First Impressions

The following pages contain brief summaries of issues of first impression identified by federal court of appeals opinions announced between February 18, 2014 and September 4, 2014. 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

***Hannon v. City of Newton*, 744 F.3d 759 (1st Cir. 2014)**

QUESTION: Whether the Internal Revenue Service ("IRS") has the authority "to discharge a portion of its tax liens on a piece of real property taken by eminent domain in exchange for payment from that taking while asserting the remaining value of its liens on any proceeds that the taxpayer obtains in a state post-taking suit for under compensation damages." *Id.* at 761.

ANALYSIS: The court reasoned that 26 U.S.C. § 6325(b)(2)(A) "gives the IRS discretion to discharge" property from a tax lien if the IRS is paid an amount, 'which shall not be less than the value' of its interest in that property." *Id.* at 765. The court posited that most of the IRS's discharges "occur to facilitate the transfer of encumbered property," and to "give clear title to the purchaser." *Id*. at 765–66. The court further noted that the controlling federal law provides that the government's lien "attaches 'to all property and rights to property' held by a delinquent taxpayer . . . " and that once a federal lien is enacted, "it automatically attaches to any property" that the delinquent taxpayer later acquires. *Id*. at 769.

CONCLUSION: The 1st Circuit held "that the IRS discharge under [26 U.S.C. § 6325(b)(2)(A)] did not surrender the government's tax lien on the proceeds of the taxpayer's post-taking suit." *Id*.

***López-Muñoz v. Triple-S Salud, Inc.*, 754 F.3d 1 (1st Cir. 2014)**

QUESTION: Whether the Federal Employees Health Benefits Act of 1959 ("FEHBA"), found at 5 U.S.C. §§ 8901-8914, "completely preempts local-law tort and contract claims arising out of a refusal by a FEHBA insurer to cover a medical procedure." *Id*. at 2.

ANALYSIS: The 1st Circuit stated that "the linchpin of the complete preemption analysis is whether Congress intended that federal law provide the exclusive cause of action for the claims asserted by the plaintiff." *Id*. at 5. The court noted that cases in which the Supreme Court found complete preemption share a common factor: "exclusive federal regulation of the subject matter of the asserted state claim, coupled with a federal cause of action for wrongs of the same type." *Id.* The 1st Circuit further determined, in regard to the FEHBA, the preemption clause "is not sufficiently broad enough to confer federal jurisdiction." *Id.* at 6. The 7th Circuit is the only other circuit to address this issue and also did not read the FEHBA as affecting complete preemption. *Id*. at 8.

CONCLUSION: The 1st Circuit held that "the FEHBA does not completely preempt local-law claims relating to the denial of benefits." *Id*.

***Millay v. Me. DOL*, 762 F.3d 152 (1st Cir. 2014)**

QUESTION: Whether the limitations period applicable "to an action for judicial review brought pursuant to" 29 U.S.C. § 722(c)(5)(J) (the Rehabilitation Act) should be guided by state law or the default of the federal catch-all statute of limitations, 28 U.S.C. § 1658(a). *Id*. at 153.

ANALYSIS: The 1st Circuit examined how Congress amended Title I of the Rehabilitation in 1998 to include "a different default rule for a civil action arising under an Act of Congress enacted after December 1, 1990" because prior to this, the Rehabilitation Act did not contain a statute of limitation period. *Id*. at 155. (internal quotation marks omitted). The court noted that the Supreme Court previously held that "if the plaintiff's claim against the defendant was made possible by a post-1990 enactment of Congress, the [catch-all] limitations period applies." *Id*. The court emphasized that "[i]t was these 1998 amendments to the Rehabilitation Act that enabled the plaintiff to bring the current proceeding for judicial review." *Id*. The 1st Circuit reasoned that there was "simply no justification for hinging the applicability of [§ 1658(a)] on whether or not the relevant statute created a new substantive violation of federal law." *Id*. at 156.

CONCLUSION: The 1st Circuit held "the right to judicial review that the statute creates is subject to the general catch-all limitations period contained in § 1658(a)." *Id*. at 157.

***OMJ Pharms., Inc. v. United States*, 753 F.3d 333 (1st Cir. 2014)**

QUESTION: Whether a U.S. taxpayer is required to reduce its credit cap under 26 U.S.C. § 936(j)(5)(D) by the amount of the credit-eligible income associated with the line of business, when the business is sold to a foreign corporation that does not pay U.S. corporate income taxes, and thus has no credit cap to increase. *Id*. at 334.

ANALYSIS: The court, when interpreting § 936, tried to create a framework very similar to that of 26 U.S.C. § 41(f)(3), which governs "the calculation of the tax credit for increases in research expenditures." *Id*. at 336. The 1st Circuit noted that the plain text of the statute "does not read as one would expect it to had Congress intended that all sales of business lines would decrease a seller's cap." *Id*. at 340. The court found through the nature of the possessions tax regime, and the structure of the statute, that Congress's attention was on the Puerto Rican economy when enacting this statute. *Id*. at 341. The court further found that § 936 was aimed at leaving the balance of caps in Puerto Rico unaffected, and that having a reduction in a seller's cap when there would not be an increase would

offset this balance and would have "marginally decreased the size of the transitional cushion." *Id.*

CONCLUSION: The 1st Circuit held that "a reduction in a seller's cap as a result of the sale of a business line is appropriate only in the event of a corresponding increase in the buyers cap," and that when there is no claim that the taxpayer's sale of a business line to a foreign corporation increased or could have increased the foreign company's credit cap, the sale does not reduce the taxpayer's credit cap under § 936(j)(5)(D). *Id*.

***Ortiz-Graulau v. United States*, 756 F.3d 12 (1st Cir. 2014).**

QUESTION: Whether the term "use" under 18 U.S.C. § 2251 means to "to employ or avail oneself of the use of a minor in order to create a visual depiction of sexually explicit conduct" or has a narrower meaning in the context of a consensual sexual relationship with a minor. *Id*. at 17.

ANALYSIS: The Court noted that other circuits including the 2nd, 4th and 8th have held that "the 'use' element in § 2251 is met when a defendant intentionally films or photographs a minor's sexually explicit conduct." *Id*. at 18. The 1st Circuit reasoned that in enacting § 2251, "Congress intended a broad ban on the production of child pornography and aimed to prohibit the varied means by which an individual might actively create it." *Id*. As such, the court found that "use" should be given its plain dictionary meaning in the broadest sense. *Id*.

CONCLUSION: The Court held that the term "use" under § 2251 is satisfied when the defendant "was actively and directly involved in producing a sexually explicit depiction of a minor even in the absence of a complaining witness or the prosecution's inability to identify the specific minor." *Id*. at 19.

***Riley v. Metro. Life Ins. Co.*, 744 F.3d 241 (1st Cir. 2014)**

QUESTION: Whether the Employee Retirement Income Security Act ("ERISA") "must be treated as a continuing violation or as an installment contract, with a new accrual date starting a new limitations period for each payment." *Id*. at 246.

ANALYSIS: The court noted that the 2nd, 3rd , and 9th Circuits have addressed and rejected the same type of accrual theory that the plaintiff presents in an ERISA context. *Id*. The 1st Circuit found it particularly persuasive that the plaintiff did not present any district court opinions that apply his accrual approach. *Id*. at 247. The court noted that the 1st Circuit, in a previous case, stated in dicta that it "speculated that if the City was required to make periodic payments, and successively underpaid [plaintiff], a claim might arise each time a payment was made," but that this case was distinguishable from the present case. *Id*. (internal quotation

marks omitted). The court concluded that ERISA's purposes of encouraging employers to "offer benefits by assuring a predictable set of liabilities," and that the rejection of the accrual theory furthers this goal of predictability. *Id*. at 248.

CONCLUSION: The 1st Circuit held that a disability plan does not have to "be treated as a continuing violation or as an installment contract with a new accrual date starting a new limitations period for each payment." *Id.* at 246.

***United States v. Fish*, 758 F.3d 1 (1st Cir. 2014)**

QUESTION: Whether Massachusetts's Daytime and Nighttime Breaking and Entering ("B&E") offenses can be characterized under 18 U.S.C. § 16(b) as crimes of violence. *Id.* at 15.

ANALYSIS: The court first examined a previous 1st Circuit decision, *United States. v. Brown*, 631 F.3d 573 (1st Cir. 2011), which held that "nighttime B&E did not qualify as a 'crime of violence' under the residual clause of the career offender provision" of sentencing guideline U.S.S.G. § 4B1.2. *Id*. at 7 (citation omitted). Next, the court turned to its decision in *United States v. Farrell*, 672 F.3d 27 (1st Cir. 2012), which held that a district court's holding that the daytime B&E statute, found at 18 U.S.C. § 924(e) was a "violent felony" was plainly erroneous. *Id*. at 7. Relying on these two decisions, the court noted that they were based on the "breadth of the 'building' element," meaning that building within the statute included so many structures that the threat of violence towards a person was more unlikely than the theft of property. *Id*. at 8.

CONCLUSION: The 1st Circuit held that the defendant's "prior convictions for daytime B&E and nighttime B&E are not categorically crimes of violence under § 16(b)." *Id.*

***United States v. Roberson*, 752 F.3d 517 (1st Cir. 2014)**

QUESTION: Whether a defendant's prior conviction, that was subsequently vacated, qualifies as a "predicate offense" under the Sex Offender Registration and Notification Act ("SORNA"). *Id*. at 521.

ANALYSIS: The 1st Circuit reasoned that SORNA, defines the term "sex offender" as "an individual who *was convicted* of a sex offense." *Id*. at 521. The court explained that Congress has stated that "'convicted' refers to the historical fact of the conviction, regardless of whether that conviction might later be vacated." *Id*. at 522. Thus, the court reasoned that the term "'was convicted' refers to the fact of conviction and does not refer only to a 'valid' conviction." *Id*.

CONCLUSION: The 1st Circuit held that the registration requirement under SORNA "applies to a person who 'was convicted' of a sex offense

regardless of whether that conviction is later vacated, when federal charges have been brought for conduct before the vacation of conviction." *Id*. at 519.

***United States v. Sep'lveda-Hernández*, 752 F.3d 22 (1st Cir. 2014)**

QUESTION ONE: Whether "the statute doubling the maximum available penalty for drug distribution in close proximity to a youth center . . . creates an independent substantive offense or, instead, operates merely as a sentencing-enhancing factor[.]" *Id*. at 25 (citation omitted).

ANALYSIS: The court stated that "ten of our sister circuits have grappled with the same question, and all of them have concluded that § 860(a) creates an independent substantive offense, not merely a sentence-enhancing factor." The court further noted there was not contrary circuit court precedent, and concluded that the "consensus position is correct, and that a statute ought to be read as a whole." *Id*. at 27 (citation omitted). The court reasoned that it would have been strange for "Congress to describe a person as having been convicted under a sentencing factor – and we do not think that Congress indulged such an awkward locution here." *Id*.

CONCLUSION: The 1st Circuit held that § 860(a) creates an independent substantive offense, but that the evidence presented at trial "was insufficient to support convictions for that offense." *Id* at 25.

QUESTION TWO: Whether "the defendant can be held to account on a lesser included offense theory under 21 U.S.C. § 841(a)(1)," even though "the evidence was insufficient to ground convictions under § 860(a)." *Id.* at 25.

ANALYSIS: The court observed that the 2nd, 3rd, 5th, and 10th Circuits have held that a multi-step test is used to determine "whether a particular case create[s] an environment suitable for the exercise of § 2106 authority." *Id*. at 28. The court concluded that the "multi-step test provides the proper analytic framework in a § 2106 inquiry," and when it utilized this test, the court found that injustice would not occur under this specific case. *Id*. at 29, 31.

CONCLUSION: The 1st Circuit held that under § 860(a), the defendant can "be held to account on a lesser included theory under § 841(a)(1). *Id*. at 25.

***United States v. Suárez-González,* 2014 U.S. App. LEXIS 14005 (1st Cir. 2014)**

QUESTION: Whether a U.S.S.G. §2B5.1(b)(2)(A) sentencing enhancement applies when the defendant did not use a "counterfeiting device" to make counterfeit postal money orders, but rather, conventional

equipment used by the U.S. Postal Service on authentic money order blanks. *Id*. at *5–6.

ANALYSIS: The court noted that under §2B5.1(b)(2)(A), a two-level sentencing enhancement applies when the defendant has "manufactured or produced any counterfeit obligation . . . of the United States, or possessed or had custody of or control over a counterfeiting device or materials used for counterfeiting." *Id*. The court reasoned that "the term 'counterfeiting device' has a plain, ordinary, and unambiguous meaning: a device used for counterfeiting." *Id*. at *6. The court looked to the Sentencing Commission, which defined counterfeit as "an instrument that has been falsely made, manufactured, or *altered*." *Id.* at *6–7 (emphasis added). The court further noted that "the Sentencing Commission stated unreservedly that the . . . definition [of counterfeit] was meant to insure that altered instruments are treated as counterfeit and sentenced under §2B5.1." *Id*. at *9 (internal quotation marks omitted). Finally, the court reasoned that "[t]he authenticity of the printer in no way diminishes the counterfeit nature of the ersatz money orders printed at the [defendant's] direction." *Id.* at *9–10.

CONCLUSION: The 1st Circuit held that,"[b]y arranging for the printing of fake dollar amounts on otherwise worthless money order blanks, the appellant 'altered' those blanks — and this alteration was accomplished through the use of a machine . . . " and thus, the device was used to create counterfeit money orders and the sentencing enhancement applies. *Id.* at *9–12.

SECOND CIRCUIT

***City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173 (2d Cir. 2014)**

QUESTION: "Whether the bar on extraterritorial application of the United States securities laws, as set forth in *Morrison v. National Australia Bank Ltd*., 561 U.S. 247 (2010), precludes claims arising out of foreign-issued securities purchased on foreign exchanges, but cross-listed on a domestic exchange (the so-called "listing theory")." *Id*. at 176.

ANALYSIS: The 2nd Circuit stated that "the 'listing theory' is irreconcilable with *Morrison*, when read as a whole." *Id.* at 180. The court articulated that *Morrison* focuses on purchases and sales of securities in the United States and that the Supreme Court "explicitly rejected the notion that the "*national* public interest pertains to transactions conducted upon *foreign* exchanges and markets." *Id*. (internal quotation marks omitted). Further, the court noted that *Morrison* rejected the notion that the Securities Exchange Act of 1934 applies "to transactions regarding

stocked traded in the United States which were effected outside the United States." *Id*. at 180. (internal quotation marks omitted).

CONCLUSION: The 2nd Circuit held that the Supreme Court's decision in *Morrison "*precludes claims brought pursuant to the Securities Exchange Act by purchasers of shares of a foreign issuer on a foreign exchange, even if those shares were cross-listed on a United States exchange." *Id*. at 176.

***Ermini v. Vittori*, 758 F.3d 153 (2d Cir. 2014)**

QUESTION ONE: Whether removal of an autistic child from an educational program, which would cause him to suffer loss of skills associated with his cognitive and emotional abilities, would constitute a psychological harm pursuant to 13(b) of the Hague Convention. *Id.* at 160.

ANALYSIS: The court noted that "Article 13(b) explicitly lists 'psychological' harm and 'physical' harm as appropriate harm for triggering the Convention's affirmative defenses." *Id*. The court also noted that the "district court established there was a probability that the harm would materialize." *Id*. at 166. The court reasoned that the harm of losing "the ability to develop cognitive, emotional, and relational skills, and potentially lead an independent life, if removed from his currently therapy and repatriated, establishe[d] harm of a 'severe magnitude' manifestly sufficient to satisfy the exception." *Id.*

CONCLUSION: The 2nd Circuit held that the child in this case "faced a grave risk of harm if removed from his current therapy and returned to Italy." *Id.* at 153.

QUESTION TWO: Whether a denial without prejudice in a Hague Convention case constitutes an error of law. *Id.* at 167.

ANALYSIS: The court noted that the Convention "stresses the importance of deciding matter expeditiously. *Id*. The court further noted that the Hague Convention "is not concerned with establishing the person to whom custody of the child will belong at some point in the future, nor with the situations in which it may prove necessary to modify a decision." *Id*.

CONCLUSION: The 2nd Circuit held that "the Convention did not permit denial of the petition without prejudice." *Id.* at 168.

***Kalyanaram v. Am. Ass'n of Univ. Professors at the N.Y. Inst. of Tech.*, 742 F.3d 42 (2d Cir. 2014)**

QUESTION: "Whether the statute of limitations on a [duty of fair representation] claim is tolled during litigation in state court to confirm or set aside an arbitration award." *Id.* at 48.

ANALYSIS: The court recognized that "equitable tolling of limitations periods has been recognized in various contexts where pursuing a separate administrative remedy is a precondition to filing suit." *Id*. at 48. However, the court noted that in situations where a plaintiff pursues parallel avenues of relief, tolling has not applied. *Id*. at 49. The court reasoned that tolling was not appropriate because the present case did not include a "unitary statutory scheme mandating administrative action before [a] suit can be brought in a federal forum' and '[t]he purposes of the two avenues of relief differed." *Id*. (internal quotation marks omitted).

CONCLUSION: The 2nd Circuit held that tolling was not appropriate because the conclusion of the lower proceedings was merely "in harmony with the salutary policy favoring the prompt resolution of labor disputes" rather than administrative proceedings required prior to bringing a legitimate claim in federal court, and therefore, because the two avenues taken in search of relief were "parallel," the award of arbitration relief must be vacated. *Id*.

***Parkcentral Global HUB Ltd. v. Porsche Auto. Holdings SE*, 2014 U.S. App. LEXIS 15758 (2d Cir. 2014)**

QUESTION: "[W]hether a transnational [securities-based] swap agreement may be afforded the protection of § 10(b)" of the Securities Exchange Act of 1934. *Id*. at *38.

ANALYSIS: The court reasoned that extending the protection of § 10(b) to transnational securities-based swaps would be an impermissible extraterritorial application of the Securities Exchange Act of 1934. *Id*. at *6. The court based its decision on the general principle espoused by the Supreme Court in *Morrison v. National Australia Bank Ltd*., 561 U.S. 247 (2010) "that, by virtue of the presumption against extraterritorial application of U.S. statutes, § 10(b) of the Securities Exchange Act of 1934, the basic antifraud provision of the U.S. securities laws, has no extraterritorial application, and no civil suit under that section may be brought unless predicated on a purchase or sale of a security listed on a domestic exchange or on a domestic purchase or sale of another security." *Id*. at *3. However, the court declined to adopt a "comprehensive rule or set of rules that will govern all future cases to come before this [c]ourt" or apply this holding outside the transnational swap agreement context. *Id*. at *51.

CONCLUSION: The 2nd Circuit held that extending the protection of § 10(b) to transnational securities-based swaps would be an impermissible

extraterritorial application of the Securities Exchange Act of 1934, but declined to adopt a bright-line rule. *Id*.

***Price Trucking Corp. v. Norampac Indus.*, 748 F.3d 75 (2d Cir. 2014)**

QUESTION: Whether the Federal Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") "grants the subcontractor a right of recovery against the landowner [where the general contractor was paid but failed to forward monies to the subcontractor], [even though this] effectively requir[es] the landowner to pay twice for the same work performed – once to the contractor and once to the subcontractor." *Id.* at 77.

ANALYSIS: The 2nd Circuit stated that, under CERCLA, landowners may pay for cleanups by providing moneys directly to a general contractor, even when a subcontractor actually executed the cleanup. *Id.* at 86. The court thus found that a subcontractor's inability to recover the full cost of its cleanup "falls outside of Congress's concern for enacting the statute," owing to the fact that neither CERCLA's language nor its legislative history suggests that the statute eliminates or otherwise limits the common law rule "bar[ring] direct recovery for breaches of contract against a party not in privity with the claimant" in the waste cleanup context. *Id*. at 84–86.

CONCLUSION: The 2nd Circuit held that CERCLA does not allow a subcontractor to sue a landowner to obtain payment for cleanup work the subcontractor performed for the landowner where the landowner already paid the subcontractor's general contractor for the work, even though the general contractor never forwarded any monies to the subcontractor. *Id.* at 77.

***Stanczyk v. City of New York*, 752 F.3d 273 (2d Cir. 2014)**

QUESTION: "[W]hether [Federal Rule of Civil Procedure] Rule 68 not only cancels the operation of Rule 54(d) – which entitles a prevailing party to costs – but also reverses that rule." *Id*. at 281.

ANALYSIS: The 2nd Circuit noted that every court that has addressed this question has come to the same conclusion, that "Rule 68 reverses Rule 54(d) and requires a prevailing plaintiff to pay a defendant post-offer costs if the plaintiff's judgment is less favorable than the unaccepted offer." *Id*. The 2nd Circuit relied on prior precedent examining "Rule 68's plain language, purpose, and historical roots," as well as the uniformity among the other circuits that have already reached a conclusion on this issue. *Id*. The court also noted that by not awarding attorney fees to the prevailing plaintiff, this conclusion would not conflict with 42 USCS § 1988. *Id*. at 282.

CONCLUSION: The 2nd Circuit held that Rule 68 reverses the operation of Rule 54(d) by requiring a prevailing plaintiff to pay the defendants' post-offer costs, excluding any attorney fees. *Id*. at 281.

***United States v. Crandall*, 748 F.3d 476 (2d Cir. 2014)**

QUESTION: Whether the Sixth Amendment requires accommodations for defendants with hearing impairments, and if so, what are those accommodations? *Id.* at 478.

ANALYSIS: The 2nd Circuit began its analysis by acknowledging the decades old Supreme Court proposition that "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Id*. at 481. This court noted that this right stems from the Compulsory Process and Confrontation Clauses, guaranteeing a defendant in a criminal proceeding "a meaningful opportunity to present a complete defense," which means that the defendant "must possess sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . ." *Id.* The court then analogized the situation of a hearing impaired individual to that of an individual requiring a foreign language interpreter. *Id*.

CONCLUSION: The 2nd Circuit held that "the right to participate in one's own trial encompasses the right to reasonable accommodations for impairments to that participation, including hearing impairments," but limited these accommodations "that are requested by the defendant before or during trial, or the need for which is, or should reasonably be, clear or obvious to the district judge." *Id.* at 481–82.

THIRD CIRCUIT

***Batchelor v. Rose Tree Media Sch. Dist.*, 2014 U.S. App. LEXIS 13641 (3d Cir. 2014)**

QUESTION: "Whether a claim that a school district retaliated against a child and/or the child's parents for enforcing the child's rights under the [Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1482,] could be brought under, and remedied by, the IDEA." *Id.* at *17.

ANALYSIS: The court noted that the 1st and 11th Circuits have "require[d] IDEA exhaustion [for] retaliation claims . . . ." *Id.* at *19. The court reasoned that the plain language of the IDEA allows parents of disabled children to bring a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child . . . " *Id.* at *18. The court posited that the retaliation claims under "the

Rehabilitation Act and ADA 'relate unmistakably' to the provision of a [free and appropriate public education (FAPE)], and are thus subject to the IDEA's exhaustion requirement." *Id.* at *19. The court reasoned that exhaustion develops "the record for review on appeal," encourages "parents and the local school district to work together to formulate an IEP for a child's education," and allows "the education agencies to apply their expertise and correct their own errors." *Id.*

CONCLUSION: The 3rd Circuit held that "the plain language and structure of the IDEA, in addition to the purpose of the IDEA's exhaustion requirement and the policy concerns supporting it" suggests that "retaliation claims related to the enforcement of rights under the IDEA must be exhausted before a court may assert subject matter jurisdiction." *Id.* at *23.

***Brownstein v. Lindsay*, 742 F.3d 55 (3d Cir. 2014)**

QUESTION ONE: "When a joint authorship claim under the Copyright Act arises and accrues?" *Id.* at 58.

ANALYSIS: The court noted that, when determining when a cause of action accrues, it will obey the "discovery rule," which states that "a claim accrues when the plaintiff discovers or should have discovered with 'due diligence that his rights had been violated." *Id*. at 70. The 3rd Circuit noted that the 2nd, 7th, and 9th Circuits have adopted an "express repudiation rule" which states that "a joint authorship claim arises and an author is alerted to the potential violation of his rights when his authorship has been expressly repudiated by his co-author." *Id*. The court determined that the discovery rule will this apply "once a plaintiff's authorship has been expressly repudiated" because the plaintiff will only be on notice once his rights have been violated. *Id*.

CONCLUSION: The 3rd Circuit held "an authorship claim arises and accrues when a plaintiff's authorship has been 'expressly repudiated.'" *Id*. at 58.

QUESTION TWO: "Whether courts have the authority to cancel copyright registrations." *Id*.

ANALYSIS: The court first examined the Copyright Act and determined that "there is no statutory authority in the Copyright Act that gives courts any general authority to cancel copyright registrations." *Id.* at 75. Next, the court recognized that copyright registration cancellation is an administrative function, and as such, is reserved for the Copyright Office. *Id.* The 3rd Circuit further noted "the Lanham Act explicitly provides courts with the general authority to cancel trademarks" and that if Congress's intent was to provide courts with the same authority

regarding copyright registrations, "it could have done so in equally express statutory language." *Id.*

CONCLUSION: The 3rd Circuit held that "courts have no authority to cancel copyright registrations because there is no statutory indication whatsoever that courts have such authority . . . " and that the power of cancellation "resides exclusively with the Copyright Office." *Id.* at 75–77.

***D.E v. Cent. Dauphin Sch. Dist.*, 2014 U.S. App. LEXIS 16546 (3d Cir. 2014)**

QUESTION: "Whether a party seeking to enforce a favorable decision from an administrative due process hearing must exhaust administrative remedies before filing suit in a court of law" pursuant to the Individuals with Disabilities Education Act (IDEA) *Id*. at *29.

ANALYSIS: The court stated that Congress envisioned that plaintiffs would exhaust administrative processes before instituting legal proceedings, and, as such, courts should enforce the exhaustion requirement. *Id*. at *31. However, the court noted that there are four exceptions to the exhaustion requirement, where: "(1) exhaustion would be futile or inadequate; (2) the issue presented is purely a legal question; (3) the administrative agency cannot grant relief; and (4) exhaustion would cause severe or irreparable harm." *Id*. at *32. Further, the court reasoned, "administrative exhaustion of a favorable decision is futile and barred by the express language of the statute in that only 'aggrieved parties' may appeal." *Id*. at *34.

CONCLUSION: The 3rd Circuit held that "a party seeking to enforce a favorable decision from an administrative due process hearing need not exhaust administrative remedies before filing suit in a court of law" under the IDEA. *Id*.

***La. Forestry Ass'n v. Sec'y U.S. DOL*, 745 F.3d 653 (3d Cir. 2014)**

QUESTION: Whether "the Department of Labor ("DOL") exceeded its authority by enacting a regulation governing the calculation of the minimum wage a U.S. employer must offer in order to recruit foreign workers under the H-2B visa program." *Id*. at 658.

ANALYSIS: The court examined both the DOL's "general rulemaking authority in the context of the H-2B program, as well its compliance with the requirements" of the Administrative Procedure Act ("APA) and the Immigration and Nationality Act ("INA") in the promulgation of the 2011 Wage Rule. *Id*. at 669. The court began by examining the Department of Homeland Security's interpretation of the INA, and reasoned that "Congress endowed the Department of Homeland

Security with general authority to administer the nation's immigration laws." *Id.* at 669-70. After performing a *Chevron* deference analysis, the court concluded that "the 2011 Wage Rule was promulgated pursuant to a [lawful] subdelegation of the [Department of Homeland Security's authority to administer the H-2B program." *Id*. at 674–75.

CONCLUSION: The 3rd Circuit held that "the 2011 Wage Rule was issued pursuant to the [Department of Homeland Security's] permissible conditioning of the grant of H-2B petitions on the advice of the [Department of Labor] pursuant to the [Department of Homeland Security's] charge from Congress to determine[ ] H-2B visa petitions after consultation with appropriate agencies of the Government." *Id*. at 675 (internal quotation marks omitted).

***M.R. v. Ridley Sch. Dist.*, 744 F.3d 112 (3d Cir. 2014)**

QUESTION: Whether, under the 'stay-put provision' of the Individuals with Disabilities Education Act ("IDEA"), "parents are eligible for reimbursement for private school costs if they do not file a claim seeking payment until *after* a court has ruled in favor of the school district." *Id.* at 115.

ANALYSIS: The court noted "the stay-put provision itself impliedly and necessarily, deems reimbursement for the costs of pendent placement in a private school an appropriate remedy." *Id.* at 123. The court reasoned that "there is no separate requirement of a court finding of appropriateness," but that this obligation, instead, arises automatically. *Id.* The court further noted that 20 U.S.C. § 1415(j) states, "the child shall remain in the current education placement until" the completion of all [IDEA] proceedings. *Id.* According to the court, Congress did not intend for placement based on an agreement with the State or local education agency to be less secure than one based on an IEP. *Id.* at 124.

CONCLUSION: The 3rd Circuit held that "under the statute and [the] court's precedent" the pendent placement under § 1415(j) remained the private school "through at least the conclusion of the proceedings in the district court and the school district's correlative obligation to pay for . . . schooling there also remained intact." *Id.* at 125.

***Reifer v. Westport Ins. Corp.*, 751 F.3d 129 (3d Cir. 2014)**

QUESTION: Whether a district court's discretionary remand under the Declaratory Judgment Act ("DJA") constitutes an appealable "final decision" under 28 U.S.C. §1291. *Id.* at 133.

ANALYSIS: The court determined that a remand under the DJA is indistinguishable from the remand the Supreme Court considered in *Quackenbush v. Allstate*, 517 U.S. 706 (1996). *Id.* The court noted that

in *Quackenbush*, the Supreme Court found that generally a remand order will be appealable "where it effectively puts the litigants out of court so that its effect is precisely to surrender jurisdiction of a federal suit to a state court" and when it "conclusively determines an issue that is separate from the merits." *Id.* at 133–34 (internal quotation marks omitted). The court determined that a district court's discretionary remand under the DJA effectively placed the litigants out of court. *Id.* at 134. The court concluded that a discretionary remand under the DJA "conclusively determines an issue that is separate from the merits, namely, whether the District Court should decline to exercise jurisdiction over" the declaratory judgment action. *Id.* at 134 (internal quotation marks omitted).

CONCLUSION: The 3rd Circuit held that a remand order following a decision to decline jurisdiction under the DJA is a "final decision" under § 1291 and is thus reviewable on appeal. *Id.* at 134.

***Rosano v. Twp. of Teaneck*, 754 F.3d 177 (3d Cir. 2014)**

QUESTION: Whether employer intent is necessary to establish a valid § 207(k) work period under the Fair Labor Standards Act ("FLSA"). *Id.* at 185–86.

ANALYSIS: The court noted that "[t]he text of § 207(k) does not specify how an employer establishes a qualifying work period," and [n]othing in the language of the statute requires employers to express their intent to qualify for or operate under the exemption." *Id*. at 186. The court stated that the plain language of the statute "[o]nly requires the existence of a qualifying work period. Nothing more." *Id*. The court thus "declin[ed] to adopt a rule that requires employers to clear a hurdle not provided for in the statutory text." *Id*.

CONCLUSION: The 3rd Circuit held that employers seeking to qualify for the § 207(k) exemption need not express an intent to qualify for or operate under the exemption, and that employers must only meet the factual criteria set forth in § 207(k). *Id.*

***Seamans v. Temple Univ.*, 744 F.3d 853 (3d Cir. 2014)**

QUESTION: Whether information that contains omissions, although it is accurate, is complete and accurate under the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681-1681x. *Id.* at 865.

ANALYSIS: The court first noted that the "meaning[s] of "completeness" and "accuracy" under FCRA" have never been analyzed by the 3rd Circuit. The court stated the well-accepted proposition that "factually incorrect information is 'inaccurate' for purposes of the FCRA." *Id.* The court further reasoned that a jury should decide the question of "whether technically accurate information was misleading" in such a

manner as to be expected to have an adverse effect on the issue before the court. *Id.*

CONCLUSION: The 3rd Circuit agreed with the 4th, 6th, and 9th Circuits, and held "that even if the information is technically correct, it may nonetheless be inaccurate if, through omission, it 'created a materially misleading impression.'" *Id.*

***United States v. Cruz*, 757 F.3d 372 (3rd Cir. 2014)**

QUESTION: Whether "the Government . . . can have a sufficiently important interest in forcibly medicating a defendant to restore his mental competency and render him fit to proceed with sentencing". *Id.* at 374.

ANALYSIS: The court stated that one of the Government's important interests is to punish those who have committed a crime, and in order to carry out this punishment, the defendant must be mentally competent to face sentencing. *Id.* at 381. The court noted that defendants have rights at sentencing that should be ensured, including the right to allocate, to "object to the [pre-sentencing investigation report], to argue for favorable sentencing variances and downward departures from the Sentencing Guidelines, and to oppose any arguments favoring upward variances or departures from the guidelines." *Id*. at 384. The court concluded that the "real conduct" of the defendant is determined at these sentencing, which requires that the defendant participate in "sentence proceedings and inform his attorney's actions." *Id.*

CONCLUSION: The 3rd Circuit held that the Government has a sufficiently important interest in forcibly medicating a defendant to restore his mental competency, therefore the Government possesses the power to forcibly medicate a defendant if the defendant requires medication to be fit to stand trial. *Id.* at 373.

***United States v. Erwin*, 2014 U.S. App. LEXIS 16425 (3d Cir. 2014)**

QUESTION: "Whether the possibility of de novo resentencing is barred by application of the cross-appeal rule, which provides that a party aggrieved by a decision of the district court must file an appeal in order to receive relief from the decision." *Id*. at *25.

ANALYSIS: The court noted that "Congress vested appellate jurisdiction in the Courts of Appeals for review of final decisions of the district courts." *Id*. The court further noted that "the same is true of cross-appellants," and that a party "who receives all that he has sought generally is not aggrieved by the judgment affording the relief" and therefore cannot appeal from that judgment. *Id.* The court concluded that "this requirement does not derive from the jurisdictional limitations of Article III, but from

statutes granting appellate jurisdiction and the historic practices of the appellate courts." *Id*.

CONCLUSION: The 3rd Circuit held that "the cross-appeal rule does not apply and consequently does not bar the Government from seeking de novo resentencing." *Id*. at *25.

***United States v. Harris*, 751 F.3d 123 (3d Cir. 2014)**

QUESTION: Whether "one who pleads nolo contendere to an offense is thereby ineligible for a reduction in the offense level for acceptance of responsibility pursuant to United States Sentencing Guidelines § 3E1.1." *Id*. at 125.

ANALYSIS: The 3rd Circuit recognized that a district court is in the unique position to assess the sincerity of a defendant and the court is "especially deferential to [its] assessment of whether the defendant accepted responsibility." *Id*. at 127. (internal quotation marks omitted). One who pleads nolo contendere may be offered a reduction in the offense level if the court determines he or she exhibits remorse not unlike that communicated by a guilty plea. *Id*. The court further concluded that this determination is to take into consideration the totality of the surrounding circumstances. *Id*.

CONCLUSION: The 3rd Circuit held that "a nolo contendere plea does not automatically preclude a district court from granting such a reduction, and that the court should heavily defer to the district court's assessment of whether the defendant "adequately accepted responsibility" in determining whether the defendant is entitled to an offense reduction. *Id*. at 125–26.

***United States v. McGee*, 2014 U.S. App. LEXIS 15604 (3d Cir. 2014)**

QUESTION: Whether "Rule 10b5-2(b)(2) [of C.F.R. 240] exceeds the Securities and Exchange Commission's (SEC) rulemaking authority under § 10(b) [of the Securities Exchange Act of 1934]?" *Id*. at *12.

ANALYSIS: The court noted that "the validity of Rule 10b5-2(b)(2)" warrants review "under the familiar two-step *Chevron* deference framework." *Id*. The court concluded that, at *Chevron* step one, "§ 10(b) is ambiguous and expressly delegates broad rulemaking authority to the SEC" and gives the SEC "the power to 'prescribe (regulations) as necessary or appropriate' to prevent the use of 'manipulative or deceptive device(s)" in connection with trading securities." *Id*. at *13. The court then found that, under *Chevron* step two, Rule 10b5-2(b)(2) is based on a permissible reading of 'deceptive device(s)' under § 10(b)." *Id.* at *21. While the court noted that they were "not without reservations concerning the breadth of misappropriation under Rule 105b-2(b)(2)" they ultimately

concluded that "it is for Congress to limit its delegation of authority to the SEC or to limit misappropriation by statute." *Id*.

CONCLUSION: The 3rd Circuit held that "Rule 10b5-2(b)(2) warrants *Chevron* deference and is based on a permissible reading of § 10(b)." *Id*. at 37.

FOURTH CIRCUIT

***Austin v. Plumley*, 565 Fed.Appx. 175 (4th Cir. 2014)**

QUESTION: Whether the *Pearce* presumption applies to motions under Federal Rule of Criminal Procedure 35(a). *Id.* at 186.

ANALYSIS: The court stated that the holding of *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072 (1969), is premised upon the idea that there is a need to guard against vindictiveness in the resentencing process. *Austin*, 565 Fed.Appx. at 186. In *Pearce*, the Court dealt with the resentencing of a defendant that had successfully attacked his first conviction. *Pearce*, 395 U.S. at 725. The court stated that by applying a rebuttable presumption of vindictiveness in the case at bar, it would "further the prophylactic function of the [*Pearce*] presumption." *Austin*, 565 Fed.Appx. at 189. The court noted that the prophylactic nature of the rule is aimed primarily at protecting future litigants who appeal their sentences, and is not necessarily in place to prevent the injustice done in any single case, as a "court's vindictiveness" might cause hesitance for defendants contemplating an appeal of their sentence. *Id*.

CONCLUSION: The 4th Circuit held that the *Pearce* presumption applies to Rule 35(a) motions. *Id.* at 190.

***Co. Doe v. Pub. Citizen*, 749 F.3d 246 (4th Cir. 2014)**

QUESTION: "Whether a district court retains jurisdiction to rule on a motion to intervene following a notice of appeal." *Id.* at 258.

ANALYSIS: The court noted that a majority of circuits, including the 2nd, 5th, 6th, and 7th, have applied a "general jurisdiction-stripping rule to hold that an effective notice of appeal deprives a district court of authority to entertain a motion to intervene after the court of appeals has assumed jurisdiction over the underlying manner." *Id.* The court concluded that there was no reason why a motion to intervene should be "excepted from the general rule" that divests the district court with the authority to "rule on matters once the case is before the court of appeals." *Id*.

CONCLUSION: The 4th Circuit agreed with the majority of circuits and held "that an effective notice of appeal divests a district court of jurisdiction to entertain an intervention motion." *Id.* at 259.

***In re Rowe*, 750 F.3d 392 (4th Cir. 2014)**

QUESTION: "[W]hether, in light of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), a bankruptcy court is required, absent extraordinary circumstances, to compensate Chapter 7 trustees on a commission basis." *Id.* at 394.

ANALYSIS: The court looked to the plain meaning of 11 U.S.C. § 330(a)(7) to find that the statute imposes a mandatory rule calling for trustees to be awarded reasonable compensation on a commission basis, based on § 326 of the statute. *Id.* at 396. The court further noted that while certain extraordinary circumstances might reduce this commission, such circumstances are "rare and unusual" and "include situations such as where the trustee's case administration falls below acceptable standards or where it appears a trustee has delegated a substantial portion of his or her duties to an attorney or other professional." *Id.* at 397. Thus, the court found that the "starting point for deciding Chapter 7 trustee compensation is always the commission rate to which the trustee would normally be entitled had no extraordinary circumstances existed:" whether extraordinary circumstances reduce the commission should be determined after the rate is settled. *Id.* at 398–99.

CONCLUSION: The 4th Circuit held that "absent extraordinary circumstances, Chapter 7 trustees must be paid on a commission basis, as required by § 330(a)(7)." *Id.* at 394.

FIFTH CIRCUIT

***Burnett Ranches, Ltd. v. U.S.*, 753 F.3d 143 (5th Cir. 2014)**

QUESTION: "[Whether] an otherwise qualified individual who has participated in management of the farming operations for not less than five years comes within the "Active Participation Exception" embodied in 26 U.S.C. § 464(c)(2)(A), irrespective of the fact that the legal title of such individual's attributable interest happens to be held in the name of her wholly owned S corporation rather than in her own name." *Id*. at 150.

ANALYSIS: The 5th Circuit looked to the plain language of the "Active Participation Exception" and determined that because Congress has not expressly limited the use of "interest" in the statutory language, the word "must be deemed to have been used in its broadest, generic sense, with no intention of narrowing the meaning of 'interest' to cover only technically titled ownership." *Id*. at 149. The court noted that under § 464(c)(2)(A), active participation in farm management for five years qualifies as "any interest in the partnership or enterprise for the exception as long as it is attributable to such participation not just interests that are legally held or titled, but also indirect or beneficial interests." *Id*. The

court further noted that Congress has not "expressly eliminated an 'S corporation' from the types of legal entities which [§ 464(c)(2)(A)] subjects to farming syndicate status." *Id*. The court determined that Congress "at least implicitly recognized the tax status of S corporations as purely flow-through entities," and therefore, S corporations do not prevent active-participation status in a partnership or enterprise "in which the *interest* of the active participant happens to be held in an S corp[oration] for some reason unrelated to taxes." *Id*.

CONCLUSION: The 5th Circuit held that "an otherwise qualified individual" who has been an active participant in the management of a farming operation for not less than five years falls within the scope of the "Active Participation Exception" under § 464(c)(2)(A), notwithstanding the fact that the legal title of the individual is held in the name of her S corporation. *Id*. at 150.

***Forte v. Wal-Mart Stores Inc.,* 2014 U.S. App. LEXIS 15636 (5th Cir. 2014)**

QUESTION: Whether a standard lease agreement requiring optometrists to make representations in their leases of the projected amount of hours their offices would remain open violated the Texas Optometry Act. *Id*. at *1.

ANALYSIS: The 5th Circuit found that the plain meaning of the Texas Optometry Act expressly prohibits a retailer from "attempting to control an optometrist's manner of practice." *Id.* at *12. The court based its conclusion on § 351.408 of the Act, which defines "control or attempted control" as "setting or attempting to influence the . . . office hours of an optometrist." *Id*.

CONCLUSION: The 5th Circuit held that because control is not limited to "control of the optometrists' professional (i.e. medical) judgment," and because the plain language of the statute includes attempts to control office hours, that a lease agreement requiring optometrists to make representations in their leases about their hours violates the Texas Optometry Act. *Id*. at *8–9.

***NCDR, L.L.C. v. Mauze & Bagby P.L.L.C.*, 745 F.3d 742 (5th Cir. 2014)**

QUESTION: Whether the denial of a motion to dismiss pursuant to the Texas Citizen's Participation Act ("TCPA") is immediately reviewable under the collateral order doctrine. *Id*. at 748.

ANALYSIS: The 5th Circuit began its analysis by recognizing that "where the district court's order is not a final judgment . . . the collateral order doctrine can confer limited appellate jurisdiction." *Id*. at 747. The court recognized that in order to be immediately appealed under the

collateral order doctrine, "1) the order must conclusively determine the disputed question; (2) it must resolve an important issue completely separate from the merits of the case; and (3) it must be effectively unreviewable on appeal from a final judgment." *Id*. at 747. The court found that a district court's denial of a motion to dismiss is conclusive since it is unlikely to revisit the order; the first requirement is satisfied. *Id*. at 748. In addition, the court found that the district court's order is unreviewable on appeal from a final judgment since the dismissal would provide immunity from suit and "an essential part of the defendant's claim is the right to avoid the burden of trial." *Id*. at 750.

CONCLUSION: The 5th Circuit held that it had jurisdiction to hear the immediate appeal because the "TCPA satisfies all three requirements" of the collateral order doctrine. *Id*. at 748.

***Sarmientos v. Holder*, 742 F.3d 624 (5th Cir. 2014)**

QUESTION: Whether a conviction under a state statute that does not include the exact same elements as the Concealed Substances Act ("CSA"), 21 U.S.C. § 841(a)(1), is equal to a felony punishable under the CSA, and is therefore treatable as an aggravated felony for immigration purposes. *Id.* at 628–29.

ANALYSIS: The court reviewed the definition of an aggravated felony in the context of The Immigration and Nationality Act (INA), 18 U.S.C. § 924(c), finding that, "a conviction under state law may qualify," but that a state offense only constitutes a felony under the CSA if "it proscribes conduct punishable as a felony under that federal law." *Id.* at 628. The court recognized that in comparing a state statute to the CSA, it must evaluate "the least of the acts criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *Id.* at 628. The court compared the elements of Florida's statute on possession and sale of controlled substances, to the elements of the CSA and found that Florida's statute did not require the defendant to know that the substance was considered a controlled substance. *Id.* at 629–30. The court concluded that the "least of the acts criminalized" by the Florida statute does not violate 21 U.S.C. § 841(a)(1), because "although a person could be convicted under the Florida statute without any knowledge of the illicit nature of the substance he possesses, the same person could not be convicted of drug trafficking under 21 U.S.C. § 841(a)(1)." *Id.* at 631.

CONCLUSION: The 5th Circuit held that a conviction under a state drug trafficking statute that does not include the elements of the CSA will not qualify as an aggravated felony for immigration purposes. *Id.* at 631.

***Taylor v. Bailey Tool & Mfg. Co.*, 744 F.3d 944 (5th Cir. 2014)**

QUESTION: Whether the Texas "relation back statute" or Fed. R. Civ. P. 15(c) governs when determining the timeliness of a plaintiff's federal claims made in an amended state court filing. *Id*. at 946.

ANALYSIS: The 5th Circuit noted that the 6th and 9th Circuits have addressed this issue, and concluded that analogous state rules, not Rule 15(c), apply. *Id*. at 946. The Court agreed with this application, and recognized that Federal Rules "do not provide for retroactive application to the procedural aspects of a case that occurred in state court prior to removal to federal court." *Id*. Further, the 5th Circuit noted that it has applied state rules to analogous circumstances, in order to "determine the implications of events that occurred while" a case was pending before a state court. *Id*. at 947.

CONCLUSION: The 5th Circuit held that the Texas statute applied to the determination of "whether [the defendant's] amended petition filed in state court relates back to the date of his original petition," and concluded that the "amended petition did not relate back under the Texas statute" because the claims asserted in the original petition were barred. *Id.* at 947.

***United States ex rel. Babalola v. Sharma*, 746 F.3d 157 (5th Cir. 2014)**

QUESTION: "Whether the district court properly construed the False Claims Act ("FCA") to require a pending qui tam action in order for another proceeding to constitute an alternate remedy" pursuant to 31 U.S.C. § 3730(c)(5). *Id.* at 161.

ANALYSIS: The court noted that by way of a qui tam action, a private party may bring a civil action for violation of 31 U.S.C. § 3729 on behalf of the United States Government. *Id.* at 160. The 5th Circuit reasoned that "the Government may elect to pursue its claim through an alternate remedy available to the Government." *Id.* The court noted that the language of the statute must be analyzed first to determine the plain meaning of the statute. *Id.* at 161. The court observed, in analyzing the plain language of the statute, that for any proceeding to be "alternate," two or more choices must have existed at the time of the Government's election of the alternate remedy. Thus, the court concluded that a qui tam proceeding must be in existence at the time of the said election. *Id.* at 161.

CONCLUSION: The 5th Circuit held that if a qui tam action is filed subsequent to the Government's criminal prosecution, the Government's criminal proceeding for prosecution of § 3729 violators is not an alternate remedy for relators to be granted relief. *Id.* at 161.

***United States v. Mackay*, 757 F.3d 195 (5th Cir. 2014)**

QUESTION: Whether a presentence report ("PSR") is "part of the record" under Fed. R. Civ. P. 36. *Id*. at 196.

ANALYSIS: The court conducted a statutory analysis and determined that a PSR is "of like kind or character" to judgments and orders, both of which are "part of the record" under Rule 36. *Id.* at 198. The court noted that "like an order, the PSR contains 'directions or instruction' about the defendant's sentence." *Id.* The court also found that, akin to a judgment, the "PSR determines the rights and obligations of the defendant going forward." *Id*.

CONCLUSION: The 5th Circuit held that a PSR is "a part of the record" because the PSR affects the rights and obligations of the defendant as well as being "of like kind or character as a 'judgment' or 'order' and that it is embraced by the terms 'other part of the record' as used in Rule 36." *Id*.

***United States v. Phea*, 755 F.3d 255 (5th Cir. 2014)**

QUESTION: "Whether [18 U.SC]. § 1591(a) requires that a defendant know that his conduct is in or affects interstate commerce." *Id*. at 264.

ANALYSIS: The Court first investigated the meaning of "knowingly" by looking at *Flores–Figueroa v. United States*, 556 U.S. 646 (2009), which held that "knowingly" applies to each element of the criminal statute and that "as a matter of ordinary English grammar, it seems natural to read the statute's word 'knowingly' as applying to all the subsequently listed elements of the crime." *Id*. The court relied on the reasoning in *Flores–Figueroa* to declare that the interstate nexus element "is not related to the direct object of the transitive verbs 'recruits, entices, harbors, transports, provides, obtains, or maintains by any means.'" *Id*. at 265. The court noted that "[a] person" is the direct object in the statute; "however, it is not the person who must be in or affecting interstate or foreign commerce, but rather that it is the actions described by the transitive verbs that must occur in, or affect, interstate or foreign commerce." *Id.* The court thus concluded that "the interstate nexus element is in essence an adverbial phrase modifying the transitive verb" and *Flores–Figueroa* does not address this issue.

CONCLUSION: The 5th Circuit held that the application of "knowingly" in § 1591(a) does not apply to the interstate nexus element. *Id.*

SIXTH CIRCUIT

***Bickley v. Dish Network, LLC*, 751 F.3d 724 (6th Cir. 2014)**

QUESTION: Whether a satellite television provider had a "legitimate business need" to request a consumer credit report under 15 U.S.C. § 1681(b) of the Fair Credit Reporting Act ("FCRA"). *Id.* at 730–31.

ANALYSIS: The court looks at § 1681(b), which allows for the furnishing of a consumer report to an individual "that it has reason to believe will use the information for one of several permissible purposes," which are detailed in the statute. *Id.* at 730. One of those permissible purposes arises when a person has a "legitimate business need for the information . . . in connection with a business transaction that is initiated by the consumer." *Id.* (internal quotation marks omitted). The court noted that case law clearly articulates that a company has a "'legitimate business need' when it assesses a consumer's *eligibility* for a business service." *Id*. at 731. The court found that at the time the satellite provider allegedly accessed the consumer's credit report, "it believed that [the consumer] was a potential customer," and thus had a need to "clarify the consumer's identity and to ascertain his eligibility for service . . . ." *Id.* at 732.

CONCLUSION: The 6th Circuit held that the satellite provider had a "legitimate business need" to request the consumer report, because it believed that the consumer was a potential customer. *Id.*

***F.H. v. Memphis City Schs.*, 2014 U.S. App. LEXIS 17102 (6th Cir. 2014)**

QUESTION: Whether a claim of breach of a settlement agreement must be exhausted before bringing a civil suit to enforce rights pursuant to the Individuals with Disabilities Education Act ("IDEA"). *Id*. at *8.

ANALYSIS: The court relied on the 2004 Amendments to the IDEA that state "in the case that a resolution is reached to resolve the complaint at a [resolution session], the parties shall execute a legally binding agreement that is . . . enforceable in any State court of competent jurisdiction or in a district court of the United States." *Id*. The court noted that the terms of a settlement agreement reached at a resolution session are enforceable in state and federal courts, pursuant to 20 U.S.C. § 1415(f)(1)(B)(iii). *Id*. at *8–*9. The court further reasoned that the 2004 Amendments to IDEA, coupled with the plain language of the settlement agreement at issue here, provided for an enforceable agreement. *Id*. at *9.

CONCLUSION: The 6th Circuit held that because a settlement agreement was enforceable in courts, "that the breach of contract claim does not require administrative exhaustion." *Id*.

***Hescott v City of Saginaw*, 757 F.3d 518 (6th Cir. 2014)**

QUESTION: Whether a successful plaintiff is required to pay the defendant's post-offer attorney's fees pursuant to the fee-shifting statutes contained in Fed. R. Civ. P. 68. *Id*. at 520.

ANALYSIS: The court reasoned that although the award of costs under Rule 68 can be read as including attorney's fees, these costs must

be "properly awardable." *Id.* at 528. The court noted that, pursuant to 42 U.S.C. § 1988, only a prevailing party can recover attorney's fees. *Id*. at 529. The court found that a party must first prevail and then prove that the action was "frivolous, unreasonable or without foundation" to be awarded attorney's fees. *Id*. (internal quotation marks omitted). The court concluded that a defendant must be the prevailing party in order to receive attorney's fees. *Id*.

CONCLUSION: The 6th Circuit reasoned that "because § 1988 is not a ″two-way fee-shifting statute,″ Rule 68 cannot force a prevailing civil-rights plaintiff to pay a defendant's post-offer attorneys' fees." *Id*. at 528.

***Huffman v. Hilltop Cos., LLC*, 747 F.3d 391 (6th Cir. 2014)**

QUESTION: Whether the "strong presumption in favor of arbitration applies post-expiration when an arbitration clause is not listed in a survival clause." *Id*. at 396.

ANALYSIS: The court stated that "where ambiguity in agreements involving arbitration exists . . . the strong presumption in favor of arbitration applies." *Id.* at 396–97. The court noted that district courts in the 7th and 8th Circuits have applied the presumption in favor of arbitration where "the agreement was ambiguous on the issue of whether the arbitration clause survived." *Id*. at 397. The 6th Circuit further recognized that one of its district courts found that there were ambiguities in the arbitration clause and held that "considering the contract as a whole . . . is the correct way to determine whether the parties unambiguously intended for the arbitration clause to expire with the contract." *Id*. at 397–98.

CONCLUSION: The 6th Circuit held that the strong presumption in favor of arbitration controls where there is ambiguity in a contract, but omission of an arbitration clause from a survival clause could satisfy the "clear implication" standard, where it was the intent of the parties for the arbitration clause not to survive the termination of the contract. *Id*. at 398.

***Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398 (6th Cir. 2014)**

QUESTION: "[W]hether the Communications Decency Act of 1996 ("CDA"), 47 U.S.C. § 230, bars the state-law defamation claims" of a person who was the "unwelcome subject" of several posts uploaded on a popular website. *Id*. at 401.

ANALYSIS: The court reasoned, "Congress envisioned an uninhibited, robust, and wide-open internet." *Id.* at 415. The court rejected application of an encouragement theory of "development," as such a theory would "inflate the meaning of 'development' to the point of

eclipsing the immunity from publisher-liability that Congress established." *Id.* at 414. The court similarly rejected the application of an adoption or ratification theory, noting that, "[a] website operator cannot be responsible for what makes another party's statement actionable by commenting on that statement *post hoc*." *Id*. at 415. The court instead decided that a material contribution measure of "development," as expressed by the 9th Circuit, was more appropriate in the given circumstances. *Id*.

CONCLUSION: The 6th Circuit held that an online publisher was not liable when "that publisher did not materially contribute to the tortious content." *Id.* at 417.

***McCarthy v. Ameritech Publishing, Inc.*, 763 F.3d 488 (6th Cir. 2014)**

QUESTION: Whether the monetary award directed by Fed. R. Civ. P. 37(c)(2) includes the cost of preparing the fee application for such an award. *Id*. at 494.

ANALYSIS: The 6th Circuit noted that the 8th Circuit considered this issue and stated that "the magistrate's scrutiny on remand should extend also to hours reasonably spent by a Booker's local counsel in seeking the discovery sanctions." *Id*. 493. The court also noted that the 7th Circuit awarded attorneys fees under Rule 37(c)(2) "for the time expended by the defendant's in filing and briefing their motion for attorney's fees." *Id*. The court then examined other provisions of Rule 37, as well as Federal Rule of Civil Procedure 36, and found that it "would be incongruous to interpret Rule 37(c)(2) to bar district courts from awarding reasonable fees and expenses associated with the preparation and presentation of fee applications." *Id*.

CONCLUSION: The 6th Circuit held that monetary awards under Rule 37(c)(2) include all reasonable costs, including "reasonably attorney's fees and costs associated with the preparation and presentation of the fee application." *Id*. at 488.

***Plymouth Park Tax Servs., LLC v. Bowers (In re Bowers)*, 759 F.3d 621 (6th Cir. 2014)**

QUESTION: Whether a debtor, during the pendency of a bankruptcy proceeding to a tax certificate holder, must pay the interest rate denoted on the face of the tax certificate as the "certificate rate of interest," 0.25%, or the interest rate pursuant to § 5721.38 (2010) of the Ohio Revised Code, 18%. *Id*. at 623.

ANALYSIS: The 6th Circuit noted that the "Ohio Revised Code's tax certificate provisions specifically address situations where delinquent taxpayers file for bankruptcy protection." *Id.* at 626. Further, the court

determined that there is no statutory authority or case law that mandates that "the filing of a notice of intent to foreclose triggers an early expiration of the six year period." *Id*. at 627.

CONCLUSION: The 6th Circuit held that Ohio Revised Code § 5721.37(A)(3)(b) applied, and the "0.25% interest rate on the face of the tax certificate is the 'certificate rate of interest' and continues to accrue during the extension of time because of the bankruptcy filing. *Id*. at 628.

***RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., LLC*, 754 F.3d 380 (6th Cir. 2014)**

QUESTION ONE: "Whether Regulation B's definition of 'applicant,' which differs from the definition in Equal Credit Opportunity Act ("ECOA"), is entitled to deference such that guarantors may raise ECOA claims." *Id*. at 384.

ANALYSIS: The court found that the ECOA defines an applicant as "any person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit." *Id.* The court noted that this definition "does not overtly include guarantors," but "Regulation B's definition of applicant does for the purpose of enforcing spouse-grantor rule." *Id.* The court examined the words "applies" and "credit," and determined that ECOA's definition was ambiguous since "it could be read to include third parties who do not initiate an application for credit, and who do not seek credit for themselves –a category that includes guarantors." *Id.* at 384–85.

CONCLUSION: The 6th Circuit held that in light of legislative silence, and proper agency construction, regulation B's classification of 'applicant' constitutes a valid interpretation of the statutory definition, thus allowing a guarantor to seek relief for spouse-guarantor rule violations. *Id.*

QUESTION TWO: Whether "a spouse-guarantor can assert a violation of Regulation B–and therefore of ECOA–as an affirmative defense." *Id.* at 384.

ANALYSIS: The court stated that violations of the ECOA can be asserted as: (1) a claim or counterclaim (2) a defense of recoupment or (3) an affirmative defense of illegality. *Id.* at 387. The court noted that the defense of recoupment "allows a defendant to defend against a claim by asserting–up to the amount of the claim–the defendant's own claim against the plaintiff growing out of the same transaction." *Id.* The court reasoned that, generally, defendants are allowed to "raise an affirmative claim as a defense of recoupment, absent the clearest congressional language to the contrary." *Id.* (internal quotation marks omitted). The court found nothing

in the statute that would "deny defendants the ability to assert a violation as recoupment defense" and "Congress has explicitly granted courts the ability to craft appropriate equitable remedies for ECOA violations." *Id.*

CONCLUSION: The 6th Circuit held that a violation of ECOA and Regulation B can be raised as an affirmative defense of recoupment. *Id.*

***T.S v. Doe*, 742 F.3d 632 (6th Cir. 2014)**

QUESTION: Whether "in a [42 U.S.C.] § 1983 qualified-immunity case, [officials may] benefit from a subsequent Supreme Court case that would cause a reasonable official to have at least a good-faith doubt that a given practice is prohibited." *Id.* at 637.

ANALYSIS: The court began its analysis by stating that "the touchstone of qualified immunity in general, and the clearly-established-law inquiry in particular, is objective good faith." *Id.* at 637. The court reasoned that a grant of immunization from suit would incentivize government officials to pursue their duties "with the zeal and decisiveness required by the public good." *Id*. The court also noted that while the 2nd and the 8th Circuits have previously addressed the issue, the facts of each were factually distinguishable. *Id*. at 640.

CONCLUSION: The 6th Circuit held that the plaintiffs did not meet "their burden of demonstrating that every reasonable official in June 2009 would have known that conducting a suspicionless strip search of a juvenile detainee during his or her intake into a detention facility violated the Fourth Amendment." *Id.* at 640.

***United States v. Morgan*, 2014 U.S. App. LEXIS 13133 (6th Cir. 2014)**

QUESTION: Whether 18 U.S.C. § 924(c)(1)(A), which proscribes the use and possession of a firearm during and in relation to the commission of a drug trafficking offense, "authorizes [only] fixed-term minimum sentences or whether it may also authorize a life sentence." *Id*. at *22.

ANALYSIS: The court noted that the Supreme Court has expressed that the "starting point" of statutory construction cases begin with "the language employed by Congress." *Id*. The court articulated that "the language employed [in the statute] establish[ed] a floor of ten years' imprisonment, leaving open sentences above that floor. *Id.* at *23. The court also found that the legislative history supported their reading of the statute. *Id.* The court further explained that it was guided by the Supreme Court's pronouncements in *Alleyne v. United States*, 133 S. Ct. 2151, 2160 (2013).

CONCLUSION: The 9th Circuit held that "[t]he statutory maximum permitted under § 924(c)(1)(A) is a life sentence." *Id.* at *23–*24.

SEVENTH CIRCUIT

***In re Equip. Acquisition Res., Inc*., 742 F.3d 743 (7th Cir. 2014)**

QUESTION: Whether the abrogation of sovereign immunity with respect to 11 U.S.C. § 544 allows a debtor in possession to bring a state-law fraudulent-transfer suit against the federal government, despite that sovereign immunity would bar a regular creditor from doing so outside of the bankruptcy realm. *Id.* at 746.

ANALYSIS: The 7th Circuit disagreed with district courts and bankruptcy courts, stating that those decisions focused too narrowly on the language in 11 U.S.C. § 106(a)(1) and largely disregarded § 544(b)(1)'s actual-creditor requirement. *Id.* at 748. The court explained that § 544(b) requires a showing of a creditor "who could use a state's applicable law to recover the payment from the IRS." *Id.* at 747 (internal quotation marks omitted). The court noted that when no such creditor exists, the trustee cannot bring the claim. *Id.* The court opined that "because no unsecured creditor could obtain relief against the United States using the Illinois Uniform Fraudulent Transfer Act," a debtor's tax payment is "not 'voidable under applicable law' within the meaning of § 544(b)(1)." *Id*.

CONCLUSION: The 7th Circuit held that a debtor acting with the state-law avoidance powers of an unsecured creditor does not have a viable cause of action to avoid a tax when the substantive requirements of § 544(b)(1) are unambiguous. *Id.* at 751.

***United States v. Perry*, 743 F.3d 238 (7th Cir. 2014)**

QUESTION: "Whether a defendant's past time served due to a prior revocation of his supervised release should count towards and so limit the maximum sentence the district court can impose for a subsequent violation of his supervised release under 18 U.S.C. § 3583(e)(3)." *Id.* at 241.

ANALYSIS: The court noted that, pursuant to 18 U.S.C. § 3583(k), "[i]f a defendant required to register as a sexual offender under the Sex Offender Registration and Notification Act ("SORNA") commits any criminal offense . . . the court shall revoke the term of the supervised release" and require the defendant to be imprisoned for not less than five years. *Id*. at 240–41. The court observed that the 2nd, 5th, 8th, and 9th Circuits have determined that the statutory language does not require courts to aggregate time served as a result of violation of supervised released terms. The court reasoned that the defendant may be required to serve the maximum, five years, for each subsequent violation of his release terms. *Id.* at 242. The court further noted that, as a result of statutory construction and interpretation, the addition of the phrase "on any such revocation" to § 3583(e) demonstrates that the Court need not aggregate time served for each violation of release terms. *Id.* at 241.

CONCLUSION: The 7th Circuit held that the statutory maximum imposed on repeat offenders is not altered by a defendant's prior time served for a previous violation of his supervised release, and previous time served for violations of supervised release need not be aggregated. *Id.* at 242.

***United States v. Pollock*, 757 F.3d 582 (7th Cir. 2014)**

QUESTION: Whether "possession of a specific firearm is an element of a felon in possession charge" under 18 U.S.C. § 922(g). *Id*. at 588.

ANALYSIS: The court noted that the 1st Circuit determined that "possession of a specific firearm was not an element of the offense." *Id*. at 587. The 7th Circuit agreed with the 1st Circuit in finding that the "language and history of the statute reflects the desire of Congress to keep *any* firearm out of the hand of convicted felons, regardless of the gun type." *Id*. The 7th Circuit concurred with the 1st Circuit's conclusion that there is the absence of "any legal tradition that sheds light on the question before us." *Id*. (internal quotation marks omitted).

CONCLUSION: The 7th Circuit concluded that "the particular firearm possessed is not an element of the crime under § 922(g), but instead the means used to satisfy the element of 'any firearm.'" *Id*.

EIGHTH CIRCUIT

***Becker v. Int'l Bhd. of Teamsters Local 120*, 742 F.3d 330 (8th Cir. 2014)**

QUESTION: Whether the statute of limitations on a breach of fair representation cause of action begins to accrue on the date of the alleged breach or on the date of the arbitration award. *Id*. at 333.

ANALYSIS: The court found it important that the plaintiff's complaint involved the defendant's handling of the Facility Closure Agreement ("FCA"). *Id.* at 334. The court noted that during prior proceedings to remedy the dispute, an "arbitrator was involved in the collective bargaining agreement." *Id*. The court concluded that it was evident that the defendant was not attempting to "remedy the breach of its duty of fair representation in these negotiations regarding the [FCA] as a part of the arbitration proceedings . . . " *Id.*

CONCLUSION: The 7th Circuit held that a plaintiff's cause of action begins to accrue at the moment "[he] should reasonably have known of the union's alleged breach." *Id*. at 335.

***Hammer v. Sam's East Inc.*, 754 F.3d 492 (8th Cir. 2014)**

QUESTION: Whether the Article III requirement of an actual or threatened injury can exist solely by the invasion of a statute creating legal rights. *Id*. at 498.

ANALYSIS: The court noted that the issue of whether invasion of a legal right created by Congress can satisfy the actual injury requirement is not a novel principle in the law of standing. *Id*. The 8th Circuit found that Congress in enacting a statute is giving an individual a legal right, and invasion of this right is an "actual injury." *Id*. "It is of no consequence that appellant's injury is dependent on the existence of a statute." *Id*. at 498–99. The court found further support from the decisions of its sister circuits, specifically the 9th Circuit, which found there to be Article III standing due to the alleged violation of statutory rights. *Id*. at 500.

CONCLUSION: The 8th Circuit held that suffering an "actual, individualized invasion of statutory right," satisfied the "injury-in-fact requirement of Article III standing." *Id*. at 499.

***Stoebner v. San Diego Gas & Elec. Co. (In re LGI Energy Solutions, Inc.)*, 746 F.3d 350 (8th Cir. 2014)**

QUESTION: Whether 11 U.S.C. § 547(c)(4) "such creditor" language "must *in all circumstances* be construed as limiting subsequent new value to that personally provided by the creditor [whom] the trustee elects to sue to recover the preferential transfer." *Id*. at 352–356.

ANALYSIS: The 8th Circuit first noted that case law cited in support of the limitation was only persuasive authority, and that other persuasive authority on the topic contradicts the limitation proposition. *Id.* at 354–55. However, the court recognized that the case law only stated that a "preferred creditor cannot offset subsequent new value provided by a non-preferred creditor[,]" but this was not relevant to the issue before the court because "both the utility customers and the utilities benefited from [trustee]'s preferential transfers to [said] utilities." *Id*. at 354-55. The 8th Circuit reasoned that other federal circuit courts have also considered and rejected the proposition mentioned above, in accordance with § 547(c)(4)'s goal of "encourag[ing] creditors to deal with troubled businesses." *Id* at 355–56.

CONCLUSION: The 8th Circuit held that "in three-party relationships where the debtor's preferential transfer to a third party benefits the debtor's primary creditor, new value (either contemporaneous or subsequent) can come from the primary creditor, even if the third party is a creditor in its own right and is the only defendant against whom the debtor has asserted a claim of preference liability." *Id*. at 356.

***United States v. Emly*, 747 F.3d 974 (8th Cir. 2014)**

QUESTION: Whether 18 U.S.C. § 2252(a)(4)(B) "permits a charge for each [child pornography] matter possessed in violation of the statute." *Id*. at 977.

ANALYSIS: The 8th Circuit began by noting that it has previously suggested that the language "1 or more" in § 2252(a)(4)(B) "manifests Congress' intent to include multiple matters in a single unit of prosecution." *Id.* at 977. The court recognized that under subsection (a)(5)(B) of the statute, the 8th Circuit has previous allowed for a conviction on multiple counts of child pornography. *Id.* However, the 8th Circuit explicitly distinguished the language of (a)(5)(B) from that of (a)(4)(B), noting that the words "any" in the former carries a different meaning from "1 or more" in the latter. *Id.* at 978.

CONCLUSION: The 8th Circuit held that the defendant's three possession counts of child pornography were "multiplicitous," and only one count of possession should be charged under subsection (a)(4)(B). *Id*. at 980.

NINTH CIRCUIT

***Asarco, LLC v. Union Pac. R.R. Co.*, 2014 U.S. App. LEXIS 16614 (9th Cir. 2014)**

QUESTION: Whether, under Rule 15 (c), "an amended pleading relates back if it includes allegations that were expressly disclaimed in the original pleading." *Id*. at *10.

ANALYSIS: The court reasoned that the relation back doctrine is to be liberally applied so that parties can limit their initial pleadings to claims and defenses with evidentiary support. *Id*. at *14. The court noted that parties should be able to amend their pleadings if new facts are discovered after further investigation and discovery. *Id*. The court further noted that Rule 15 only requires that "a party be notified of litigation concerning a particular transaction or occurrence" and not the exact scope of relief sought. *Id*.

CONCLUSION: The 9th Circuit held that a plaintiff need only plead the general conduct, transaction, or occurrence to preserve its claims against a defendant. *Id*.

***Chandra v. Holder*, 751 F.3d 1034 (9th Cir. 2014)**

QUESTION: Whether the Board of Immigration Appeals ("BIA") "must consider changed country conditions" when considering a "changed conditions exception" for untimely motions to reopen removal proceedings, pursuant to 8 C.F.R. § 1003.2(c)(3)(ii). *Id.* at 1037.

ANALYSIS: The court noted that the 6th, 7th and 11th Circuits have "each determined that the BIA must consider changed country conditions as they relate to a petitioner's change in personal circumstances." *Id.* This case presented the 9th Circuit with the opportunity to agree with the reasoning of its sister courts, which have reasoned that a "purely personal change in circumstances" does not warrant the reopening of an untimely motion, but that "separate but simultaneous changes in personal circumstances and country conditions" may permit a grant of a motion to reopen removal proceedings. *Id.* at 1038

CONCLUSION: The 9th Circuit joined its sister circuits and held that when considering an untimely motion to reopen removal proceedings under the changed conditions exception, "the BIA must consider changed country conditions as they relate to a petitioner's change in personal circumstances." *Id.* at 1037.

***Courthouse News Serv. v. Planet*, 750 F.3d 776 (9th Cir. 2014)**

QUESTION: Whether the district court's decision to abstain a county court from providing same day access to complaints was a violation of a news wire service's First Amendment right of access. *Id*. at 788.

ANALYSIS: The court noted that this case presented the "same essential concerns that have compelled us to reject *Pullman* abstention in every First Amendment case except one that was uniquely postured." *Id*. at 789. The court reasoned "the right of access is 'necessary to the enjoyment' of the right to free speech." *Id*. The court further reasoned that the scope of the news wire service right was of first impression and a matter of "particular federal concern" that disconnected the case from the territory of "sensitive" state issues that federal courts would not address. *Id*.

CONCLUSION: The 9th Circuit held that given the importance of the First Amendment issues the "district court lacked the discretion to abstain under the *Pullman* doctrine." *Id*.

***Family PAC v. Ferguson*, 745 F.3d 1261 (9th Cir. 2014)**

QUESTION: Whether costs under Federal Rule of Appellate Procedure Rule 39 "include attorney's fees recoverable as part of costs under 42 U.S.C. § 1988 and similar statutes." *Id.* at 1262.

ANALYSIS: Although Rule 39 fails to define "costs," the court determined that "Rule 39(e) specifically enumerates the costs on appeal that may be taxed in the district court, and the advisory committee's note cites 28 U.S.C. § 1920 as the statutory authority for the rule." *Id.* at 1263. The court further determined that Rule 39(e) only provides for administrative costs, such as the cost of filing for notice of appeal, and not

for attorney's fees. *Id.* at 1266. However, the court noted that the advisory notes for the statute reference § 1920, which only lists administrative fees and not attorney's fees. *Id.*

CONCLUSION: The 9th Circuit held that costs under Rule 39 did not include attorney's fees recoverable under § 1988 and other similar statutes. *Id.* at 1262.

***Gillings v. Time Warner Cable LLC*, 2014 U.S. App. LEXIS 13852 (9th Cir. 2014)**

QUESTION: Whether California courts follow the *de minimis* doctrine as a defense to a wage and hour claim. *Id.* at *3.

ANALYSIS: The 9th Circuit noted that "the California Supreme Court has never ruled on the applicability of the *de minimis* doctrine to California wage claims," and determined it "must predict how it would answer the question." *Id*. The court pointed to the fact that the California Court of Appeals has applied this federal *de minimis* standard to a state wage claim in a previous case. *Id*. Furthermore, the court could find no Court of Appeals case refusing to apply the *de minimis* doctrine and the Enforcement Policies and Interpretations Manual issued by California's Division of Labor Standards Enforcement supports using the standard. *Id.* at *4. The court concluded that it would need to analyze two factors when applying the *de minimis* doctrine — "the practical administrative difficulty of recording the additional time . . . and the regularity of the additional work" and concluded these two factors may prevent the defendant from ultimately prevailing on the *de minimis* doctrine. *Id.* at *6–7.

CONCLUSION: The 9th Circuit held that California courts should follow the *de minimis* doctrine as a defense in a California wage and hour claim but that the employer was not entitled to summary judgment using the doctrine. *Id.* at *9.

***G. M. v. Saddleback Valley Unified Sch. Dist.*, 2014 U.S. App. LEXIS 13766 (9th Cir. 2014)**

QUESTION: Whether "the School District violated its child find duties" or failed to provide a Free and Appropriate Public Education ("FAPE") with respect to a student. *Id*. at *4.

ANALYSIS: The court stated that "the district court did not err in concluding that the School District complied with its child find duty with respect to Student because [the school] took steps to 'identify, locate, and evaluate'" the student. *Id*. at *2. The court further reasoned that the school district had provided a FAPE to the student because the school had drafted an individualized education plan ("IEP") "reasonably calculated to confer an educational benefit on the child." *Id*. at *3 (internal quotation marks

omitted). The court reached this conclusion despite the fact that the IEP was imperfect and the student's school counselor was aware that the student had been previously diagnosed with a major depressive disorder. *Id*. The court, however, declined to articulate a test "for when the child find obligation is triggered." *Id*. at *4 n.1.

CONCLUSION: The 9th Circuit held that the School District did not violate its child find duties or FAPE obligations with respect to the student in question and remanded to the district court to determine whether the School District should have been awarded attorney's fees. *Id.* at *4.

***Narayanan v. British Airways*, 747 F.3d 1125 (9th Cir. 2014)**

QUESTION: Whether the Montreal Convention's Article 35(1) strictures "apply equally to a claim which had not yet accrued at the time that the Convention's two-year limitations period was triggered." *Id*. at 1126.

ANALYSIS: The 9th Circuit determined that international passengers suing airline carriers for damages are governed exclusively by the Convention. *Id.* at 1127. The court determined that Article 35(1) eliminates claims brought outside "a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped." *Id.* at 1127–28. In addition, the court noted that Article 29 further limits damages claims by mandating that "any action for damages, however founded, . . . be brought subject to the conditions and such limits of liability as are set out in this Convention." *Id.* Thus, the court concluded that a reading Articles 35(1) and 29 clearly leaves no room for extending the statute of limitations on a wrongful death claim, even when the death occurs after limitations period started. *Id.* at 1128–29.

CONCLUSION: The 9th Circuit held "damages [claims] based on an injury incurred aboard an international flight must be filed within two years of the date upon which the aircraft arrived at its destination," i.e. within the limitations period, or those claims will be eliminated. *Id.* at 1132.

***Technica LLC ex rel. United States v. Carolina Cas. Ins. Co.*, 749 F.3d 1149 (9th Cir. 2014)**

QUESTION: "Whether California's contractor's licensing law restricts 'the substance of the rights' afforded to [subcontractors] under the Miller Act," found at 40 U.S.C. § 3131-3134. *Id.* at 1152.

ANALYSIS: The court explained that the Miller Act is remedial in nature and should be liberally construed to effectuate its purpose of "protect[ing] those whose labor and materials go into public projects." *Id.*

at 1152. The court also noted that the Miller Act extends explicitly to subcontractors. *Id.* The court then articulated that because the Miller Act "provides a federal cause of action, the scope of the remedy as well as the substance of the rights created thereby is a matter of federal not state law." *Id.* (internal quotation marks omitted). Thus, the court found that state law should not restrict the substance of rights afforded to subcontractors under the Miller Act. *Id.*

CONCLUSION: The 9th Circuit joined the 8th and 10th circuits and held that the absence of state licensure did not bar suit by a subcontractor under the Miller Act. *Id.* at 1152.

***United States v. Bainbridge*, 746 F.3d 943 (9th Cir. 2014)**

QUESTION: "[W]hether a change in circumstances is required for a district court to modify conditions of a criminal defendant's supervised release" from prison, pursuant to U.S.C. § 3583(e)(2). *Id*. at 949.

ANALYSIS: The 9th Circuit recognized that the 8th and 10th Circuits have previously "ruled that a change in circumstances is not required for a district court" to make modifications to the conditions of a supervised release. *Id*. The court agreed with these circuits, and refused to read a "changed circumstances" requirement into § 3583(e)(2). *Id*. at 950. The court noted that the text of § 3583(e)(2) allows a district court to modify such conditions "at *any time* prior to the expiration or termination" of the supervised release term. *Id*.

CONCLUSION: The 9th Circuit held that "a district court can modify a defendant's conditions of supervised release . . . even absent a showing of changed circumstances." *Id*.

***United States v. Ezeta*, 752 F.3d 1182 (9th Cir. 2013)**

QUESTION: Whether 20 U.S.C. §1097(a) requires, as an element of the offense, a defendant to personally receive or exercise control over federally insured funds to constitute financial aid fraud. *Id.* at 1183.

ANALYSIS: The court looked to the statutory language of § 1097(a) and determined that it "extends to knowingly and willfully causing the funds to be disbursed to a third party by fraud, false statement, or forgery." *Id.* at 1184–85. The court further stated that due to the plain meaning of "obtain," coupled with the intent of Congress for the statute to "have a broad reach," the statute covers "the act of taking money from the government via false statements and causing it to be disbursed to others." *Id.* at 1185. The court reasoned that a person does not need to receive the payment of federal funds obtained by fraud as long as that person benefitted from the fraud in some way. *Id.* at 1186.

CONCLUSION: The 9th Circuit held that "exercising personal dominion or control over the federally insured funds is not an element of financial aid fraud under the 'knowingly and willfully . . . obtain[ing] by fraud [or] false statement' language" of § 1097(a). *Id.*

***United States v. Gomez*, 757 F.3d 885 (9th Cir. 2014)**

QUESTION: "Whether the generic federal definition of statutory rape has, as an element, a four-year age difference . . . " *Id*. at 904.

ANALYSIS: The court reasoned that "a four-year age difference is an element of the generic offense of statutory rape." *Id*. The court determined that the "ordinary, contemporary, and common meaning of the term 'minor' in the context of statutory rape law was a person under sixteen years of age," but the age difference was never considered. *Id*. at 905. The court noted that "forty-one states have an age difference in some of their statutory rape laws" and further recognized that thirty-two of those states "require an age difference of four years or more." *Id*. at 906. The court additionally noted that some states require an even larger age gap. *Id*.

CONCLUSION: The 9th Circuit held that when the state statutory rape laws, the Model Penal Code, and the federal law are viewed together, they support the "conclusion that statutory rape is ordinarily, contemporarily, and commonly understood to include as an element a four-year age difference between the victim and the defendant." *Id*. at 909.

***United States v. Hui Hsiung*, 2014 U.S. App. LEXIS 13051 (9th Cir. 2014)**

QUESTION ONE: Whether, in a criminal action for antitrust violation brought under the Sherman Act, 15 U.S.C. § 1 *et seq.*, "the rule of reason applies to [a] price-fixing conspiracy" as opposed to a *per se* analysis, when the proscribed conduct occurred in another country. *Id.* at *6, *25–*26.

ANALYSIS: The court noted that the Supreme Court has stated that "horizontal price-fixing is a *per se* violation of the Sherman Act." *Id.* at *24–*25. The court further noted that the case "center[ed] on a classic horizontal price-fixing scheme [traditionally] subject to the *per se* rule" *Id.* at *29. However, the court recognized that its precedent in *Metro Indus. v. Sammi Corp.*, 82 F.3d 839 (9th Cir. 1996), was ambiguous and clashed "with the well established tradition of analyzing price fixing under the *per se* rule." *Hui Hsiung*, 2014 U.S. App. LEXIS 13051 at *26. According to the court, "[i]nvoking the language in *Metro Industries* to suggest that price-fixing cases involving foreign conduct always should be analyzed

under the rule of reason is clearly irreconcilable with Supreme Court precedent."

CONCLUSION: Thus, the 9th Circuit held that "[t]he district court was bound to apply the *per se* rule and appropriately rejected the rule of reason defense." *Id.* at *30.

QUESTION TWO: "Whether the [Foreign Trade Antitrust Improvement Act of 1982 ("FTAIA"),15 U.S.C. § 6a,] affects the subject-matter jurisdiction of the district court or if, on the other hand, it relates to the scope of coverage of the antitrust laws." *Id.* at *32–*33.

ANALYSIS: The court noted that the Supreme Court "has made a point of distinguishing between a true jurisdictional limitation and a merits determination." *Id.* at *34. The court further noted that the other circuits have found that the FTAIA is not a jurisdictional limit on the power of federal courts. *Id.* at *36. The court reasoned that the FTAIA "provides substantive elements under the Sherman Act in cases involving nonimport trade with foreign nations." *Id.* at *36–*37.

CONCLUSION: The 9th Circuit held that "the FTAIA is not a subject-matter jurisdiction limitation on the power of the federal courts but a component of the merits of a Sherman Act claim involving nonimport trade or commerce with foreign nations." *Id.* at *33.

QUESTION THREE: "Whether the fine [pursuant to the Alternative Fine Statute, 18 U.S.C. § 3571(d),] was improper because it was based on the collective gains to all members of the conspiracy rather than the gains to AUO alone." *Id.* at *57–*58.

ANALYSIS: The court found that this was "an issue of statutory interpretation." *Id.* at *58. The court noted that there was no case to support a contrary reading of the statute as it "unambiguously permits a 'gross gains' calculation based on the gain attributable to the entire conspiracy." *Id.* at *59.

CONCLUSION: The 9th Circuit held that "[t]he unambiguous language of the Alternative Fine Statute permitted the district court to impose the [] fine based on the gross gains to all the coconspirators." *Id.* at *60.

QUESTION FOUR: "Whether the district court, in not imposing joint and several liability, erred by failing to adhere to the 'one recovery' rule and failing to take into account any fines paid by AUO's coconspirators." *Id.* at *58.

ANALYSIS: The court noted that there was no support for the proposition that § 3571(d) of the Alternative Fine Statute incorporates principles of joint and several liability. *Id.* at *60. The court determined that "two of the cited cases establish that joint and several liability is *an option* available to a sentencing court." *Id.* (emphasis added). Further, the

court noted that "[t]he other cases, which address the imposition of civil penalties in RICO prosecutions and civil asset forfeiture, [were] similarly inapposite because the purpose of criminal fines is to punish the offender, not to compensate a victim or disgorge ill-gotten gains." *Id.* at *60–*61.

CONCLUSION: The 9th Circuit held that the Alternative Fine Statute does not require joint and several liability when imposing a fine. *Id.* at *61.

***United States v. IMM*, 747 F.3d 754 (9th Cir. 2014)**

QUESTION: Whether "the requirement to certify a substantial federal interest is an independent requirement that applies to each of the bases for jurisdiction set forth in [18 U.S.] § 5032 or is required only when the government asserts jurisdiction under this statute's third provision." *Id*. at 762.

ANALYSIS: The court reasoned that legislative history demonstrated that "Congress intended the substantial Federal interest requirement to apply to . . . only the third basis for jurisdiction under § 5032." *Id*. at 763. (internal quotation marks omitted). The court noted that Congress inserted both the third provision of § 5032 and the language "substantial Federal interest" together and that the Senate report explained that the third provision was "meant to give the federal government power to retain jurisdiction even when a state was willing to assume jurisdiction in certain felony cases." *Id*. Further, the court reasoned that the Senate report did not discuss applying this new "substantial federal interest" requirement to the first and second provisions of § 5032. *Id*.

CONCLUSION: The 9th Circuit held that "the requirement that the government certify a substantial Federal interest in the case or the offense to warrant the exercise of Federal jurisdiction applies only to the third provision of § 5032." *Id*. at 764 (internal quotation marks omitted).

***United States v. Williams*, 741 F.3d 1057 (9th Cir. 2014)**

QUESTION: "[W[hether an *Alford* plea entered in Washington is legally sufficient by itself to warrant a finding that a person on supervised release violated the probation against committing a new state crime . . . ." *Id*. at 1059.

ANALYSIS: The 9th Circuit recognized that it previously determined that the "effect of a *nolo contendere* plea in a subsequent criminal trial requiring proof beyond a reasonable doubt of a prior crime's commission as an element of a new charge . . . " and that this logic applied to the case at bar. *Id*. Further, the court noted that, like a *nolo contendere* plea, an *Alford* plea is not treated "as probative evidence of the commission of a crime" in Washington. *Id*. at 1060. Lastly, the court recognized that its

previous case law distinguishes the commission of a crime from the conviction of a crime. *Id*.

CONCLUSION: The 9th Circuit held "an *Alford* plea is insufficient evidence to prove commission of a state crime for the purposes of a federal supervised release violation" in light of the state itself not treating the *Alford* plea as "sufficiently probative of the fact that the defendant actually committed the acts constituting the crime or crimes of conviction." *Id*. at 1061.

***Van Asdale v. Int'l Game Tech.*, 763 F.3d 1089 (9th Cir. 2014)**

QUESTION: Whether the "prejudgment interest in a Sarbanes-Oxley whistleblower case is governed by 28 U.S.C. § 1961, the rate that applies to all civil cases in federal district courts, or 26 U.S.C. § 6621, the interest rate for underpayment of federal taxes." *Id*. at 1090.

ANALYSIS: The court reasoned that **"**[b]ecause postjudgment interest in this case is 'interest' on a 'money judgment in a civil case recovered in court . . . § 1961 should apply." *Id*. at 1092. The court noted that it previously had held that "the § 1961 rate *does* reflect market rates and thereby fully compensate[s]' aggrieved parties." *Id*. at 1093 (internal quotation marks omitted).

CONCLUSION: The court held that "§ 1961 applies to whistleblower cases that result in district court judgments because there is nothing within the Sarbanes-Oxley Act that says otherwise." *Id*.

***Vosgien v. Persson*, 742 F.3d 1131 (9th Cir. 2014)**

QUESTION: Whether "[Defendant's] demonstration of actual innocence of the compelling prostitution counts opens the *Schlup* gateway for all of the counts to which [defendant] pled guilty." *Id*. at 1136.

ANALYSIS: The court reasoned that the foundation laid by *Schlup v. Delo*, 513 U.S. 298 (1995), mandates that petitioner should be permitted to obtain review of defaulted constitutional claims "only if he falls within the narrow class of cases . . . implicating a fundamental miscarriage of justice." *Vosgien*, 742 F.3d at 1136 (internal quotation marks omitted). The court noted that where a petitioner does not claim "actual innocence" with regard to certain convictions, a 'fundamental miscarriage of justice' has not resulted "if he remains unable to challenge them due to his own procedural default." *Id*. (internal quotation marks omitted). Thus, the court determined that the defendant's demonstration of actual innocence of one of the counts with which he was charged does not "open the *Schlup* gateway." *Id.*

CONCLUSION: The 9th Circuit held that a demonstration of actual innocence under *Schlup* cannot "excuse a petitioner's procedural default for more than the counts as to which he has shown actual innocence." *Id.*

***Wood v. Yordy*, 753 F.3d 899 (9th Cir. 2013)**

QUESTION: Whether a prisoner filing an action under the Religious Land Use and Institutionalized Persons Act ("RLUIPA") "may seek damages against prison officials in their individual capacities." *Id.* at 901.

ANALYSIS: The RLUIPA prohibits a government from encumbering religious exercise in correctional institutions. *Id.* at 902. The court found that under RLUIPA a private citizen could "assert a violation as a claim or defense in a judicial proceeding in order to 'obtain appropriate relief against a government.'" *Id.* The court noted that nothing in the language of RLUIPA demonstrated Congress's intent to allow an individual government employee to be held liable. *Id.* at 904. The court reasoned that due to the limitations on Congress's powers under the Spending Clause and the language of the RLUIPA, the only way to sue an individual government employee is to sue the government, because the government receives the federal funds. *Id.*

CONCLUSION: The 9th Circuit held that an action against prison officials in their individual capacities could not be brought under RLUIPA because "legislation enacted pursuant to the Spending Clause cannot subject state officers to individual suits," since the prison officials are not the recipients of the federal funds. *Id.* at 903.

***Yokeno v. Skiguchi*, 754 F.3d 649 (9th Cir. 2014)**

QUESTION: Whether, when there is no constitutional or statutory jurisdiction, the deeming clause of 28 U.S.C § 1332 may supply the District Court of Guam statutory jurisdiction in a suit between a resident alien plaintiff and a non-resident alien defendant. *Id*. at 653.

ANALYSIS: The court analyzed the effect of the "deeming clause" of § 1332, which states "[a]n alien admitted to the United States for permanent residence shall be deemed a citizen of the state in which such an alien is domiciled." *Id.* at 654. The court looked to the 3rd, 7th, and the D.C. Circuits for interpretations of the deeming clause, and noted that although each circuit addressed a different issue, each court "recognize[d] that invoking the deeming clause to supply minimal diversity of citizenship where it would not otherwise exist . . . exceed[ed] constitutional jurisdiction." *Id* at 655–56.

CONCLUSION: The 9th Circuit held that the District Court of Guam lacked diversity subject matter jurisdiction to decide actions that were exclusively between aliens "[b]ecause the Constitution does not supply

diversity jurisdiction to Article III courts in suits between aliens," and so the court in Guam must also be limited. *Id.* at 657.

TENTH CIRCUIT

***Bonnet v. Harvest (US) Holdings, Inc.*, 741 F.3d 1155 (10th Cir. 2014)**

QUESTION: "Whether a *subpoena duces tecum* served on a non-party, Tribe, in a civil suit is itself a 'suit' triggering tribal sovereign immunity in the absence of congressional authorization or tribal waiver." *Id.* at 1156.

ANALYSIS: The court first determined that it has jurisdiction over the appeal, and subsequently defined "a suit as the prosecution of some demand in a Court of justice." *Id.*at 1158–59 (internal quotation marks omitted). The court reasoned that a *subpoena duces tecum* simply compels the production of evidence, which is necessary for a court to fairly adjudicate the underlying claim. *Id.* The court determined that "a suit includes judicial process . . . and a *subpoena duces tecum* is a form of judicial process." *Id.* at 1160 (internal quotation marks omitted).

CONCLUSION: The 10th Circuit held that the *subpoena duces tecum* served on the Tribe was "judicial process included in the suit," and thus the "subpoena itself was a 'suit' against the Tribe triggering tribal sovereign immunity." *Id.* at 1155.

***Holmes v. Colo. Coal. for the Homeless Long Term Disability Plan*, 2014 U.S. App. LEXIS 15428 (10th Cir. 2014)**

QUESTION: Whether "application of the deemed-exhausted provision to violations of ERISA's notice and disclosure requirements" should be limited to "situations where such violations prejudice claimants by denying them a reasonable review procedure." *Id*. at *43.

ANALYSIS: The court noted that other "circuits have consistently limited" application of the "deemed-exhausted provision" to situations "where such violations prejudice claimants by denying them a reasonable review procedure." *Id*. The court agreed with the reasoning expressed in the 11th Circuit that "it makes little sense to excuse plaintiffs from the exhaustion requirement where an employer is technically noncompliant with ERISA's procedural requirements but . . . the plaintiffs still had a fair and reasonable opportunity to pursue a claim through an administrative scheme prior to filing suit in federal court." *Id*. at *40 (internal quotation marks omitted).

CONCLUSION: The 10th Circuit joined the 2nd, 3rd, 8th, 9th, and 11th Circuits and held that "the deemed-exhausted provision is limited to

instances in which the notice and disclosure deficiencies actually denied the participant a reasonable review procedure." *Id.* at *45–*46.

***In re Woods*, 743 F.3d 689 (10th Cir. 2014)**

QUESTION: Whether debtors are permitted to seek relief under Chapter 12 as 'family farmers,'" which necessarily required the court to answer the question of when " a debt 'for' a principal residence 'arise[s] out of a farming operation,'" and what test to apply in order to make this determination. *Id.* at 691.

ANALYSIS: The court noted that the phrase "arise out of" is used in an identical manner in both the rule and the exception, therefore the court concluded that the phrase must be interpreted "in a way that allows the rule's exception to function" as an exception. *Id.* at 700. The court concluded that by interpreting the phrase require a "direct and substantial connection between the debt for a principal residence and the farming operation" allows the phrase to function as the exception it was intended to be. *Id.* The court further concluded that an "objective 'direct-use'" test provides "the optimal vehicle for discerning" whether the direct-and-substantial-connection standard is satisfied. *Id.* The direct-use test requires that the debt be incurred by reason of using the borrowed funds to fund the farming operation. *Id.* at 703.

CONCLUSION: The 10th Circuit held that a debt arises out of a farming operation "if it is directly and substantially connected to any of the activities constituting a 'farming operation' within the meaning of § 101(18)(a)," and that the proper test to apply when determining if the operation is "directly and substantially connected" is an "objective direct-use test." *Id* at 700.

***United States v. Fuller*, 751 F.3d 1150 (10th Cir. 2014)**

QUESTION: Whether the term "willfully," as articulated in 18 U.S.C. § 228(a) of the Child Support Recovery Act, includes a defendant who has sufficient funds to pay support, as well as a defendant who lacks sufficient funds to pay support. *Id.* at 1155.

ANALYSIS: The court explained that § 228(a) punishes one who "willfully fails to pay a past due support obligation with respect to a child who resides in another State." *Id.* at 1152. Because the statute does not define the term "willfully," the court looked to legislative history to determine its meaning. *Id.* at 1155. The court reasoned that the legislative history indicated that the "willful failure standard . . . should be interpreted in the same manner that the Federal courts have interpreted [the] felony tax provisions," which the language of § 228 was borrowed from. *Id.* The court further noted that "the willfulness element in the tax felony statute

requires proof of an intentional violation of a known legal duty, and thus describes a specific intent crime." *Id*. (internal quotation marks omitted).

CONCLUSION: The 10th Circuit held that the term "willfully" includes not only a defendant who possesses sufficient funds, but also "a defendant [who] lacks sufficient funds, so long as the defendant's financial circumstances result from his own intentional acts." *Id.* at 1156.

***United States v. Lucero*, 747 F.3d 1242 (10th Cir. 2014)**

QUESTION: Whether U.S.S.G. § 2G2.2(b)(5) "pattern-of-activity enhancement" contains a temporal or contextual limitation. *Id*. at 1247.

ANALYSIS: The court acknowledges that Comment Note 7 of the guideline states that "an upward departure may be warranted if § 2G2.2(b)(5) does not apply but the defendant engaged in the sexual abuse or exploitation of a minor" at some time. *Id*. at 1248 (internal quotation marks omitted). Further, the statute states that "pattern of activity" means "any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the court of the offense; (B) involved the same minor; or (C) resulted in a conviction." *Id*. at 1247–48. The court found that the "plain text of § 2G2.2(b)(5) . . . unambiguously authorize sentencing courts to apply the pattern-of-activity enhancement regardless of when the conduct underlying it occurred." *Id*. at 1248. The court noted that the 1st, 2nd, 3rd, 5th, 6th, 7th, 8th, 9th, and 11th Circuits courts have also concluded that there are is no temporal requirement in § 2G2.2(b)(5). *Id*. at 1249–50 (internal quotation marks omitted).

CONCLUSION: The 10th Circuit held, based on the plain language of the statute and the consistency of other circuit court rulings, that § 2G2.2(b)(5) does not contain a temporal or contextual limitation. *Id*. at 1250.

***United States v. Medina-Copete*, 757 F.3d 1092 (10th Cir. 2014)**

QUESTION: Whether an expert may offer opinion testimony pursuant to Fed. R. Evid. 702 regarding the connection between "so-called narco-saint iconography . . . [and] drug trafficking." *Id*. at 1105 (internal quotation marks omitted).

ANALYSIS: The court found that the reliability analysis was affected due to "[t]he district court's failure to fully examine how [the expert's] testimony would assist the jury." *Id*. at 1103. The court reasoned that "despite the flexibility granted to the district courts, the text of Rule 702 requires that they ensure that proffered expert testimony be based on

sufficient facts or data and the product of reliable principles and methods." *Id*. at 1105 (internal quotation marks omitted).

CONCLUSION: The 10th Circuit held that allowing an expert to testify "based on his experience without considering the relevance of breath of that experience" ignores the "facts or data" requirement of Rule 702(b). *Id*.

***United States v. Porter*, 745 F.3d 1035 (10th Cir. 2014)**

QUESTION: Whether a person's signature is a "name," pursuant to 18 U.S.C. § 1028(d)(7)'s definition of "means of identification" in relation to the aggravated identity theft statute, under U.S.C. § 1028A(a)(1). *Id*. at 1035.

ANALYSIS: The court focused its analysis on the 9th Circuit's decision in *United States v. Blixt*, 548 F.3d 882 (9th Cir. 2008), which held that "forgoing another's signature constitutes the use of that person's name and thus qualifies as a 'means of identification'" pursuant to § 1028A. *Porter*, 745 F.3d at 1040. The court found that the *Blixt* court reasoned that nothing suggested that the "the use of another's name in the form of a signature is somehow excluded from the definition of 'means of identification.'" *Id.* at 1041. The 10th Circuit agreed with the 9th Circuit's articulation that Congress's use of the word "any" in conjunction with the term "name" necessarily meant that Congress intended "to give that term an 'expansive meaning,'" *Id.* at 1042.

CONCLUSION: The 10th Circuit held "that a signature is the form of a 'name' for the purposes of § 1028(d)(7)'s definition of 'means of identification.'" *Id*.

ELEVENTH CIRCUIT

***Castillo v. United States AG*, 756 F.3d 1268 (11th Cir. 2014)**

QUESTION: Whether the Board of Immigration Appeals ("BIA") correctly considered the meaning of a "full pardon" under 8 U.S.C. § 1227(a)(2)(A)(vi) of the Immigration and Nationality Act (INA), when it "found petitioner removable as an aggravated felon, even though the [state] Board of Pardons and Paroles . . . had earlier pardoned petitioner for the conviction that rendered him removable." *Id*. at 1270.

ANALYSIS: The court noted that the because the INA does not define the meaning of the term "full and unconditional pardon," that the court had to review both Congressional intent and the plain meaning of the statute to define the term. *Id*. at 1272-73. The court found, after considering the ordinary meaning of the term "unconditional pardon," that "Congress clearly and unambiguously intended § 1227(a)(2)(A)(vi) to apply only

when an alien secures a pardon restoring all rights vitiated by the underlying adjudication of guilt." *Id*. at 1272.

CONCLUSION: The 11th Circuit held that "a pardon is only 'full' within the meaning of § 1227(a)(2)(A)(vi) when it vacates all future punishment for the underlying conviction, thereby restoring all lost rights." *Id*. at 1274. (emphasis omitted).

***Evans v. Books-A-Million*, 2014 U.S. App. LEXIS 15269 (11th Cir. 2014)**

QUESTION: Whether "additional expenses, [such as mediation, legal research, postage and travel], which the parties agree are not taxable as costs under [28 U.S.C.] § 1920, may nonetheless be awarded as attorneys' fees under 29 U.S.C. § 1132(g)(1)." *Id*. at *19–20.

ANALYSIS: The court reasoned that its precedent requires that "§ 1132(g) should be interpreted consistently with similar language in other fee-shifting statutes," and that "under 42 U.S.C. § 1988—which, like § 1132(g)(1) allows for a reasonable attorney's fee—a party may recover all reasonable expenses" incurred in litigation. *Id*. (internal quotations omitted). The court noted that the Supreme Court had ruled the same way in 1992. *Id*. at *20–21. The court further reasoned that the 2nd, 3rd, 5th and 6th Circuits have held that reasonable attorneys' fees should include all "incidental and necessary expenses incurred in furnishing effective and competent representation." *Id*. at *20.

CONCLUSION: The 11th Circuit held that "reasonable litigation expenses such as mediation, legal research, postage, and travel may be recovered under § 1132(g)(1) if it is the prevailing practice in the legal community to bill fee-paying clients separately for those expenses." *Id*. at *21.

***Paylor v. Hartford Fire Ins. Co.*, 748 F.3d 1117 (11th Cir. 2014)**

QUESTION: Whether the plaintiff's FMLA claims were "prospective" under 29 C.F.R. § 825.220(d), when the plaintiff signed a Severance Agreement with her employer. *Id.* at 1119.

ANALYSIS: The court began by discussing the defendant's claim that "prospective rights" under the FMLA means the unexercised rights of a current eligible employee to take FMLA leave and to be restored to the same or an equivalent position after the leave. *Id*. The court stated that this definition was too inclusive. *Id.* All employees in the abstract possess a right to FMLA leave, and to interpret the word as suggested by defendant would mean no employer could fire any employee with outstanding FMLA leave. *Id*.

CONCLUSION: The 11th Circuit held that "prospective rights" under the FMLA are those allowing an employee to invoke FMLA protections at some unspecified time in the future. *Id.*

***U.S. CFTC v. Hunter Wise Commodities, LLC*, 749 F.3d 967 (11th Cir. 2014)**

QUESTION: Whether the Dodd-Frank Wall Street Reform and Consumer Protection Act amendments to the Commodities Exchange Act ("CEA") authorize the Commodities Futures Trading Commission to regulate retail commodity transactions "offered on a leveraged or margined basis, or financed by the offeror, the counterparty, or a person acting in concert with the offeror or counterparty on a similar basis." *Id.* at 970.

ANALYSIS: The court began by interpreting the plain language of the CEA, and found that the retail transactions at issue fell under the Commission's jurisdiction. *Id.* at 978. The court noted that the retail transactions before it were a brokerage firm's "allegedly off-exchange and fraudulent commodity transactions." *Id.* at 967. The court reasoned that by using the rules of statutory construction, the ordinary meaning of the words of the statute required such an interpretation. *Id.* at 976. Additionally, the court concluded that the statutory language was upheld because the interpretation urged by the defendant would render the act meaningless. *Id.* at 976–77.

CONCLUSION: The 11th Circuit held that the Commodities Futures Trading Commission had authority to regulate the transactions in question, because "the transactions were retail transactions, which were leveraged or margined by trading derivatives in its own margin trading accounts with precious metals companies . . . . *Id.* at 967.

***United States v. Isnadin*, 742 F.3d 1278 (11th Cir. 2014)**

QUESTION: Whether, where a course of conduct is found and the entrapment defense is available, "the district court should [instruct] the jury that if it found entrapment as to [one count] it necessarily must have found entrapment as to the remaining counts." *Id.* at 1298–99.

ANALYSIS: The court began its analysis by stating that when the defense of entrapment is used, although the defendant must initially show that the Government induced the defendant's actions, "the burden shifts to the Government to prove beyond a reasonable doubt that the defendant was predisposed to commit the crime." *Id.* at 1297. The court noted that, even if multiple counts could be considered one course of conduct, this only assists the defendant if he can "show inducement as to each count." *Id.* at 1302. The court reasoned that if the defendant could show they were

induced in the entire course of conduct, the question of predisposition remains, and that this question is a subjective one, therefore the facts may show "that an individual defendant is predisposed to commit some crimes, but not others." *Id*.

CONCLUSION: The 11th Circuit held that "whether the charges against [the defendant] formed part of the same course of conduct is not determinative of when an entrapment defense applies to all counts or must be assessed separately by the trier of fact as to each count." *Id.* at 1300.

D.C. CIRCUIT

***All Party Parliamentary Grp. on Extraordinary Rendition v. United States Dep't of Def.*, 754 F.3d 1047 (D.C. Cir. 2014)**

QUESTION: Whether the scope of the representative provision of the Freedom of Information Act's ("FOIA") Foreign Government Entity Exception extends to FOIA requests from certain foreign diplomats and American lawyers representing foreign diplomats. *Id.* at 1048.

ANALYSIS: The court reasoned that "'agent' is a traditional and common definition of representative, and given that reading 'representative' of a foreign government entity to mean 'agent' of a foreign government entity makes perfect sense, we suspect that Congress would have used a different word—perhaps 'official,' 'employee,' or 'affiliate'—had it wanted to avoid incorporating agency principles into the Foreign Government Entity Exception." *Id.* at 1050. The court noted that the numerous references to an entity within the United States Code, followed by reference to an entity's "representatives," ensures that such provisions also apply to the entity when acting through others. *Id.* at 1051. The court reasoned that it is "reasonable to infer that Congress included the 'representative' provision in order to prevent foreign government entities from evading the Foreign Government Entity Exception by filing FOIA requests through agents, not to create a separate and independent class of disfavored Freedom of Information Act requesters." *Id.*

CONCLUSION: The D.C. Circuit held that FOIA "requesters who have authority to file requests on behalf of foreign government entities are 'representatives' of such entities when the file requests of the sort they have authority to file." *Id.* at 1053.

***Franklin-Mason v. Mabus*, 742 F.3d 1051 (D.C. Cir. 2014)**

QUESTION: Whether "a settlement agreement embodied in a judicial consent decree foreclose[s] jurisdiction by the Court of Federal Claims," if the district court lacks jurisdiction. *Id.* at 1054.

ANALYSIS: The court noted that the Court of Appeals for the Federal Circuit has previously held that "consent decrees and settlement agreements are not necessarily mutually exclusive, and, therefore, a settlement agreement, even one embodied in a decree, 'is a contract within the meaning of the Tucker Act.'" *Id.* at 1057. The court rejected the defendant's argument that consent decrees are viewed as judicial acts for the purpose of modification and enforcement, and instead recognized that the Supreme Court has "since clarified that consent decrees and settlement agreements are not, as a matter of law, mutually exclusive." *Id*. at 1058.

CONCLUSION: The D.C. Circuit held that the Court of Federal Claims is a court in which the motion to enforce "could have been brought." *Id*. at 1058.

FEDERAL CIRCUIT

***Checo v. Shinseki*, 748 F.3d 1373 (Fed. Cir. 2014)**

QUESTION: Whether a plaintiff seeking equitable tolling needs to demonstration due diligence "during the entire 120-day appeal, during the period of extraordinary circumstances . . . during the period between the end of the extraordinary circumstances and the date of filing the NOA . . . or during some other period." *Id*. at 1379.

ANALYSIS: The court followed the analysis previously articulated by the 2nd Circuit, explaining "that a court may suspend the statute of limitations for the period of extraordinary circumstances and determine timeliness by reference to the total untolled period without requiring a further showing of diligence through filing." *Id*. The court noted that the Veterans Court applies a different standard, which "require[s] a showing of due diligence throughout the appeal period." *Id*.

CONCLUSION: The court adopted the 2nd Circuit's approach, and held that "the diligence required for equitable tolling purposes is 'reasonable diligence,' not 'maximum feasible diligence.'" *Id*. at 1380.

***Cronin v. United States*, 765 F.3d 1331 (Fed. Cir. 2014)**

QUESTION: Whether the 2003 Relief Act tolls the statute of limitations during the time a service member is on the Temporary Disability Retired List. *Id*. at 1334–35.

ANALYSIS: The court first noted that the 2003 Relief Act states that "[t]he period of a servicemember's military service may not be included in computing any period . . . for the bringing of any action . . . by . . . the service member." *Id*. at 1335. The court noted that the "'absent from duty' clause thus fairly encompasses only a situation in which the active-service duty remains – in which military authority to compel active service

remains – during a period when, for good cause, the member of the service cannot engage in the otherwise-required active service." *Id*. at 1335. The court further reasoned that a member placed on the Temporary Disability Retired List "is not subject to an ongoing but suspended duty to serve," and the military does not have the right to compel the service member to return back to active service. *Id*. The court found support in prior precedents of the court that "have treated placement on the Temporary Disability Retired List as relieving a service member of a duty to serve." *Id*. at 1337.

CONCLUSION: The Federal Circuit held that the Civil Relief Act does not toll the statute of limitations for service members that are on the Temporary Disability Retired List. *Id*. at 1331.

***Lemus v. DOJ*, 2014 U.S. App. LEXIS 13493 (Fed. Cir. 2014)**

QUESTION: Whether the 90-day filing period for appeals from final decisions of the Bureau of Justice Assistance is jurisdictional in an action seeking death benefits under the Public Safety Officers' Benefits Act ("PSOBA"). *Id*. at *2.

ANALYSIS: The court noted that it has exclusive jurisdiction over PSOBA appeals. *Id*. at *2. The court further noted that if the filing period is "mandatory and jurisdictional" then a late appeal must be dismissed. *Id*. The court also reasoned that because the filing period is similar to a "'claims-processing rule' that Congress did not intend to carry 'jurisdictional consequences,' then jurisdictional barriers do not bar" the court from considering a "request to toll the statute." *Id*. at *2–*3. The court further noted that the Supreme Court treated similar provisions as jurisdictional, that the statute "uses language of jurisdictional consequence," and that the legislative history of the statute supports such a finding. *Id*. at *3–*6.

CONCLUSION: The Federal Circuit held that the statutory filing deadline of the PSOBA "is jurisdictional and not subject to equitable exception." *Id*. at *6.

***S. Snow Mfg. Co. v. SnoWizard Holdings, Inc.*, 567 Fed. App'x 945 (Fed. Cir. 2014)**

QUESTION: "Whether a [15 U.S.C.] § 1120 claim [for fraudulent registration] may be asserted on the basis of a pending trademark registration . . . ." *Id*. at 958.

ANALYSIS: The Federal Circuit noted that the 7th Circuit addressed this issue and previously stated that "[c]ompeting firms would be injured by the registration and use of the mark, not by the application itself." *Id*. The court pointed to the 7th Circuit's findings that "[r]egistration makes it

hard for new firms to use marks that represent related goods, and an 'incontestable' registration, as its name suggests, puts the mark beyond challenge on the ground that it is 'descriptive.'" *Id*. The Court also agreed with the 7th Circuit that "[t]he law has consistently forbidden procuring registration by fraud and neglected the possibility of penalizing those who seek but [do] not get registration via fraud." *Id.*

CONCLUSION: The Federal Circuit held that claims under § 1120 may not be asserted unless the trademark is registered. *Id.* at 958–99.