative plaintiff must demonstrate *both* its legal authority to represent the owner and that the trademark holder is legally incapable of representing itself.” *Id.* at 82.

***Jones v. Smith*, 720 F.3d 142 (2d Cir. 2013)**

QUESTION: Whether dismissals of habeas petitions and appeals from habeas petitions, filed under 28 U.S.C. §§ 2254–2255, are strikes under the three strikes provision within the meaning of the Prison Litigation Reform Act (PLRA). *Id.* at 143–44.

ANALYSIS: The court found that the three strikes provision intends to refer to “civil action or appeal” in the second half of the provision. *Id.* at 146. The court reasoned that this interpretation of the plain language was most consistent with the legislative history of the PLRA. *Id.* at 147. The court noted that the legislative history clearly indicates that Congress was more concerned about “frivolous litigation by prisoners challenging their confinement,” and did not intend for the statute to apply to

challenges to the lawfulness or duration of criminal confinement. *Id.* (internal citation and quotation marks omitted).

CONCLUSION: The 2nd Circuit held that “dismissals of habeas petitions challenging the prisoner’s conviction or the duration of his confinement should not be considered strikes for the purposes of the PLRA.” *Id.*

***Sokolowski v. Metropolitan Transportation Authority*, 723 F.3d 187 (2d Cir. 2013)**

QUESTION: “Whether a party waives a challenge to the jurisdiction of a special adjustment board [under the Railway Labor Act (RLA)] by explicitly conceding before the board that the board has jurisdiction.” *Id.* at 188.

ANALYSIS: The court distinguished a plaintiff’s concession of the special adjustment board’s jurisdiction and a failure by plaintiff to raise a jurisdictional challenge before the National Railroad Adjustment Board (NRAB). *Id.* at 191. The court reasoned that “[w]hile a party cannot forfeit or waive an objection to the NRAB’s jurisdiction, a party can forfeit or waive an argument based on a special adjustment board’s jurisdictional limits because those limits were established by the parties themselves.” *Id.* The court noted that it “adopted a similar rule in the arbitration context.” *Id.* at 191.

CONCLUSION: The 2nd Circuit held that a plaintiff waives a challenge to the jurisdiction of a special adjustment board by conceding before the board that it has jurisdiction” *Id.*

***Unclaimed Property Recovery Service, Inc. v. Kaplan*, No. 12-4030, 2013 U.S. App. LEXIS 17275 (2d Cir. Aug. 20, 2013)**

QUESTION: “[W]hether the holder of a copyright in a litigation document who has authorized a party to a litigation to use the document in the litigation may withdraw the authorization after the document has already been introduced into the litigation and then claim infringement when subsequent use is made of the document in the litigation.” *Id.* at *5.

ANALYSIS: The court reasoned that “[l]itigation cannot be conducted successfully unless the parties to the litigation and their attorneys are free to use documents that are a part of the litigation.” *Id.* at *6. The court noted that the “holder of the copyright in a document who authorizes a party to use that document in a litigation knows, or should know, [the] inevitable consequences of the authorization[.]” namely that subsequent use of the document would be likely, if not

necessary. *Id.* The court stated that “[o]nce a complaint is filed, it becomes a legally operative document that triggers the rights, process, and protections associated with civil litigation[,]” and as such, authorization to file the complaint may be treated as if “the author has permitted the party to establish a legal action based on the complaint.” *Id.* at *9.

CONCLUSION: The 2nd Circuit held that “an authorization [to use a copyright in a litigation document] necessarily conveys, not only to the authorized party but to all present and future attorneys and to the court, an irrevocable authorization to use the document in the litigation thereafter.” *Id.* at *5–6.

***United States v. Okatan*, 728 F.3d 111 (2d Cir. 2013)**

QUESTION: “[W]hether the prosecution may use a defendant’s assertion of the privilege against self-incrimination during a noncustodial police interview as part of its case in chief.” *Id.* at 119 (internal quotation marks omitted).

ANALYSIS: The court reasoned that allowing a prosecutor to comment on a defendant’s invocation of their right against self-incrimination poses a penalty on the user. *Id.* The court noted that “allowing a jury to infer guilt from a prearrest invocation of the privilege ignores the teaching that the protection of the [F]ifth [A]mendment is not limited to those in custody or charged with a crime.” *Id.* (internal quotation marks omitted).

CONCLUSION: The 2nd Circuit held that “where . . . an individual is interrogated by an officer, even prior to arrest, his invocation of the privilege against self-incrimination and his subsequent silence cannot be used by the government in its case in chief as substantive evidence of guilt.” *Id.* at 120.

***United States v. Shellef*, 718 F.3d 94 (2d Cir. 2013)**

QUESTION: Whether the Speedy Trial Act (STA), 18 U.S.C. §§ 3161–3174, places a limitation on the time within which a district court may grant an extension for retrial pursuant to § 3161(e). *Id.* at 102.

ANALYSIS: The court noted that § 3161(e) contains no language “temporally limiting the exercise of judicial discretion” *Id.* at 103. The court reasoned that there was no reason to “preclude retrospective findings of impracticality to safeguard against the risk . . . that district courts will simply rationalize their actions long after the fact, in order to cure an unwitting violation of the Act.” *Id.* (internal quotation marks omitted). The court determined that the assumption that a court would

act in bad faith in making such determines about impracticality was unfounded. *Id.* The court distinguished its prior mandate that § 3167(h)(7) continuances be granted only prospectively because the provision's text and legislative history "plainly expressed Congress' intent" of a prospective limitation. *Id.* at 104. Finally, the court reasoned § 3161(e)'s cap of 180 days on a trial judge's ability to grant an extension rendered any comparison to § 3167(h)(7)'s temporal concerns unnecessary. *Id.*

CONCLUSION: The 2nd Circuit held "that neither the statutory text nor unwarranted concerns about the conduct of district courts support construing 18 U.S.C. § 3161(e) to limit the exercise of a district court's extension discretion under that provision to the initial 70-day period for retrial." *Id.* at 105.

***Vidro v. United States*, 720 F.3d 148 (2d Cir. 2013)**

QUESTION: "[W]hether the United States may assert all defenses available to private persons" under the Federal Tort Claims Act (FTCA). *Id.* at 149.

ANALYSIS: The court observed that "the United States has waived its sovereign immunity for certain actions of its employees under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred" through the FTCA. *Id.* at 150 (internal quotation marks omitted). The court noted that "the United States is liable for these tort claims in the same manner and to the same extent as a private individual under like circumstances." *Id.* (internal quotation marks omitted). The court further reasoned that "immunities and defenses are defined by the same body of law that creates the cause of action, [therefore] the defenses accessible to the United States in FTCA suits are "those that would be available to a private person under the relevant state law." *Id.* at 151.

CONCLUSION: The 2nd Circuit held that "[i]n FTCA suits, the United States may assert common law defenses available to private individuals under relevant state law." *Id.*

THIRD CIRCUIT

***Bell v. Cheswick Generating Station*, No. 12-4216, 2013 U.S. App. LEXIS 17283 (3d Cir. Aug. 20, 2013)**

QUESTION: "[W]hether the Clean Air Act preempts state law tort claims brought by private property owners against a source of pollution within the state." *Id.* at *2.

ANALYSIS: The court noted that in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987) the Supreme Court “found definitively that nothing in the Clean Water Act bars aggrieved individuals from bringing a nuisance claim pursuant to the laws of the *source* State.” *Id.* at *16–17 (internal quotation marks omitted). The court reasoned that there was “no meaningful difference” between the Clean Water Act and Clean Air Act’s savings clauses. *Id.* at *17. The court noted that the 4th and 6th Circuits “have also found no meaningful distinction between the Clean Water act and the Clean Air Act.” *Id.* at *20.

CONCLUSION: The 3rd Circuit held that “[b]ased on the plain language of the Clean Air Act and controlling Supreme Court precedent . . . such source state common law actions are not preempted.” *Id.* at *2–3.

***Byrd v. Shannon*, 709 F.3d 211 (3d Cir. 2013)**

QUESTION: Whether “‘strikes’ under [the Prison Litigation Reform Act of 1996 (PLRA)] can be accrued in actions or appeals where the prisoner has prepaid the filing fee, or whether strikes can only be accrued in [In Forma Pauperis (IFP)] actions or appeals.” *Id.* at 215.

ANALYSIS: The court noted that the 6th, 7th, and 10th Circuits “have held that strikes may be accrued in actions or appeals regardless of whether the prisoner has prepaid the filing fee or is proceeding IFP.” *Id.* The court also stated that “[n]o court of appeals has held that strikes may only be accrued in IFP actions or appeals.” *Id.* The court reasoned that the language of PLRA has a “reasonably plain meaning.” *Id.* at 216. The court noted that “action or appeal” refers to both IFP and non-IFP actions or appeals because the three-strikes provision of PRLA does not exclude actions or appeals where prisoners were not granted IFP status. *Id.* The court posited that if Congress meant to differentiate between IFP and non-IFP actions or appeals, there would have been explicit language in the statute which would do so. *Id.* at 217.

CONCLUSION: The 3rd Circuit adopted the position of the 6th, 7th, and 10th Circuits and held that both IFP and non-IFP actions count as strikes under the PLRA. *Id.* at 215-17.

***Hart v. Electronic Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013)**

QUESTION: Whether “the commercial-interest-based Predominant Use Test, the trademark-based *Rogers* Test, [or] the copyright-based Transformative Use Test” is best suited to resolve “conflicts between . . . [NCAA Football Players’] right of publicity and . . . [NCAA Football Video Game’s] First Amendment [rights].” *Id.* at 153.

ANALYSIS: The court first looked to the Predominant Use Test, finding it “subjective at best, arbitrary at worst . . .” and rejected it as “antithetical to our First Amendment precedent . . .” *Id.* at 154. The court then considered the *Rogers* Test, and found it was “a blunt instrument, unfit for widespread application in cases that require a carefully calibrated balancing of two fundamental protections: the right of free expression and the right to control, manage, and profit from one’s own identity.” *Id.* at 157. The court noted that “the Transformative Use Test . . . strike[s] the best balance because it provides courts with a flexible–yet uniformly applicable–analytical framework.” *Id.* at 163. The court explained that “the Transformative Use Test maintains a singular focus on whether the work sufficiently transforms the celebrity’s identity or likeness, thereby allowing courts to account for the fact that misappropriation can occur in any market segment, including those related to the celebrity” and “requires a more circumscribed inquiry, focusing on the specific aspects of a work that speak to whether it was merely created to exploit a celebrity’s likeness.” *Id.*

CONCLUSION: The 7th Circuit held that the “Transformative Use Test is the proper analytical framework to apply to cases” involving “conflicts between the right of publicity and the First Amendment.” *Id.* at 165, 153.

***Majestic Star Casino, LLC v. Barden Development, Inc.*, 716 F.3d 736 (3d Cir. 2013)**

QUESTION: Whether “a non-debtor company’s decision to abandon its classification as an ‘S’ corporation for federal tax purposes . . . is void as a postpetition transfer of ‘property of the bankruptcy estate,’ or is avoidable, under [Bankruptcy Code, 11 U.S.C.] §§ 362, 549, and 550” *Id.* at 741.

ANALYSIS: The court reasoned that in order “[f]or the [r]evocation [of a qualified subchapter S subsidiary (QSub) status] to be void under § 362 or avoidable under §§ 549 and 550, QSub status must be (1) property (2) of the bankruptcy estate” (3) that has been transferred.” *Id.* at 750 (internal quotation marks omitted). The court noted that S-corp status is not a guaranteed right under the Internal Revenue Code (I.R.C.) and while other courts have followed “a series of precedents holding net operating losses (NOLS) to be property,” “have value in a way that S-corp status does not.” *Id.* at 753–55. The court further reasoned that “allowing QSub status to be treated as the property of the debtor subsidiary rather than the non-debtor parent . . . places remarkable

restrictions on the rights of the parent, restrictions that have no foundation in either the I.R.C. or the [U.S.] Code.” *Id.* at 760.

CONCLUSION: The 3rd Circuit held that “S-corp status is not “property” within the meaning of the Code” and that “even if [a subsidiary’s] QSub status were “property,” it is not properly seen as property of [the subsidiary’s] bankruptcy estate” *Id.* at 758, 762.

***United States v. Benjamin*, 711 F.3d 371 (3d Cir. 2013)**

QUESTION: “Whether the [18 U.S.C.] § 922(g)(1) felon-in-possession crime is a continuing offense.” *Id.* at 378.

ANALYSIS: The court noted that the 6th, 7th, 9th and 11th Circuits have “uniformly held that [§ 922(g)(1)] is a continuing offense.” *Id.* The court reasoned that “[p]ossession is generally understood as a course of conduct.” *Id.* The court posited that “by prohibiting possession Congress intended to punish as one offense all the acts of dominion which demonstrate a continuing possessory interest in a firearm.” *Id.* (internal quotation marks omitted.)

CONCLUSION: The 3rd Circuit agreed with the 6th, 7th, 9th, and 11th Circuits and held “that the felon-in-possession crime in § 922(g)(1) is a continuing offense.” *Id.*

***United States v. Graves*, 722 F.3d 544 (3d Cir. 2013)**

QUESTION: Whether “a delay resulting from a competency proceeding extends until a hearing addressing the defendant’s competence is held, or just until the completion of a competency report” under the Speedy Trial Act (STA), 18 U.S.C. § 3161. *Id.* at 547 (internal quotation marks omitted).

ANALYSIS: The court stated that under the STA, a “defendant’s trial must begin within 70 days of the public filing of the indictment or the defendant’s appearance before a judicial officer of the court, whichever is later.” *Id.* at 546. The court noted that the language of the STA excludes the “delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant” from the 70-day calculation. *Id.* The court reasoned that “[b]y making clear that the time spent examining the defendant is included in the delay attributed more generally to a competency proceeding, that provision indicates that such a proceeding involves more than just the competency examination itself.” *Id.* at 547. The court noted that “the use of the term ‘proceeding’ suggests judicial involvement, not solely the collection of evidence.” *Id.*

CONCLUSION: The 3rd Circuit held that the plain language of the STA demonstrates that the excludable delay extends beyond the completion of a competency report, which is “only one step in determining a defendant’s competence to stand trial.” *Id.*

***United States v. Stinson*, No. 12-2012, 2013 U.S. App. LEXIS 17478 (3d Cir. Aug. 21, 2013)**

QUESTION: Whether U.S.S.G. § 2B1.1(b)(15)(A), which provides for sentence enhancement if the defendant “derived more than \$1,000,000 in gross receipts from one or more financial institutions as a result of the offense” requires that a financial institution must be the source of \$1 million in gross receipts for the enhancement to apply. *Id.* at *10 (internal quotation marks omitted).

ANALYSIS: The court reasoned that before the 2001 amendment, the portions of the statute addressing financial institutions and portions addressing the derivation of \$1 million from the offense had remained separate. *Id.* The court noted that the plain language of the amended provision merged the separate requirements, which lead the court to conclude that a financial institution must be the source of the gross receipts. *Id.*

CONCLUSION: The 3rd Circuit held that “§ 2B1.1(b)(15)(A) will apply when the evidence shows that a financial institution, not an individual, was the source of the \$1 million in gross receipts” and that “[a] financial institution is a source of a defendant’s gross receipts if it owns the funds.” *Id.* at *15, 8.

FIFTH CIRCUIT

***In re Lively*, 717 F.3d 406 (5th Cir. 2013)**

QUESTION: Whether “Chapter 11’s absolute priority rule, 11 U.S.C. § 1129(b)(2)(B), as amended by the BAPCPA [Bankruptcy Abuse Prevention Consumer Protection Act], applies in . . . individual debtor cases.” *Id.* at 407.

ANALYSIS: The court recognized that other courts’ handling of this issue has yielded two classes of interpretation. *Id.* at 408. The court noted that the 4th and 10th Circuit adopted a “narrow” interpretation, holding that the absolute priority rule was amended “so that individual debtors could exclude from its reach only their post-petition earnings and post-petition acquisitions of property, *i.e.*, only property that was not already included in the Chapter 11 estate by § 541.” *Id.* at 408–09. In contrast, the court noted that the “broad” interpretation “holds that the exception’s (§ 1129(b)(2)(B)(ii)) reference to property ‘included in’ the

individual debtor's estate 'under' § 1115 subsumes or supersedes the § 541 definition completely, thus [abrogating] the absolute priority rule." *Id.* at 409. The court reasoned that the narrow interpretation was "unambiguous and correct," and that "the opposite interpretation leads to a repeal by implication of the absolute priority rule for individual debtors." *Id.* at 409. The court opined that such an outcome was disagreeable because "repeals by implication are disfavored and will not be presumed unless the legislature's intent is 'clear and manifest.'" *Id.* at 410.

CONCLUSION: The 5th Circuit held that the individual debtor exception under Chapter 11's absolute priority rule "plainly covers only the individual debtor's post-petition earnings and post-petition acquired property." *Id.* at 409.

***Memorial Hermann Hospital v. Sebelius*, 728 F.3d 400 (5th Cir. 2013)**

QUESTION: "Whether mergers must constitute bona fide sales to qualify [for depreciation adjustment] under 42 C.F.R. § 413.134(I)." *Id.* at 402.

ANALYSIS: The court noted that every circuit to consider the issue has held that mergers must constitute bona fide sales in order to qualify for a depreciation adjustment under 42 C.F.R. § 413.134(I). *Id.* The 5th Circuit reasoned that due to the lack of evidence to warrant a circuit split and the unanimity among the circuits regarding this issue, it would join the other circuits. *Id.*

CONCLUSION: The 5th Circuit held that "mergers must constitute bona fide sales in order to be eligible for depreciation adjustments under 42 C.F.R. § 413.134(I)." *Id.* at 408.

***Ngomi Kariuki v. Tarango*, 709 F.3d 495 (5th Cir. 2013)**

QUESTION: Whether, on summary judgment, "the 'hearing de novo' language [of 8 U.S.C. § 1421(c)] impels an evidentiary hearing or whether an FRCP [(Federal Rule of Civil Procedure)] 56 review suffices." *Id.* at 500.

ANALYSIS: The court noted that the 2nd, 3rd, and 11th Circuits have found that a "hearing de novo" encompasses a FRCP 56 review. *Id.* at 500–01. The court noted that under FRCP 81(a)(3) the FRCP "apply to proceedings for admission to citizenship to the extent that the practice in those proceedings" is not statutorily specified and has since adopted the practice in civil actions. *Id.* at 501. The court rejected the argument that § 1421(c)'s "vague reference" to a "hearing de novo" amounts to an alternatively specified practice. *Id.* at 502. The court stated that "de

novo” clarifies that “the deferential ‘arbitrary and capricious’ standard [of review] often applicable to administrative reviews [did] not apply in this context,” because past practices in naturalization hearings, both before and after the Immigration of Act of 1990, have conformed to the FRCP. *Id.*

CONCLUSION: The 5th Circuit held “that a ‘hearing de novo’ within the meaning of [§] 1421(c) encompasses an FRCP 56 review on summary judgment” and not an evidentiary hearing. *Id.* at 503.

United States v. Renda, 709 F.3d 472 (5th Cir. 2013)

QUESTION: Whether a contracting officer’s conclusion “that a government contractor is indebted to the government, rendered pursuant to the” Contract Disputes Act of 1978, as amended, 41 U.S.C. §§ 7101–7109 (the CDA), amounts to a “claim” under the Priority Statute, 31 U.S.C. § 3713. *Id.* at 481.

ANALYSIS: The court explained that the Supreme Court has instructed lower courts to give the Priority Statute a liberal interpretation . . . [and] that [a]ll debtors to the United States, whatever their character, and by whatever mode bound, may be fairly included within its reach.” *Id.* at 481. (internal citation and quotation marks omitted). The court noted that other “courts have applied the priority statute to Government claims of all types.” *Id.* The court further reasoned that finality is not a requirement of the Priority Statute. *Id.* at 482.

CONCLUSION: The 5th Circuit held that “the term ‘claim’ encompasses a [contracting officer’s] determination that a government contractor is indebted to the government.” *Id.* at 484.

United States ex rel. Vavra v. Kellogg Brown & Root, Inc., 727 F.3d 343 (5th Cir. 2013)

QUESTION: “[W]hether the government may ever bring a suit under [41 U.S.C.] § 55(a)(1) [(the Anti-Kickback Act)] alleging an employer is vicariously liable for the kickback-related conduct of its employees.” *Id.* at 347.

ANALYSIS: The court first noted that a “corporation is only a legal entity and . . . cannot act or have a mental state by itself.” *Id.* at 348 (internal quotation marks omitted). The court reasoned, “the acts and mental states of its agents and employees will be imputed to the corporation where such natural persons acted on behalf of the corporation.” *Id.* (internal quotation marks omitted). The court concluded that “[s]ince [§] 55(a)(1) makes corporations liable for

kickback activity, it requires attributing liability to corporate entities for that activity under a rule of vicarious liability.” *Id.*

CONCLUSION: The 5th Circuit concluded “that § 55(a)(1) permits the government to attribute liability to corporate defendants vicariously.” *Id.* at 348.

SIXTH CIRCUIT

***Fulgenzi v. PLIVA, Inc.*, 711 F.3d 578 (6th Cir. 2013)**

QUESTION: Whether the Food, Drug, and Cosmetic Act (FDCA) preempts a state failure-to-warn claim against a generic drug manufacturer that did not update its label “after the branded-drug manufacturer [of the same drug] strengthened the warnings on its label” *Id.* at 580.

ANALYSIS: The court noted that it was required “to conduct a preemption analysis in accord with the principles of *Wyeth* and *Mensing*.” *Id.* at 583. It first evaluated the claim under impossibility preemption, “where it is impossible for a private party to comply with both state and federal requirements[.]” and found that as the generic manufacturer was required to comply with both federal and state requirements, impossibility preemption did not apply. *Id.* at 584. (internal quotation marks omitted). The court then considered whether the claim was preempted because the state tort suit “would frustrate ‘purposes and objections’ of Congress” and concluded that it would not. *Id.* at 585–86.

CONCLUSION: The 6th Circuit held “that state laws that provide for damages for inadequate warnings in violation of the federal duty of sameness do not conflict with federal drug policy[.]” *Id.* at 586.

***Peterson v. Johnson*, 714 F.3d 905 (6th Cir. 2013)**

QUESTION: Whether a finding of fact made by a state agency acting in a judicial capacity has a “preclusive effect in collateral litigation brought” under 42 U.S.C. § 1983 where the defendant continues to dispute the factual matter. *Id.* at 908.

ANALYSIS: The court noted that in *University of Tennessee v. Elliott*, 478 U.S. 788 (1986), the Supreme Court held that a state administrative agency’s un-reviewed factual determination will be accorded the same preclusive effect as entitled to state courts “when a state agency acting in a judicial capacity resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate” *Id.* at 912. The court stated that the preclusive effect of the factual determination turned on whether the agency was “acting in a

judicial capacity[:]" and whether the "hearing officer resolved a disputed issue of fact[:]" and (3) if the matter was properly before it. *Id.* at 912–13. (internal quotation marks omitted). The court posited that if those elements are satisfied, the court "must give the agency's finding of fact the same preclusive effect it would be given in state courts." *Id.* at 913.

CONCLUSION: The 6th Circuit held that state court would accord preclusive effect to the agency's finding of fact and, therefore, the agency's determination must be given preclusive effect in the collateral federal litigation. *Id.* at 917.

***United States v. Martin*, 516 Fed. Appx. 433 (6th Cir. 2013)**

QUESTION: Whether 18 U.S.C. §§ 1956(a)(1)(A)(i) and (a)(1)(B)(i) reflect "separate and distinct crimes or simply multiple means of committing a single offense" of money laundering. *Id.* at 446.

ANALYSIS: The court noted that the 2nd, 3rd, 4th, 5th, 9th, and 11th Circuits have held "that the subsections do not establish separate crimes but rather set forth two alternative bases for committing money laundering." *Id.* at 446–47. The court reasoned that the two dependent clauses modify the same pronoun and contain the same conduct and standards of participation, and only differ as to the purpose of the money laundering stated therein. *Id.* at 447. The court noted that these provisions were unlike the "two dependent clauses separated by a disjunctive 'or'" in 18 U.S.C. § 924(c), the latter of which Congress later passed with the "inten[t] to delineate a new offense . . ." *Id.* at 447–48.

CONCLUSION: The court held "§§ 1956(a)(1)(A)(i) and (a)(1)(B)(i) are multiple means of committing the single offense of money laundering. Therefore, they may be charged in a single count . . ." *Id.*

***Vertrue v. Vertrue, Inc.*, 719 F.3d 474 (6th Cir. 2013)**

QUESTION: "[W]hether [the unnamed plaintiffs] are entitled to tolling during the pendency of a prior putative class action suit[]" under 28 U.S.C. § 1367(d). *Id.* at 477.

ANALYSIS: The court noted that there are three interpretations of § 1367(d): the "substitution approach," the "extension approach," and the "suspension approach." *Id.* at 481. The court reasoned that "[t]he substitution approach fails to give effect to state statutes of limitations, and the extension approach fails to give any operative effect to § 1367(d) in a number of cases in which the state statute of limitations does not expire during the course of federal litigation." *Id.* The court also noted that the suspension approach "suspends the running of the statute of limitations . . . while the federal court is considering the claim and for

thirty days after the claim is dismissed.” *Id.* (internal quotation marks omitted).

CONCLUSION: The 6th Circuit adopted the suspension approach and held that the suspension approach “properly gives effect to both § 1367(d) and the state statute of limitations.” *Id.*

SEVENTH CIRCUIT

***Almutairi v. Holder*, 722 F.3d 996 (7th Cir. 2013)**

QUESTION: Whether “an order from the [Board of Immigration Appeals (BIA)] resolving everything except an issue relating to voluntary departure satisfies the finality rules of the [Immigration and Naturalization Act (INA)].” *Id.* at 1001.

ANALYSIS: The court noted that “immigration statutes do not shed much light on the question” of whether an order resolving everything except voluntary departure is ripe. *Id.* The court attempted to analogize a BIA order resolving all issues except that of voluntary departure to civil litigations, stating that, “a case is not final until the district court has disposed not only of all theories of recovery, but also of all theories of relief.” *Id.* The court reasoned that in the immigration context, “the ‘final’ order might do no more than establish that the alien is removable: it need not . . . order immediate removal.” *Id.* The court recognized that the 1st, 4th and 6th Circuits have all addressed this issue as well, and found that an order from the BIA resolving all issues except that of voluntary departure “satisfies the finality rules of the INA . . .” *Id.*

CONCLUSION: The 7th Circuit joined the 1st, 4th, and 6th Circuits, and held that “an order from the BIA resolving everything except an issue relating to voluntary departure satisfies the finality rules of the INA . . .” *Id.*

***CFTC v. Worth Bullion Group*, 717 F.3d 545 (7th Cir. 2013)**

QUESTION: Whether a wholesaler qualifies as a “consumer finance institution” under the Right to Financial Privacy Act (RFPA), 12 U.S.C. § 3401. *Id.* at 549.

ANALYSIS: The court first considered plain and ordinary meaning of “consumer finance institution,” as it is not explicitly defined in the RFPA. *Id.* at 549–50. The court found that the dictionary definition of “finance company” did not suffice, and instead choose to rely on the canon of *noscitur a sociis*. *Id.* at 550. The court reasoned that all of the “referenced entities surrounding the phrase ‘consumer finance institution’ in the RFPA’s definition of ‘financial institution’ . . . convey considerably more than a tangential or secondary relationship to the field

of financing.” *Id.* at 551. The court further noted that the reason “these entities [exist] is to provide financing and cash loans to the general public, making these services a core function and purpose of [the business].” *Id.*

CONCLUSION: The 7th Circuit held that “Congress did not intend ‘consumer finance institution’ to include every retailer that extends financing to a percentage of its customers as part of its business” *Id.*

***Grochocinski v. Mayer Brown Rowe & Maw, LLP*, 719 F.3d 785 (7th Cir. 2013)**

QUESTION: Whether “estoppel based in part on the conduct of a non-party must comport with the exceptions to non-party preclusion” established in *Taylor v. Sturgell*, 553 U.S. 880 (2008), or whether “judicial estoppel is more flexible than the preclusion doctrines and can be applied regardless of whether the case meets an exception identified in *Taylor*.” *Id.* at 795.

ANALYSIS: The court observed that “judicial estoppel is more flexible than the claim and issue preclusion doctrines that were the concern in *Taylor*.” *Id.* at 796. The court noted that judicial estoppel is not “reducible to any general formulation of principle” and consequently does not “lend itself to rigid rules.” *Id.* The court reasoned that when “considering judicial estoppel effects of a non-party’s conduct,” it is appropriate to “engage in an equitable inquiry that turns on the specific circumstances of an individual case.” *Id.*

CONCLUSION: The 7th Circuit held that the “applicability of judicial estoppel is not limited to the exceptions for claim and issue preclusion identified in *Taylor*.” *Id.*

***Morris v. Nuzzo*, 718 F.3d 660 (7th Cir. 2013)**

QUESTION: “[W]hether, or to what extent, a federal district court can make choice of law determinations in conducting a fraudulent joinder analysis” *Id.* at 671.

ANALYSIS: The 7th Circuit noted “that the fraudulent joinder analysis allows district courts to ‘assume’ limited jurisdiction over an otherwise non-removable action to consider the viability of claims against an alleged fraudulently joined defendant.” *Id.* The court reasoned that “courts may not be absolutely precluded from considering choice of law questions that may arise in the fraudulent joinder context.” *Id.* The court found that “the district court must necessarily predict what substantive law the state court would apply” in predicting whether there

was any reasonable possibility of a state court ruling against a fraudulently joined defendant. *Id.* The court reasoned that finding otherwise would allow a plaintiff to “potentially circumvent the fraudulent joinder doctrine by identifying *any* jurisdiction in the United States in which its claim against the alleged fraudulently joined defendant stood a reasonable possibility of success, even if the jurisdiction bore absolutely no relation to the case.” *Id.* at 671–72.

CONCLUSION: The 7th Circuit held that “choice of law decisions can be made as part of the fraudulent joinder analysis where the choice of law decision is dispositive to the outcome, and where the removing defendant bears the same heavy burden to make the choice of law showing.” *Id.* at 672 (internal quotation marks omitted).

***Redmond v. Redmond*, 724 F.3d 729 (7th Cir. 2013)**

QUESTION: Whether “the parent with physical custody of a child commit[s] wrongful retention—colloquially, an ‘abduction’—by renege[ing] on a promise, made under oath, to obey a newly entered custody order in favor of the other parent.” *Id.* at 740.

ANALYSIS: The 7th Circuit reasoned that the purpose of the Hague Convention is to “target international child abduction . . . and it is not a jurisdiction-allocation or full-faith-and-credit treaty.” *Id.* at 741. The court further reasoned that “a fundamental premise of the Hague Convention is that the interests of children are best served when they remain in their country of habitual residence while their parents resolve contested custody questions in the courts of that country.” *Id.* at 742.

CONCLUSION: The court held “the concepts of removal and retention can be understood only by reference to the child’s habitual residence: a legal adjustment of a parent’s custody rights does not by itself give rise to an abduction claim.” *Id.* at 741–42.

***United States v. Mire*, 725 F.3d 665 (7th Cir. 2013)**

QUESTION: Whether the Controlled Substance Act (CSA), 21 U.S.C. §§ 841(a)(1), 856(a)(1) violates the Due Process Clause because it “do[es] not provide sufficient notice to persons of ordinary intelligence that khat plants may contain cathinone or chathine and, therefore, may be illegal to possess.” *Id.* at 672.

ANALYSIS: The court noted that the issue was not “whether the statute was vague in and of itself” because although khat is not listed in the CSA or in the regulations, the statute “specifically provides that cathinone and chathine are controlled substances.” *Id.* at 673. Rather, the issue was whether the statute was “‘underinclusive,’ because persons

of ordinary intelligence would not necessarily know that khat is (or contains) a controlled substance even after reading the statutory text, as opposed to a statute that cannot be understood on its face.” *Id.* The court observed that, although “an ordinary person would not understand or generally know that khat contains two controlled substances,” a law’s vagueness may be mitigated by the offense’s scienter requirement. *Id.* at 673–74.

CONCLUSION: The 7th Circuit held that where the criminal offense for which the defendant was convicted required “actual knowledge” that khat contained a controlled substance, any argument that application of the CSA would violate Due Process must fail. *Id.* at 674.

EIGHTH CIRCUIT

***SEC v. Das*, 723 F.3d 943 (8th Cir. 2013)**

QUESTION: Whether the Securities and Exchange Commission (SEC) was required to show that the officer acted “knowingly” in violation of SEC Rule 13b2-1 in a civil enforcement action against a former corporate officer for allegedly falsifying company records. *Id.* at 954.

ANALYSIS: The court noted that the 7th Circuit held that the SEC “has previously stated that there is no scienter requirement in SEC Rule 13b2-1 because § 13(b) of the 1934 Securities Exchange Act contains no words indicating that Congress intended to impose a scienter requirement.” *Id.* The court stated that the 2nd Circuit held that “Congress amended § 13(b) to provide that knowing falsification is required before *criminal* liability shall be imposed, plainly implying that falsification of the information to be filed in accordance with § 13(b) need not be knowing in order to lead to civil liability.” *Id.*

CONCLUSION: The 8th Circuit held that the SEC was only required to show negligence in the falsification of records under Rule 13b2-1. *Id.*

***United States v. Behrens*, 713 F.3d 926 (8th Cir. 2013)**

QUESTION: Whether the “no knowledge” defense to imprisonment contained in 15 U.S.C. § 78ff(a) requires proof that a defendant was aware of the specific SEC rule that was violated. *Id.* at 929.

ANALYSIS: The court noted that it had “interpreted ‘willfully violates’ in . . . [the context of § 78ff(a)] as requiring proof of th ‘intentional doing of wrongful acts,’ but not as requiring proof that the defendant knew of a particular securities law or SEC rule prohibiting his actions.” *Id.* The court determined that the “no knowledge” defense must offer “at least some but not all willful violators the added protection

of avoiding imprisonment” in order to be meaningful. *Id.* The court reasoned that, consistent with Supreme Court precedent and the language of § 78ff(a), the “no knowledge” defense “cannot be limited . . . to no knowledge of the existence of the pertinent SEC rule or regulation” or “no knowledge that the conduct actually violated the pertinent SEC rule or regulation.” *Id.* at 929–30.

CONCLUSION: The 8th Circuit held that the best reading “of the no-knowledge provision is to allow individuals to avoid a sentence of imprisonment if they can establish that they did not know the substance of the SEC rule or regulation they allegedly violated, regardless of whether they understood its particular application to their conduct.” *Id.* at 930.

NINTH CIRCUIT

***Corro-Barragan v. Holder*, 718 F.3d 1174 (9th Cir. 2013)**

QUESTION: Whether the meaning of “physically present” within the Immigration and Nationality Act (INA), 8 U.S.C. § 1229c(b)(1)(A), requires “uninterrupted physical presence in the United States for one year for an alien to be eligible for voluntary departure at the conclusion of removal proceedings.” *Id.* at 1177.

ANALYSIS: The court examined “physically present” by looking to the plain meaning of the statute, as well as the statutory history and legislative purpose, and concluded that the statute is unambiguous. *Id.* at 1178–79. The court relied on the 11th Circuit’s prior reasoning and noted as a point of statutory construction that “Congress explicitly set forth special rules for the treatment of certain breaks in physical presence under § 1229b [cancellation of removal], and yet no exceptions are provided for breaks in physical presence under § 1229c(b).” *Id.* at 1179.

CONCLUSION: The 9th Circuit held “that [§ 1229c(b)] requires uninterrupted physical presence in the United States for one year for an alien to be eligible for voluntary departure at the conclusion of removal proceedings.” *Id.* at 1177.

***County of Sonoma v. Federal Housing Finance Agency*, 710 F.3d 987 (9th Cir. 2013)**

QUESTION: Whether the Federal Housing Finance Agency (FHFA) directive to “government sponsored entities that purchase and securitize residential mortgages” (the Enterprises) “to discontinue purchasing [property assessed clean energy,] PACE-encumbered mortgages [(property assessed clean energy-encumbered mortgages)] is a lawful

exercise of its authority as conservator of the Enterprises.” *Id.* at 988, 992.

ANALYSIS: The court noted that the 2nd and the 11th Circuits have held that a “directive not to purchase PACE-encumbered mortgages was within the FHFA’s broad powers as a conservator.” *Id.* at 992–93. The court reasoned that that FHFA has “all the rights, titles, powers and privileges of the Enterprises.” *Id.* at 993. The court also noted that the Housing Economic Recovery Act, “HERA[,] permits FHFA to take actions that are appropriate to carry on the business of the Enterprises and preserve and conserve the assets and property of the Enterprises.” *Id.* (internal quotation marks omitted). The court further reasoned that “FHFA can, as conservator, take over the Enterprises and operate them with all the powers of the shareholders, directors, and officers of the Enterprises, and conduct all business of the Enterprises. *Id.* Additionally, the court found that “[a] decision not to buy assets that FHFA deems risky is within its conservator power to carry on the Enterprises’ business and to preserve and conserve the assets and property of the Enterprises.” *Id.* (internal quotation marks omitted).

CONCLUSION: The 9th Circuit agreed with the 2nd and 11th Circuits, and held that “[a]lthough FHFA’s powers as conservator are not limitless, the ability to decide which mortgages to buy is an inherent component of FHFA’s charge to preserve and conserve the Enterprises assets.” *Id.*

***Jamerson v. Runnels*, 713 F.3d 1218 (9th Cir. 2013)**

QUESTION: Whether the Supreme Court’s decision in *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011) “bars consideration of evidence designed to reconstruct the racial composition of the jury venire.” *Id.* at 1226.

ANALYSIS: The court noted that “[w]here a habeas petitioner alleges a *Batson* violation, courts are required to conduct side-by-side comparisons of the black venire panelists who were struck and white panelists allowed to serve to evaluate the merits of the claim.” *Id.* (internal quotation marks omitted). The court also noted that “[i]f the state court has not performed this comparative juror analysis, we must do so in the first instance.” *Id.* The court reasoned that “[w]ithout knowing the race of each venire member – a fact visible to the state trial court but obscured by the cold record on review – it would be impossible to discharge this duty.” *Id.* Taken together, the 9th Circuit interpreted these two lines of precedent to conclude that *Pinholster* did not bar its consideration of evidence demonstrating the racial makeup of a

petitioner's jury venire. *Id.* Rather, the court found that *Pinholster* was primarily concerned with preventing a federal habeas court from relying on evidence outside the state court record to reach its result. *Id.*

CONCLUSION: The 9th Circuit held that "*Pinholster* allows us to consider photographs that show the racial composition of a jury venire to the extent that those photographs merely reconstruct facts visible to the state trial court that ruled on the petitioner's *Batson* challenge." *Id.* at 1227.

***K.M. v. Tustin Unified School District*, 725 F.3d 1088 (9th Cir. 2013)**

QUESTION: "Whether a school meets the [Americans with Disabilities Act] ADA's requirements for accommodating deaf or hard-of-hearing students as long as it provides a [free appropriate public education (FAPE)] for such students in accord with § 1414(d)(3)(B)(iv)–(v) of the Individuals with Disabilities Act (IDEA)." *Id.* at 1100.

ANALYSIS: The court first noted that it must examine IDEA's FAPE requirement against Title II of the ADA's communication regulations and § 504 of the Rehabilitation Act of 1973. *Id.* From its comparative analysis, giving considerable deference to the Justice Department's interpretation of Title II, the court found the ADA and IDEA requirements to be significantly different. *Id.* First, the court noted that "the factors that the public entity must consider in deciding what accommodations to provide . . . are different." *Id.* Additionally, the court noted "Title II provides the public entity with defenses unavailable under the IDEA" and requires that public schools provide disabled students with an "equal opportunity to participate in, and enjoy the benefits of . . . [the school] program," which is not mandated by the IDEA. *Id.* at 1101, 1096. Based on these differences the court found that "in some situations, but not others, [a] school[] may be required under the ADA to provide services to deaf or hard-of-hearing students that are different than the services required by the IDEA." *Id.* at 1100.

CONCLUSION: The 9th Circuit held that "courts evaluating claims under IDEA and Title II must analyze each claim separately under the relevant statutory and regulatory framework." *Id.* at 1101.

***Logan v. U.S. Bank North America*, 722 F.3d 1163 (9th Cir. 2013)**

QUESTION: "[W]hether the Protecting Tenants at Foreclosure Act of 2009 (PTFA . . .) provides a private right of action." *Id.* at 1165. (internal quotation marks omitted).

ANALYSIS: The court first acknowledged that the Supreme Court has repeatedly held that private rights of action must be created by

Congress, either explicitly or implicitly. *Id.* at 1169. The court noted that the parties agreed that PFTA does not explicitly create a private right of action. *Id.* at 1170. The court reasoned that “[n]othing in the language and structure of [PFTA] reflects a clear and unambiguous intent to create a private right of action.” *Id.* at 1171.

CONCLUSION: The 9th Circuit held that the PFTA does not provide for a private right of action because Congress neither explicitly nor implicitly created the right. *Id.* at 1173.

***Oracle America, Inc. v. Myriad Group A.G.*, 724 F.3d 1069 (9th Cir. 2013)**

QUESTION: “[W]hether incorporation of the UNCITRAL [(United Nations Commission on International Trade Law)] rules into the parties’ arbitration provision constitutes clear and unmistakable evidence that the parties intended to arbitrate arbitrability.” *Id.* at 1073.

ANALYSIS: The court recognized that the 2nd and D.C. Circuits “have concluded that incorporation of the 1976 UNCITRAL arbitration rules constitutes clear and unmistakable evidence that parties to an agreement intended to arbitrate questions of arbitrability.” *Id.* The court noted that “incorporation of the American Arbitration Association’s (AAA) arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.” *Id.* at 1074. The court reasoned that the AAA rules and UNCITRAL rules both contain similar “jurisdictional provision[s],” which further demonstrated the consistency of both rules’ application. *Id.*

CONCLUSION: The 7th Circuit held that “as long as an arbitration agreement is between sophisticated parties to commercial contracts, those parties shall be expected to understand that incorporation of the UNCITRAL rules delegates questions of arbitrability to the arbitrator.” *Id.* at 1075.

***Saese v. McDonald*, 725 F.3d 1045 (9th Cir. 2013)**

QUESTION: Whether “defense counsel’s unfulfilled promise to produce a witness at trial [during an opening statement] could constitute ineffective assistance of counsel” under the principles of *Strickland v. Washington*, 466 U.S. 668 (1984). *Id.* at 1048.

ANALYSIS: The court noted that under the *Strickland* standard, defendant must establish counsel’s “deficient performance and prejudice in order to prove that he has received ineffective assistance of counsel.” *Id.* (internal quotation marks omitted). The court noted that counsel must, however, make a promise before the prejudice prong can be

satisfied. *Id.* at 1050. The 9th Circuit found that counsel’s statement that they were “counting on [the witness] to tell the truth and corroborate what the girl said—was not a promise that the [witness] would definitely testify, but rather an expression of hope that the [witness] might in fact appear.” *Id.*

CONCLUSION: The 9th Circuit held that it was not reasonable to find that counsel’s statement did not amount to a promise and that therefore the failure to produce a witness at trial did not constitute ineffective assistance of counsel under the principles of *Strickland*. *Id.*

***Sams v. Yahoo! Inc.*, 713 F.3d 1175 (9th Cir. 2013)**

QUESTION: Whether a defendant “satisfies the requirements to establish ‘good faith reliance’” under 18 U.S.C. § 2707(e) and how to interpret the legal definition of the same. *Id.* at 1180–81.

ANALYSIS: The court reasoned “the test of good faith reliance under § 2707(e) should contain both an objective and subjective element.” *Id.* at 1180. The court noted that a defendant cannot benefit from the “good faith defense” if the defendant “actually knew that the subpoena (or other process) was invalid under the applicable law.” *Id.* at 1181. The court noted that determining whether a defendant satisfies the “good faith reliance” test is a “mixed question of law and fact.” *Id.* The defendant’s actual knowledge that the subpoena was invalid is a question of fact, while the question of “whether defendant’s belief in the validity of the subpoena was objectively reasonable is a mixed question of law and fact.” *Id.*

CONCLUSION: The 9th Circuit held that “the good faith defense under 18 U.S.C. § 2707(e) is met when the defendant complies with a subpoena (or other process detailed in § 2707(e) of the SCA) that appears valid on its face, in the absence of any indication of irregularity sufficient to put the defendant on notice that the subpoena may be invalid or contrary to applicable law.” *Id.* at 1180–81.

***SEIU v. National Union of Healthcare Workers*, 711 F.3d 970 (9th Cir. 2013)**

QUESTION: “[W]hether [29 U.S.C.] § 501 of the Labor Management Reporting and Disclosure Act [(LMRDA)] creates a fiduciary duty to the union as an organization, not merely the union’s rank-and-file members.” *Id.* at 975.

ANALYSIS: The 9th Circuit noted that under the LMRDA, “officers of labor unions are held to the highest standards of responsibility and ethical conduct in administering the affairs of the union.” *Id.* at 978.

The court stated that the “statutory language [§ 501(a)] explicitly highlights the duty of union officers to the organization itself, not merely the union’s members.” *Id.* at 980. The court further noted that, “if statutory language is unambiguous and the statutory scheme is coherent and consistent, judicial inquiry must cease.” *Id.* at 979.

CONCLUSION: The 9th Circuit held that “§ 501 . . . creates a fiduciary duty the union as an organization, not merely the union’s rank-and-file members.” *Id.* at 975.

***United States v. Sanchez*, 710 F.3d 724 (9th Cir. 2013)**

QUESTION: Whether a prohibited purpose can be fairly described as a “primary or principal” use of the premises in order to apply a sentencing enhancement under U.S.S.G. § 2D1.1(b)(12). *Id.* at 729, 731.

ANALYSIS: The court noted that the 8th Circuit recently considered the issue in discussing whether a defendant used the premises primarily as a family home or for a collateral purpose of selling drugs. *Id.* at 729. The court found the 8th Circuit persuasive, reasoning that “the application note’s call to compare the frequency of illegal and legal activities at premises leads to odd results when the premises also serve as a primary residence.” *Id.* The court further noted that while it’s own “case law holds that under § 856, the illicit use need not be the sole purpose,” other circuits have “further explained that in the residential context, the manufacture (or distribution or use) of drugs must be at least one of the primary or principal uses to which the house is put.” *Id.* (internal quotation marks omitted). The court concluded that “in a residential case, a mere comparing of frequencies does not alone answer the question” given the similarity in language of § 856(a)(1). *Id.* at 731.

CONCLUSION: The 9th Circuit held that it would “consider both the frequency the prohibited uses occurred on the premises and whether those uses were significant in scope” in tandem in determining “whether the prohibited purpose can be fairly described as a primary or principal use of the premises.” *Id.*

***United States v. Thomas*, 726 F.3d 1086 (9th Cir. 2013)**

QUESTION: Whether a superseding indictment under the Speedy Trial Act (STA) requires the seventy-day speedy trial time period to start over. *Id.* at 1089.

ANALYSIS: The court first looked at the language of 18 U.S.C. § 3161(c)(1), which creates the seventy-day clock, and found it does not provide a plain answer. *Id.* at 1090. The court then considered other aspects of the STA, finding that the government’s obtaining a

superseding indictment is somewhat analogous to the “government’s choice to have an indictment dismissed and recharged.” *Id.* The court stated that for reindictments, the initial seventy-day clock still applies, but it is slowed by section 3161(h)(5), which excludes from the applicable speedy-trial clock “any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge” for offenses that are the same or are required to be joined with that offense. *Id.* The court reasoned that this language suggests that separate and distinct charges brought by superseding indictment are both ineligible for exclusion and subject to the initial clock or “they stand on their own and are subject to a new timing period under section 3161(c)(1).” *Id.* The court found the 5th Circuit’s discussion on this point instructive, which recognized that when charges do not have to be joined, the government “may obtain a fresh speedy trial clock by [] waiting [for the] completion of the prosecution for charges in the original indictment” and then begin a new prosecution on the additional charges. *Id.* at 1091.

CONCLUSION: The 9th Circuit held that “charges in a superseding indictment not required to be joined with the original charges come with a new [70]-day clock under the [STA].” *Id.*

ELEVENTH CIRCUIT

***ComTran Group, Inc. v. U.S. DOL*, 722 F.3d. 1304 (11th Cir. 2013)**

QUESTION: Whether it is “appropriate to impute a supervisor’s knowledge of his own violative conduct to his employer under the [Occupational Health and Safety Act], thereby relieving the Secretary of Labor (Secretary) of her burden to prove the knowledge element of her prima facie case[.]” *Id.* at 1306.

ANALYSIS: The court reasoned that because the “supervisor acts as the ‘eyes and ears’ of the absent employer[.]” it would be reasonable to hold the employer liable for the supervisor’s conduct as though the employer had knowledge of the violative conduct. *Id.* at 1317. The court determined that the “rogue conduct” of a supervisor “cannot be imputed to the employer,” but rather that the Secretary must establish the “employer’s actual knowledge, or . . . constructive knowledge based on the fact that the employer could . . . foresee the unsafe conduct of the supervisor that is, through evidence of lax safety standards.” *Id.* at 1316. (internal quotation marks omitted).

CONCLUSION: The court concluded that “[i]f the Secretary seeks to establish that an employer had knowledge of misconduct by a supervisor, she must do more than merely point to the misconduct itself. To meet her

prima facie burden, she must put forth evidence independent of the misconduct.” *Id.* at 1318.

***Lindley v. FDIC*, No. 12-12015, 2013 U.S. App. LEXIS 17019 (11th Cir. Aug. 16, 2013)**

QUESTION: Whether, under § 1819(b)(2)(A), a district court “has jurisdiction over a pendent state law claim that the FDIC has removed to the District Court when the FDIC is later dismissed from the case” *Id.* at *27.

ANALYSIS: The court looked to the “[t]he language of § 1819(b)(2)(A), the legislative history of FIRREA, [Financial Institutions Reform, Recovery, and Enforcement Act], other canons of statutory construction, [the circuit’s] own precedent, and the weight of persuasive authority from other Circuits” to reach its interpretation. *Id.* at *35. The court reasoned that “the terms of 12 U.S.C. § 1819 evince a clear congressional intent to provide a federal forum when the FDIC is made a party to state court litigation.” *Id.* at *30. (internal quotation marks omitted). The court found that “[t]hese purposes are better served if § 1819(b)(2)(A)’s use of ‘is a party’ means that the FDIC need only be a party at the time the case is filed in order to establish jurisdiction over all pendent claims.” *Id.*

CONCLUSION: The 11th Circuit joined the 2nd, 5th, and 8th Circuits and concluded that “when the FDIC is a party to a civil suit and removes that case to federal court, the District Court has original jurisdiction over claims against non-FDIC defendants, and this jurisdiction is not lost if the FDIC is later dismissed from the case.” *Id.* at *35.

***MDS (Canada), Inc. v. RAD Source Technologies, Inc.*, 720 F.3d 833 (11th Cir. 2013)**

QUESTION: “[W]hether the Federal Circuit has exclusive jurisdiction to hear an appeal of a breach of contract claim that would require the resolution of a claim of patent infringement for the complainant to succeed.” *Id.* at 837–38.

ANALYSIS: The court noted that “[b]ecause this action was filed before Congress passed the America Invents Act of 2011, it [was] governed by a statute that granted the Federal Circuit exclusive jurisdiction of an appeal from a final decision of a district court of the United States if the jurisdiction of that court was based, in whole or in part, on section 1338.” *Id.* at 841 (internal quotation marks omitted). The court noted that Supreme Court precedent dictates that § 1338 must

be interpreted in tandem with § 1331, granting federal question jurisdiction, because both statutes use the term “arising under.” *Id.* The court found that the factors of the substantiality inquiry in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), “establish that the issue of patent infringement here is not a substantial federal question for the purpose of section 1338.” *Id.* at 842. The court reasoned that “[t]o hold all questions of patent infringement are substantial questions of federal law for the purposes of federal patent jurisdiction would sweep a number of state-law claims into federal court.” *Id.* at 843.

CONCLUSION: The 11th Circuit held that “the Federal Circuit [does not have] exclusive jurisdiction to hear an appeal of a breach of contract claim that would require the resolution of a claim of patent infringement for the complaint to succeed.” *Id.* at 837–38, 856.

***Scimone v. Carnival Corp.*, 720 F.3d 876 (11th Cir. 2013)**

QUESTION: “[W]hether a defendant has the right, pursuant to 28 U.S.C. §§ 1332(d)(11), 1441, and 1453, to remove multiple and separate lawsuits to federal court as mass actions if the lawsuits in the aggregate contain 100 or more plaintiffs whose claims revolve around common questions of law or fact, but neither the plaintiffs nor the state court have proposed that 100 or more persons’ claims be tried jointly.” *Id.* at 878.

ANALYSIS: The court noted that under § 1332(d)(11)(B)(i), the plaintiff, the defendant or the state court acting *sua sponte* may make a proposal to try the claims jointly. *Id.* at 881. The court went on to note that the “structure of the exceptions to removal jurisdiction carved out by the [Class Action Fairness Act (CAFA)] . . . ,bars removal of suits where the claims are joined upon motion of a defendant.” *Id.* (internal quotation marks omitted). The court reasoned that the statute’s text and structure make clear “that the plaintiffs can propose a joint trial, either by naming 100 or more plaintiffs in a single complaint or by their litigation conduct at any time prior to defendants’ removal of their action to federal court.” *Id.* The court further noted, “the burden of showing that plaintiffs proposed a joint trial rests with the removing defendant.” *Id.* at 882. The court stated “[a]bsent a proposal or perhaps a *sua sponte* court determination, [] the federal courts lack subject-matter jurisdiction over the plaintiffs’ claims.” *Id.*

CONCLUSION: The 11th Circuit held “that plaintiffs have the ability to avoid § 1332(d)(11)(B)(i) jurisdiction by filing separate complaints naming less than 100 plaintiffs and by not moving for or otherwise proposing joint trial in the state court.” *Id.* at 884.

***Sunbeam TV Corp. v. Nielsen Media Research, Inc.*, 711 F.3d 1264 (11th Cir. 2013)**

QUESTION: “Whether, to establish antitrust standing, . . . [a] customer[], must establish the existence of a willing and able competitor that would have entered the relevant market and competed with . . . [the incumbent], but for . . . [the incumbent’s] exclusionary conduct” *Id.* at 1270.

ANALYSIS: The court found the standard set forth by the D.C. Circuit and adopted by the district court to be persuasive and convincing precedent on the issue. *Id.* at 1273. The court, in adopting that standard, stated that similar to a would-be entrant suing an incumbent firm, “a would-be *purchaser* [customer] suing an incumbent monopolist for excluding a potential competitor from which it might have brought a product at a lower price must prove the excluded firm was willing and able to supply it but for the incumbent’s firm exclusionary conduct.” *Id.* at 1272.

CONCLUSION: The 11th circuit held that “[w]hether or not the plaintiff is a customer or a competitor . . . the plaintiff must prove the existence of a competitor willing and able to enter the relevant market, but for the exclusionary conduct of the incumbent monopolist.” *Id.* at 1273.

***United States v. Cruz*, 713 F.3d 600 (11th Cir. 2013)**

QUESTION: Whether U.S.S.G. § 2B1.6 precludes a sentence enhancement for the use or possession of device-making equipment, when a defendant is “already subject to a two-year mandatory sentence under 18 U.S.C. § 1028A for aggravated identity theft.” *Id.* at 602.

ANALYSIS: The court first looked at the text of the applicable Guidelines sections, § 2B1.1(b)(10) and the commentary to § 2B1.6, noting that § 2B1.6 limits the application of § 2B1.1(b)(10) to avoid double-counting. *Id.* at 605–06. The court noted that the “[1st] and [8th] Circuits, however, have held that § 2B1.6 is not an across-the-board bar on applying § 2B1.1(b)(10) enhancements to defendants convicted under § 1028A.” *Id.* at 606. The court stated that, “[a] plain reading of [§ 2B1.6] commentary makes clear that the use of device-making equipment is not the type of relevant conduct,” precluded from enhancement by § 2B1.6. *Id.*

CONCLUSION: The 11th Circuit held that sentence enhancement under § 2B1.1(b)(10)(A)(1) for possession or use of device-making equipment is not precluded by § 2B1.6. *Id.* at 607.

D.C. CIRCUIT

***Lesesne v. Doe*, 712 F.3d 584 (D.C. Cir. 2013)**

QUESTION: Whether the Prison Litigation Reform Act (PLRA)'s exhaustion requirement, 42 U.S.C.S. § 1997e(h), is a prerequisite for a plaintiff who, although no longer a prisoner at the time the complaint was filed, failed to exhaust all administrative remedies while an inmate. *Id.* at 585.

ANALYSIS: The court observed that the § 1997e(h) analysis “is an obvious, straightforward legal question that does not require further factual development.” *Id.* at 588. The court noted that the PLRA's exhaustion requirement, which states that a prisoner must exhaust all administrative remedies before filing a formal complaint, is not required if the complaint is filed after the prisoner is released from jail. *Id.*

CONCLUSION: The D.C. Circuit held that the PLRA exhaustion requirement does not apply to a plaintiff who is not a prisoner at the time the complaint is filed, regardless of whether or not the plaintiff exhausted all administrative remedies while in prison. *Id.* at 589.

***United States v. Spencer*, 720 F.3d 363 (D.C. Cir. 2013)**

QUESTION: Whether the phrase “term of supervised release authorized by statute” at the beginning of 18 U.S.C.S. § 3583(e)(3) “caps the aggregate amount of revocation imprisonment at the amount of supervised release” under the provision. *Id.* at 368.

ANALYSIS: The court observed that the plain language of the statute was unambiguous, thus the court “must give effect to its plain meaning.” *Id.* at 369. The court explained that the phrase “on any such revocation,” added in the 2003 amendment to § 3583(e)(3), modifies the phrase “term of supervised release authorized by statute.” *Id.* at 370. The court noted that “had Congress intended the first half of § 3583(e)(3) to require aggregation, it would not have amended the second half of the statute to preclude such an interpretation.” *Id.*

CONCLUSION: The D.C. Circuit held that “upon each revocation of supervised release, a defendant may be sentenced to the felony class imprisonment limits at the end of § 3583(e)(3), without regard to prison time previously served for revocation of supervised release in the same case.” *Id.*

FEDERAL CIRCUIT

***Abbott Laboratories v. Cordis Corp.*, 710 F.3d 1318 (Fed. Cir. 2013)**

QUESTION: “[W]hether [35 U.S.C.] Section 24 empowers a district court to issue a subpoena in an *inter partes* reexamination proceeding, in

the absence of PTO [(Patent and Trademark Office)] regulations allowing parties to take testimony by deposition in such proceedings.” *Id.* at 1320.

ANALYSIS: The court noted that § 24 allows a district court clerk to issue subpoena’s for “any contested case in the PTO.” *Id.* at 1322. The court states that it defines “contested case” “in light of its plain text and relationship with adjacent provisions of Title 35, its legislative history, and the interpretation given to it by other courts.” *Id.*

CONCLUSION: The Court of Appeals for the Federal Circuit held that “[s]ince the PTO does not provide for depositions in *inter partes* reexamination proceedings, such proceedings are not ‘contested cases’ within the meaning of Section 24, and subpoenas under Section 24 are not available.” *Id.* at 1320.