# First Impressions

The following pages contain brief summaries of issues of first impression identified by federal court of appeals opinions announced between September 3, 2015 and January 31, 2016. 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

***Summers v. Fin. Freedom Acquisition LLC,* 807 F.3d 351 (1st Cir. 2015)**

**QUESTION:** The 1st Circuit questioned whether a "mortgage was unenforceable because the mortgagee had failed to file a claim in the decedent's estate." *Id*. at 353.

**ANALYSIS:** The court first noted that "[b]ecause the Rhode Island Supreme Court has not addressed whether probate extinguishes a real estate mortgage, our task is to vaticinate how that court would likely rule

if faced with the issue." *Id*. at 356. The court reasoned that "[t]he case law elsewhere, confirms our intuition that the Rhode Island Supreme Court, if faced with the question, would hold that the right to foreclose should be treated as separate and distinct from the right to collect the underlying debt." *Id*. at 358. Moreover, the court noted that, "it follows that, in Rhode Island, a mortgagee need not make a monetary claim against an estate in probate proceedings in order to retain its in rem rights to proceed against the real property that secures the mortgage debt." *Id*. The court went onto reason that, "[a]fter the decedent passed away and the mortgage balance remained unpaid, it was to the scaffold of property law that Financial Freedom turned. It properly exercised its right of foreclosure, and that in rem proceeding was wholly independent of the probate process." *Id*.

**CONCLUSION:** The 1st Circuit held that it was its' belief that "the Rhode Island Supreme Court, were it confronted with the question, would conclude that the failure to file a claim in the probate court would not bar a mortgagee holding a reverse mortgage on real property from collecting the balance due through the equitable remedy of foreclosure." *Id*. at 358. Finally, the court noted, "[t]he probate process does not extinguish a real estate mortgage but, rather, only extinguishes personal liability for the underlying debt." *Id*.

***United States ex rel. Gadbois v. PharMerica Corp.*, 809 F.3d 1 (1st Cir. 2015)**

**QUESTION:** Whether Federal Rule of Civil Procedure 15(d) is available to cure most kinds of defects in subject matter jurisdiction. *Id*. at 3.

**ANALYSIS:** The court explains that Rule 15(d) "prescribes that 'the court may permit supplementation even though the original pleading is defective in stating a claim.'" *Id.* at 5. The court then stated that courts have generally read rule 15(d) to include defects in subject matter jurisdiction among the defects that may be corrected through a supplemental pleading. *Id.* Additionally, the court cited several other circuits that agree with its conclusion. *Id.* The court further noted that "in federal question cases, courts have been careful not to import the time-of-filing rule indiscriminately. *Id.*

**CONCLUSION:** The 1st Circuit held that Federal Rule of Civil Procedure 15(d) is available to cure most kinds of defects in subject matter jurisdiction. *Id.* at 3.

***Whyte v. Lynch*, 807 F.3d 463 (1st Cir. 2015)**

**QUESTION:** "Whether third-degree assault as defined by [state] law, describes a 'crime of violence' under [18 U.S.C. § 16(a)]." *Id*. at 467.

**ANALYSIS:** To determine whether a state crime is categorically "violent," courts implement a two-part test as required by Congress. *Id*. at 466. Congress defines a "crime of violence" as: "(a) an offense that has as an element the use, attempted use, or threatened use of *physical force* against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." *Id*. (emphasis added). Since the offense in question was not a felony, the court limited its analysis to only part (a). *Id*. While the court found the state statute satisfied the intent requirement of Congress' test because it did not merely require recklessness or negligence, the 1st Circuit held that third-degree assault did not require the act of "physical" or "violent force." *Id*. at 468, 471–72.

**CONCLUSION:** The 1st Circuit joined the 2nd Circuit holding that "third-degree assault as defined by [state] law, does not require proof of all the required elements of a 'crime of violence'" and therefore cannot be categorically labeled as one. *Id*. at 465.

## SECOND CIRCUIT

***EEOC v. Sterling Jewelers Inc.*, 801 F.3d 96 (2d Cir. 2015)**

**QUESTION:** Whether there is a proper scope of the federal courts power to review if the Equal Employment Opportunity Commission (EEOC) has fulfilled its pre-suit administrative obligations. *Id.* at 100–101.

**ANALYSIS:** The 2nd Circuit considered the prior case in which it was determined that Congress gave the federal courts this power. *Id*. at 101. The court noted that in *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015), the Supreme Court provided guidance for the scope of judicial review regarding the EEOC. *Id*. The Supreme Court further explained that judicial review in this regard is narrow and only serves to enforce statute requirements that the EEOC must abide. *Id*. The 2nd Circuit articulated that with this limited judicial review, the EEOC must show that it took steps to determine the creditability of allegations. *Id.* The court reasoned that the limited review respects the discretion of the EEOC, and reflects the desire for substantive results. *Id.*

**CONCLUSION:** The 2nd Circuit held that there is a proper scope of a federal court's power to review whether the EEOC has fulfilled its pre-suit

administrative obligations, albeit limited. *Id*. The court further held that the proper scope of judicial review is to determine whether the EEOC conducted an investigation. *Id*.

***Harrison v. Republic of Sudan*, 802 F.3d 399 (2d Cir. 2015)**

**QUESTION:** Whether a foreign governmental entity is properly served notice of suit when notice is sent to the defendant government's minister of foreign affairs via its embassy in Washington, DC. *Id*. at 404.

**ANALYSIS:** The court noted that the requirement of service is subject to the final clause of 28 U.S.C. § 1608(a)(3), which requires only that service be sent "to the head of the ministry of foreign affairs." *Id*. The court reasoned that mailing the notice of suit to the foreign minister via the embassy in Washington, DC is proper because the statute is "silent as to any specific location where the mailing is to be addressed," and "[i]f Congress had wanted to require that the mailing be sent to the head of the ministry of foreign affairs in the foreign county, it could have said so." *Id*.

**CONCLUSION:** The 2nd Circuit held that the mailing by the plaintiff to the foreign government's minister of foreign affairs at its embassy in Washington, DC "was consistent with the language of the statute and could reasonably be expected to result in delivery to the intended person." *Id*.

***Morse v. Fusto*, 804 F.3d 538 (2d Cir. 2015)**

**QUESTION:** Whether the "general-verdict rule" is subject to waiver. *Id*. at 551.

**ANALYSIS:** The 2nd Circuit determined that the defendants failed to request that the district court submit to the jury a special verdict form or interrogatories on each set of facts in support of their legal theory of the case prior to jury deliberations. *Id*. at 551–52. Additionally, the defendants failed to object to the jury instructions or verdict sheet before the jury deliberated. *Id*. at 552. The 2nd Circuit explained that since the defendants did not take advantage of these other procedural remedies available under the Federal Rules, the defendants could not rely on the general-verdict rule. *Id*.

**CONCLUSION:** The 2nd Circuit held the "general-verdict rule is subject to waiver, and that the defendants have waived their ability to invoke the rule." *Id*. at 553.

***Tann v. Bennett*, 807 F.3d 51 (2d Cir. 2015)**

**QUESTION:** Whether "a state custody order moots an International Child Abduction Remedies Act claim ["ICARA"]." *Id.* at 53.

**ANALYSIS:** The court first looked at the language of the Hague Convention, which states that "[t]he sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention." *Id.* at 52 (internal quotation marks omitted). The court noted that the purpose of the Convention was "to prevent situations where a family member would remove a child to jurisdictions more favorable to [his or her] custody claims in order to obtain a right of custody from the authorities." *Id*. (internal quotation marks omitted). The 2nd Circuit then relied on a 7th Circuit ruling which posited that, if a state custody order made an ICARA claim moot, it would go against the purpose of the Convention. *Id*. at 53.

**CONCLUSION:** The 2nd Circuit held that a state's custody order does not moot an ICARA claim because it "could encourage the jurisdictional gerrymandering that the Hague Convention was designed to prevent." *Id*.

THIRD CIRCUIT

***Brand Mktg. Grp. LLC. v. Intertek Testing Servs., NA., Inc.*, 801 F.3d 347 (3d Cir. 2015)**

**QUESTION:** Whether punitive damages are available in negligent misrepresentation claims. *Id*. at 358.

**ANALYSIS:** The 3rd Circuit began by analyzing a Pennsylvania Supreme Court case, *Hutchison ex rel. Hutchison v. Luddy*, 870 F.2d 766 (Pa. 2005). *Id*. at 358. In *Hutchison*, it was determined that a plaintiff in a negligence case may undertake an additional burden of attempting to prove that the defendant's conduct was both negligent and outrageous, therefore warranting punitive damages. *Id*. The 3rd Circuit noted that, despite the fact that Restatement (Second) of Torts § 552B does not specifically warrant punitive damages for negligent misrepresentation claims, there is no indication that any specific tort falls outside the realm of those for which punitive damages may be awarded. *Id*. The court agreed with the opinion in *Hutchinson*, and found that there is no need to distinguish between negligent misrepresentation claims and all other negligence claims. *Id*. at 359.

**CONCLUSION:** The 3rd Circuit held that "*Hutchison* generally permits a plaintiff to undertake the additional burden of proving the heightened culpability required to sustain a punitive damages claim . . . in negligent misrepresentation cases." *Id*.

***G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601 (3d Cir. 2015)**

**QUESTION:** Whether 20 U.S.C. § 1415(f)(3)(C), which establishes a statute of limitations for the Individuals with Disabilities Education Act (IDEA) claims of two years and 20 U.S.C. § 1415(b)(6)(B), which allows claims for injuries up to two years prior to their discovery, collectively allow plaintiffs to bring claims under IDEA for injuries occurring up to 4 years prior to filing the complaint. *Id*. at 604.

**ANALYSIS:** The court noted that the plain meaning of the contradictory statutes cannot be reconciled without "on the one hand, of ignoring swaths of the statutory text or, on the other, accepting a reading that is absurd on its face." *Id*. at 615. The 3rd Circuit reasoned that since the statute of limitations appears multiple times throughout the federal act and the legislative history suggests that congress intended there to be a two-year statute of limitations, § 1415(f)(3)(C) had to be a mere restatement of § 1415(b)(6)(B)'s filing limitation rather than a contradictory allowance for additional claims to be brought. *Id*. at 617–23.

**CONCLUSION:** The 3rd Circuit held that claimants have only "two years from the date they knew or should have known of [an IDEA] violation to request a due process hearing through the filing of an administrative complaint." *Id*. at 626.

***Goldman, Sachs & Co. v. Athena Venture Partners, L.P.*, 803 F.3d 144 (3d Cir. 2015)**

**QUESTION:** Whether a party waives its right to seek vacatur of an award by waiting to challenge a panel member's participation until after the award has been decided. *Id.* at 147.

**ANALYSIS:** The court began by stating that a general rule, where a party automatically waives its claim if it fails to raise concerns prior to arbitration, would be inappropriate. *Id.* at 147. The 3rd Circuit then proceeded to analyze the "constructive knowledge standard," and how the court almost adopted this standard in a previous case. *Id.* at 148–49. The "constructive knowledge standard" requires parties to exercise "diligence and tenacity" in investigating potential conflicts when the party knew or should have known facts of misconduct. *Id.* at 148.

**CONCLUSION:** The 3rd Circuit held that the losing party waived its right to vacate the award when it did not further investigate the panel member after receiving information about his legal troubles. *Id*. at 150.

***Grp. Against Smog & Pollution, Inc. v. Shenango Inc.*, 810 F.3d 116 (3d Cir. 2016)**

**QUESTION:** Whether the term "prosecuting" in the diligent prosecution bar "requires an agency enforcement action to be pending in court if it is to bar a citizen suit." *Id*. at 128.

**ANALYSIS:** The court reasoned that, "because the 2012 and 2014 civil actions culminated in final judgments, they were not pending before a court when [the Group Against Smog and Pollution] GASP filed its citizen suit, and therefore the Consent Decrees from these actions could not support a diligent prosecution bar." *Id*. The court then notes, "[t]his issue is one of first impression in this Court." *Id*.

**CONCLUSION:** The 3rd Circuit held that, "[w]e have little difficulty in holding that when a state or federal agency diligently prosecutes an underlying action in court, the diligent prosecution bar will prohibit citizen suits during the actual litigation as well as after the litigation has been terminated by a final judgment, consent decree, or consent order and agreement." *Id*. The court further notes that, "when a state or federal agency diligently pursues an ongoing consent decree that may be modified by the parties and enforced by the agency, the diligent prosecution bar will prohibit citizen suits." *Id*. Applying the law to the case at hand the court states, "the parties in the present case were still able to modify or enforce the 2012 Consent Decree and 2014 Consent Order and Agreement and the district court correctly found that the [Allegheny County Health Department] ACHD was 'diligently prosecuting' the case by taking actions that furthered the goals of these Consent Decrees, which was compliance with the regulations." *Id*.

***Hassan v. City of New York*, 804 F.3d 277 (3d Cir. 2015)**

**QUESTION:** Whether religious classifications trigger heightened scrutiny under the Equal Protection Clause. *Id*. at 299.

**ANALYSIS:** The court began by acknowledging that although no "binding precedent" existed on this issue, it could be guided by "implicit" messages in Supreme Court decisions. *Id.* One such decision concluded "religious classifications are treated like others traditionally subject to heightened scrutiny, such as those based on race." *Id*. (citing *United States v. Armstrong*, 517 U.S. 456, 464 (1996)). The court was also influenced by the 2nd, 8th, 9th and 10th Circuits which "subject[ed] religious-based classifications to heightened scrutiny." *Id*. at 300.

**CONCLUSION:** The 3rd Circuit held that "intentional discrimination based on religious affiliation must survive heightened equal-protection review." *Id*. at 301.

***In re Trump Entm't Resorts Unite Here Local 54*, 810 F.3d 161 (3d Cir. 2016)**

**QUESTION:** Whether "a Chapter 11 debtor-employer able to reject the continuing terms and conditions of a collective bargaining agreement (CBA) under [18 U.S.C.] § 1113 after the CBA has expired?" *Id.* at 164.

**ANALYSIS:** The 3rd Circuit began by noting that "[t]his appeal requires us to resolve the effect of two potentially conflicting provisions of federal law." *Id*. at 163. Describing the conflict, the court explained, "Section 1113 of the Bankruptcy Code allows a Chapter 11 debtor to 'reject' its CBAs under certain circumstances. The National Labor Relations Act (NLRA) prohibits an employer from unilaterally changing the terms and conditions of a CBA even after its expiration." *Id.* As a result, "under the NLRA, the key terms and conditions of an expired CBA continues to govern the relationship between a debtor-employer and its unionized employees until the parties reach a new agreement or bargain to impasse." *Id*. at 164. The court read both "statutory frameworks seriatim, and assume[d] that Congress passed each subsequent law with full knowledge of the existing legal landscape." *Id.* at 167. The court reasoned that the "when the employer's statutory obligations to maintain the status quo under the terms of an expired CBA will undermine the debtor's ability to reorganize and remain in business, it is the expertise of the Bankruptcy Court which is needed rather than that of the NLRB. For that reason, whether the CBA is in effect or is expired, it is the Bankruptcy Court which should make the review and decide on the necessity of the modification." *Id*. at 173.

**CONCLUSION:** The 3rd Circuit held "that § 1113 applies to a CBA after it has expired." *Id*.

***J.B. v. Fassnacht*, 801 F.3d 336 (3d Cir. 2015)**

**QUESTION:** "Whether the Supreme Court's ruling in [*Florence v. Board of Chosen Freeholders of County of Burlington*, 132 S. Ct. 1510, (2012)] extends to juvenile detainees." *Id.* at 342.

**ANALYSIS:** The 3rd Circuit stated that its analysis must balance the constitutional rights of the juvenile against the security interests of the detention facility. *Id*. The court further noted that the practice of preforming a strip search on juveniles before admitting them into the general population of the facility must be "reasonably related to legitimate peneological interests." *Id*. The court reasoned that there is no easy way to differentiate the security risks posed by juvenile and adult detainees, noting further that when dealing with juvenile detainees the state is acting as the legal guardian and therefore the need to ensure the safety of all detainees is heightened. *Id*. at 343. The 3rd Circuit went on to dismiss

the argument that such a practice should be subject to the reasonable suspicion standard previously applied by the Supreme Court because that case dealt with a strip-search in a school setting, and such an individualized standard could be subject to abuse in a juvenile detention facility. *Id*. at 344.

**CONCLUSION:** The 3rd Circuit held that the policy of strip-searching juvenile detainees before releasing them into the general population of the juvenile detention facility was to be analyzed under the standards set forth by the Supreme Court in *Florence*. *Id*. at 346.

***United States v. Schneider*, 801 F.3d 186 (3d Cir. 2015)**

**QUESTION:** Whether The Mann Act precedent applies to prosecutions under 18 USCS § 2423(b), for the transportation of minors. *Id.* at 192.

**ANALYSIS:** The court considered the language of both The Mann Act and 18 USCS § 2423(b). *Id.* The court noted that the crucial language of § 2423(b) is the same language of the original Mann Act. *Id.* at 193. This language is "for the purpose of" phrase. *Id.* The court reasoned that the relationship between § 2423(b) and the Mann Act suggests that Congress intended this phrase to have the same meaning in the two statutes. *Id.*

**CONCLUSION:** The 3rd Circuit held that Mann Act precedent is instructive and persuasive in 18 USCS § 2423(b) cases. *Id*. at 192.

## FOURTH CIRCUIT

***Hernandez-Zavala v. Lynch*, 806 F.3d 259 (4th Cir. 2015)**

**QUESTION:** Whether a conviction under a state law that does not have a domestic relationship as an element of the offense constitutes a "crime of domestic violence" under 8 U.S.C. § 1227(a)(2)(E)(i). *Id.* at 262–63.

**ANALYSIS:** The court was charged with determining which approach was appropriate in determining whether a state conviction would constitute "crime of domestic violence" under 8 U.S.C. § 1227(a)(2)(E)(i). *Id.* at 263. The court favored the "circumstance-specific" approach, which permits the court to consider underlying evidence of the conviction, thereby allowing the court to determine if a domestic relationship existed between the defendant and the victim. *Id.* The court found that this approach would be just, as the language of the state's offense does not fit within the framework of the federal statute. *Id.* at 264. The court found by means of the "circumstance-specific" approach that the Defendant did commit an act of violence and was in a domestic relationship with the victim. *Id*.

**CONCLUSION:** The 4th Circuit, using the "circumstance-specific" approach, held that the Defendant was in fact in a domestic relationship with the victim, thereby permitting a finding of domestic abuse satisfying 8 U.S.C. § 1227(a)(2)(E)(i). *Id.* at 268.

***Rich v. United States,* 811 F.3d 140 (4th Cir. 2015)**

**QUESTION:** Whether "the discretionary function exception to the" Federal Torts Claims Act (FTCA) applies to prison officials' decisions regarding "prisoner placement and the handling of threats posed by inmates against one another." *Id*. at 145.

**ANALYSIS:** The court noted that the 7th, 8th, 9th and 11th Circuits have all held that prison officials receive discretion under the FTCA. *Id.* The court posited that "[p]rison officials are afforded discretion in determining where to place inmates and whether to keep certain individuals or gangs separated from one another." *Id*. at 146. The court further reasoned that "because these decisions invoke several policy considerations for prison administrators, they are precisely the kind of determinations that the discretionary function exception is intended to protect." *Id*.

**CONCLUSION:** The 4th Circuit held that "the discretionary function exception shields the prison officials from liability with respect to whether they should have separated [a prisoner] from his attackers." *Id*.

## FIFTH CIRCUIT

***Bender v. United States Parole Comm'n,* 802 F.3d 690 (5th Cir. 2015)**

**QUESTION ONE:** Whether the Parole Commission can impose a sentence, a term of imprisonment, and supervised release that exceeds a foreign sentence. *Id*. at 694.

**ANALYSIS:** The 5th Circuit looked at the Domestic statutory law that sets the parameters for incarceration of prisoners transferred from foreign countries under the Transfer Treaty. *Id*. The court noted that Congress has imposed a temporal limitation on the Parole Commission's discretion so that the combined periods of imprisonment and supervised release that result from such determination shall not exceed the term of imprisonment imposed by the foreign court on that offender. *Id*. The 5th Circuit stated that the "as though language" in the statute is ambiguous, and thus, as a result, the court must defer to the Commission's reasonable interpretation of the provision. *Id*. at 695. Therefore, time served rather than time sentenced is the appropriate measure of a prisoner's total time under federal supervision, and must not exceed the foreign sentence. *Id*.

**CONCLUSION:** The 5th Circuit joined the 9th and 7th Circuit by holding that "[a]lthough the foreign sentence serves as a cap on the amount of time a transferred prisoner may serve, it does not operate precisely as a statutory maximum under federal sentencing law." *Id*. at 695–96.

**QUESTION TWO:** Whether a sentence that is indeterminate discredits good time credit? *Id*. at 694.

**ANALYSIS:** The 5th Circuit again looked at the applicable regulations, and stated that "the regulation is consistent with the purposes of the Treaty and the statute because it prevents a transferred prisoner's sentence from being longer than his original sentence and allows the prisoner the benefit of an earlier release from imprisonment, but also ensures that the sentence is not shorter in duration than the original sentence." *Id*. at 696.

**CONCLUSION:** The 5th Circuit once again aligned itself with the 9th Circuit by holding that the purpose of the Parole Commission is to ensure that the remaining sentence does not exceed a prisoner's original sentence. *Id*. Moreover, "where the period of supervised release would otherwise exceed the duration of the original sentence, supervised release terminates when the full term of the original sentence is completed." *Id*.

***Gibson v. United States*, 809 F.3d 807 (5th Cir. 2016)**

**QUESTION:** Whether the discretionary function exception applies to a government agency under the Federal Tort Claims Act. *Id*. at 811.

**ANALYSIS:** The court began by first determining whether the actions at issue before the court were discretionary in nature. *Id*. at 811–12. The 5th Circuit left the matter unresolved reasoning that it was unclear. *Id*. at 813. The court continued by examining whether policy reasons supported a discretionary exception. *Id*. The court looked to decisions by the 3rd and 9th Circuit for its analysis. *Id*. at *813–14. Based on the decisions of these circuits, the 5th Circuit determined that the discretionary function is not appropriate when the government is acting as a business. *Id*. at 815.

**CONCLUSION:** The 5th Circuit held that the discretionary function does not apply where the government is acting as a business. *Id*.

***Hartfield v. Osborne*, 808 F. 3d. 1066 (5th Cir. 2015)**

**QUESTION:** Whether 28 U.S.C.S. §2254 governs a habeas application when the petitioner is currently in custody pursuant to a state court judgment, but was not at the time of filing. *Id.* at *1072.

**ANALYSIS:** The 5th Circuit found the 10th Circuit case, *Yellowbear v. Wyoming Attorney General*, 525 F.3d 921, 922–25 (10th Cir. 2008) instructive in their analysis. *Id.* The court also discussed the differences between a § 2241 motion, and a § 2254 motion, noting that § 2241

challenges pretrial detention, whereas a § 2254 petition is the proper avenue for attacking the validity of a conviction and sentence. *Id.*

**CONCLUSION:** The 5th Circuit held that the plain language of § 2254 includes petitioner's current petition for a writ, because petitioner is currently in custody pursuant to a state court judgment and any habeas writ that issues from a federal court at the present time would necessarily release him from custody pursuant to a state court judgment. *Id.* at 1071–72.

***Seth B. v. Orleans Parish Sch. Bd.*, 810 F.3d 961 (5th Cir. 2016)**

**QUESTION:** Whether the phrase "hear additional evidence at the request of a party," under the Individuals with Disabilities Education Act (IDEA), requires a district court to hold an evidentiary hearing where witnesses testify and are cross-examined. *Id*. at 966.

**ANALYSIS:** The 5th Circuit found that the text of the IDEA itself does not require such a hearing. *Id*. at 970. The court further stated that the district court did not decide the case on the basis of the administrative record alone. *Id*. at 973. The district court in fact received additional evidence in the form of exhibits, affidavits, and depositions, and it held oral argument on the motion for summary judgment. *Id*.

**CONCLUSION:** The 5th Circuit concluded that an evidentiary hearing was not required. *Id*.

***United States v. Churchwell*, 807 F.3d 107 (5th Cir. 2015)**

**QUESTION:** "[W[hether a government agent may be held criminally liable for aiding and abetting where he *accepts or certifies as true* another's passport application that he knew contained false statements." *Id.* at 115.

**ANALYSIS:** The court reasoned that "[a]s a general rule, a defendant is guilty of aiding and abetting if he knowingly associated himself with and participated in the criminal venture." *Id.* (internal quotation marks and citations omitted). The court noted that "[o]ther circuits have considered whether aiding and abetting includes certifying and accepting false statements," and that the 9th Circuit has upheld a conviction for aiding and abetting passport fraud. *Id.* at 116.

**CONCLUSION:** The 5th Circuit held that a government agent may be held criminally liable for aiding and abetting if he "*accepts or certifies as true* another's passport application that he knew contained false statements." *Id.* at 115–16.

***Kitchen v. Heyns*, 802 F.3d 873 (6th Cir. 2015)**

**QUESTION:** Whether or not the 6th Circuit has appellate jurisdiction over an appeal from a Federal Rules of Civil Procedure, Rule 21 order dismissing some but not all of the defendants in a lawsuit. *Id*. at 874.

**ANALYSIS:** The court began by interpreting the language of Rule 21 of the Federal Rules of Civil Procedure. *Id.* Rule 21 applies when a party improperly adds or omits other parties in a lawsuit. *Id.* Under Rule 21, a court may (1) add or drop parties; or (2) sever the claims against the parties. *Id.* In this case, the defendants asked the court to drop fifteen of the twenty-two joined parties. *Id.* Pursuant to Rule 21, the court granted their demand and dismissed them without prejudice. *Id.* The court explained that when claims are severed, a plaintiff may appeal that judgment. *Id.* at 875. The court noted that in this particular case, the court did not sever claims, but simply removed parties without a judgment; and therefore the plaintiff may not appeal this decision. *Id.*

**CONCLUSION:** The 6th Circuit held that they did not have appellate jurisdiction and therefore dismissed the appeal. *Id.* at 876.

***Kreipke v. Wayne State Univ.*, 807 F.3d 768 (6th Cir. 2015)**

**QUESTION:** Whether a state university is a state agency, entitled to Eleventh Amendment sovereign immunity and therefore not a "person" subject to liability under the False Claims Act (FCA). *Id.* at 776.

**ANALYSIS:** The court posited that the circuits that have decided this issue, namely the 4th, 5th, 9th, 10th and 11th Circuits, have unanimously held that the proper test to determine whether an entity is an "arm of the state," for purposes of sovereign immunity under the Eleventh Amendment, is the four-factor *Ernst* test. *Id.* at 775. The court reasoned that the definition of "person" under the FCA "parallels the limitations on sovereign immunity under the Eleventh Amendment[.]" *Id.* The court followed in line with the other circuits in holding that the *Ernst* test was the proper examination for determining state liability under the FCA. *Id.*

**CONCLUSION:** The 6th Circuit held that, based on a test implemented unanimously by other circuits, the university was an arm of the state and therefore not a "person" subject to liability under the FCA. *Id.* at 781.

***Mokdad v. Lynch*, 804 F.3d 807 (6th Cir. 2015)**

**QUESTION:** Whether a district court has subject matter jurisdiction to hear a plaintiff's direct challenge to his placement on a no-fly list by the

Terrorist Screening Center, along with his challenge to the adequacy of the procedure to contest his inclusion on the no-fly list. *Id.* at 808.

**ANALYSIS:** 49 U.S.C.S. § 46110 makes it clear that the Federal Court of Appeals has exclusive jurisdiction to review the orders of some federal agencies such as the TSA. *Id.* at 809. The district court found that while the Terrorist Screening Center was not included in §46110, the doctrine of "inescapable intertwinement" allows the order by the Terrorist Screening Center to be covered due to its relationship with the TSA orders. *Id.* at 810. The doctrine of inescapable intertwinement specifies that special review statutes such as §46110 apply to "challenges to orders by a covered agency [and] to claims inescapably intertwined with an order by a covered agency." *Id.* The 6th Circuit disagreed with this view because such an expansive view "would run the risk of inadvertently expanding the number and range of agency orders that might fall under exclusive-jurisdiction provisions that Congress did not intend to sweep so broadly." *Id.* at 815. The 6th Circuit reasoned that the doctrine of inescapable intertwinement could not be extended to orders made by an agency not included in the statute, as was the case with the Terrorist Screening Center's order to place the defendant on the no fly list. *Id.*

**CONCLUSION:** The 6th Circuit held that the Federal Court of Appeals did not have exclusive jurisdiction over a challenge to a placement on a no-fly list and the district court does have subject matter jurisdiction over the issue. *Id.* Furthermore, the 6th Circuit declined to answer the question whether § 46110 would deprive the district court of subject matter jurisdiction to a challenge of the adequacy of the redress process and dismissed the claim without prejudice. *Id.*

## NINTH CIRCUIT

### ***Atl. Cas. Ins. Co. v. GTL, Inc.*, No. 13-35133, 2015 U.S. App. LEXIS 22602 (9th Cir. Dec. 24, 2015)**

**QUESTION:** "Whether, in a case involving a claim of damages by a third party, an insurer who does not receive timely notice according to the terms of an insurance policy must demonstrate prejudice from the lack of notice to avoid defense and indemnification of the insured." *Id*. *2.

**ANALYSIS:** The 9th Circuit began by certifying this issue of first impression to the Montana Supreme Court pursuant to Montana Rule of Appellate Procedure 15(3) because it involved a controlling question of state law. *Id*. As a result, "[t]he Montana Supreme Court accepted jurisdiction of the certified question and [] rendered its decision." *Id*.

**CONCLUSION:** The Montana Supreme Court found "an insurer who does not receive timely notice according to the terms of an insurance policy must demonstrate prejudice from the lack of notice to avoid defense and indemnification of the insured." *Id*.

***Bradford v. Scherschligt*, 803 F.3d 382 (9th Cir. 2015)**

**QUESTION:** Whether the statute of limitations for an action under 42 U.S.C. § 1983 based upon the deliberate fabrication of evidence runs from the time of the vacated conviction or ultimate acquittal. *Id*. at 384.

**ANALYSIS:** The 9th Circuit analogized this question of law to the common law tort which it found closely resembled the issue of malicious prosecution. *Id*. at 387–88. The court noted that the statute of limitations for malicious prosecution begins at the point when "the proceedings against the plaintiff have [been] terminated in such a manner that they cannot be revived." *Id.* at 388. The court further stated that it is both practical and logical to follow the statute of limitations for malicious prosecution and set the triggering date as the day of acquittal. *Id*.

**CONCLUSION:** The 9th Circuit determined that because a plaintiff's proceedings terminate at acquittal, this is the appropriate statute of limitations period. *Id*.

***Bravo v. City of Santa Maria*, 810 F.3d 659 (9th Cir. 2016)**

**QUESTION:** Whether "in considering an award of attorney fees under 42 U.S.C. § 1988, it is appropriate to take into consideration a plaintiff's success in obtaining a settlement against another party arising out of the same facts." *Id.* at 662.

**ANALYSIS:** The 9th Circuit noted that the first thing that courts do when determining the amount of reasonable attorney fees is to apply the lodestar method to determine what is reasonable. *Id.* at 665–66. Then the district court may adjust the lodestar based on a variety of factors including degree of success obtained by the plaintiffs. *Id*. at 666. The Supreme Court has held that that degree of success is "the most critical factor" in determining reasonableness. *Id*.

**CONCLUSION:** The 9th Circuit held that a district court may, "within the exercise of its discretion, consider the damages portion of a settlement payment by other defendants in evaluating a plaintiff's degree of success," however, it should do so only if plaintiff's counsel's time spent on settling cannot be separated from the time spent on non-settling. *Id*. at 666–67.

***Costa Brava P'ship III LP v. ChinaCast Educ. Corp. (In re ChinaCast Educ. Corp. Sec. Litig.)*, 809 F.3d 471 (9th Cir. 2015)**

**QUESTION:** Whether an employee's acts of fraud may be imputed to his employer even when those acts were against the interest of the employer. *Id*. at 472.

**ANALYSIS:** The court began by first noting that "[f]ederal securities law, embodied in the Securities Act of 1933 and the Securities Exchange Act of 1934", under which the claim was brought, "creates an extensive scheme of civil liability." *Id*. at 474 (internal quotation marks omitted). The court reasoned that because the federal securities law does not provide explicit rules for corporate liability, agency principles should apply. *Id*. at 475–76. The 9th Circuit looked at the principle of imputation which establishes liability for an employer based on acts performed within the scope of employment. *Id*. at 476. The court applied the principle of imputation to the issue at hand, noting that other courts have also followed agency principles. *Id*. at 475–76.

**CONCLUSION:** The 9th Circuit held that employers may be liable for an employee's actions that occur within the scope of employment when taking the action. *Id*. at 473.

***Dorrance v. United States*, 807 F.3d 1210 (9th Cir. 2015)**

**QUESTION:** "[W]hether a life insurance policyholder has any basis in a mutual life insurance company's membership rights." *Id.* at 1211.

**ANALYSIS:** The court noted that over the late 1990s and early 2000s there had been a trend towards the "demutualization" of mutual life insurance companies. *Id.* "As many mutual insurance companies transformed into stock companies, the surplus resulting from the sale of shares in the company was divided among current policy holders, often in the form of stocks." *Id.* The court stated that plaintiffs received and then sold the stock derived from the demutualization of life insurance companies they had policies from. *Id.* The plaintiffs asserted a zero cost basis in the stock and paid tax on the gain, while later claiming a full refund on the taxes paid on sale of stock since the stock "represented a return of previously paid policy premiums or because their mutual rights were no capable of valuation." *Id*. The court further noted that the government took the position that they were not entitled to a refund. *Id.*

**CONCLUSION:** The 9th Circuit held that the IRS properly rejected their refund claim because the plaintiffs offered "nothing to show payment for their stake in the membership rights, as opposed to premium payments for the underlying insurance coverage." *Id.* at 1219.

***HSBC Bank USA, N.A. v. Blendheim*, 803 F.3d 477 (9th Cir. 2015)**

**QUESTION:** "Whether [a] bankruptcy court [may] properly void[] [a creditor's] lien pursuant to [11 U.S.C.] § 506(d)" when the creditor fails to timely respond to a debtor's objection. *Id.* at 482, 489.

**ANALYSIS:** The court reasoned that the language of § 506(d) unequivocally expressed Congress's "clear and manifest purpose [] to nullify a creditor's legal rights in a debtor's property if the creditor's claim is not allowed, or disallowed." *Id*. at 489. Here, the bankruptcy court did not allow a creditor to prosecute its claim because the creditor failed to timely respond to the debtor's objection under § 506(d). *Id*. at 481–82. The court's plain interpretation of § 506(d) led it to hold that the claim's associated lien is also void under the statute. *Id*. at 482. Furthermore, the court and parties agreed that neither of the two exceptions specified in § 506(d) applied to the facts of the case. *Id*. at 489.

**CONCLUSION:** The 9th Circuit held that a bankruptcy court may void a lien pursuant to § 506(d) when the creditor fails to timely respond a debtor's objection. *Id.* at 501.

***Lenz v. Universal Music Corp.*, 801 F.3d 1126 (9th Cir. 2015)**

**QUESTION:** Whether copyright holders are required by 17 U.S.C. §512(c)(3)(A)(v) to determine whether material that potentially infringes on the respective copyright is considered a fair use of the copyright under 17 U.S.C. §107 prior to issuing a takedown notification. *Id*. at 1131–32.

**ANALYSIS:** The 9th Circuit explained that 17 U.S.C. §512 (c)(3)(A)(v) requires a takedown notification to include "a statement that the complaining party has a good faith belief that the use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law." *Id.* at 1129. The court noted that the key to whether fair use must be considered by a copyright holder is whether fair use is an authorization under the law as contemplated by the statute. *Id*. at 1132. Since Title 17 (Copyrights) does not define the term "authorize," the 9th Circuit looked to the common meaning. *Id*. at 1133. The 9th Circuit pointed out that Black's Law Dictionary defines "authorize as "[t]o give legal authority," "formally approve," or "empower." *Id*. (citing *Authorize*, Black's Law Dictionary (10th ed. 2014)). Therefore, 17 U.S.C. §107 "'empowers and formally approves' the use of copyrighted material if the use constitutes fair use." *Id*.

**CONCLUSION:** The 9th Circuit determined that the provisions of 17 U.S.C. §107 have created a form of "non-infringing use" because fair use is authorized by the law. *Id*. at 1133. Accordingly, a holder of a copyright "must consider the existence of fair use before sending a takedown notification" permitted by 17 U.S.C. §512(c). This demonstrates that, at

least for purposes of 17 U.S.C. §512(f), fair use must be treated differently than other traditional affirmative defenses found in copyright law. *Id*.

***Reyes v. Smith*, 810 F.3d 654 (9th Cir. 2016)**

**QUESTION:** Whether an inmate has exhausted administrative remedies under 42 U.S.C. § 1997e, if his grievance is decided on the merits at all available levels of administrative review despite failure to comply with a procedural rule. *Id.* at 656.

**ANALYSIS:** When prison officials decide not to enforce a procedural rule, but instead decide an inmate's grievance on the merits, then officials have had an opportunity to correct any claimed deprivation, and an administrative record supporting the prison's decision has been developed. *Id*. at 658. Dismissing the inmate's claim for failure to exhaust does not advance the statutory goal of avoiding unnecessary interference in prison administration. *Id*.

**CONCLUSION:** The 9th Circuit held that a prisoner exhausts all administrative remedies despite "failing to comply with a procedural rule if prison officials ignore the procedural problem and render a decision on the merits of the grievance at each available step of the administrative process." *Id.*

***Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425 (9th Cir. 2015)**

**QUESTION:** Whether the preemption provided for in the Federal Arbitration Act (FAA) extends to preempt California state law against waiving of claims pursuant to the Private Attorneys General Act (PAGA) of 2004. *Id.* at 427.

**ANALYSIS:** The 9th Circuit began its analysis by noting that the California Supreme Court held in *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014), that pre-dispute agreements to waive PAGA claims are unenforceable under California Law. *Id.*, at 429. Continuing with its analysis, the 9th Circuit noted that the FAA "was enacted in 1925 in response to widespread judicial hostility to arbitration agreements." *Id.* Therefore, the 9th Circuit reasoned that the *Iskanian* opinion does not conflict with the FAA, because it gave no preference to litigation over arbitration. *Id.* at 433.

**CONCLUSION:** The 9th Circuit determined that no preemption is necessary because the *Iskanian* opinion does not conflict with the legislative purpose of the FAA. *Id.* at 434.

***Sung Kil Jang*, No. 11-73587, 2015 U.S. App. LEXIS 22311 (9th Cir. Dec. 22, 2015)**

**QUESTION:** Whether "section 302 of the North Korean Human Rights Act of 2004 (the Act), 22 U.S.C. § 7842, preclude[s] a finding that a North Korean has 'firmly resettled' in South Korea . . . even though he otherwise meets the requirements of firm resettlement?" *Id.* at *2.

**ANALYSIS:** The court reasoned that "the text of the Act contains no reference to firm resettlement," and that "the firm resettlement statute and regulation do not refer to nationality or require an analysis of the asylum applicant's nationality." *Id.* at *12. The court noted that the regulation merely asks whether the individual has received an offer of some sort of permanent status. *Id.*

**CONCLUSION:** The 9th Circuit held that 22 U.S.C. § 7842 is clear and does not affect "the analysis of whether a North Korean has 'firmly resettled' in South Korea (or anywhere else)." *Id.* at *11–12.

***Talaie v. Wells Fargo Bank, NA*, 808 F.3d 410 (9th Cir. 2015)**

**QUESTION:** Whether 15 U.S.C. § 1641(g), which "requires a creditor who obtains a mortgage loan by sale or transfer to notify the borrower of the transfer in writing," applies retroactively. *Id*. at 411.

**ANALYSIS:** The court began its analysis by stating that there exists in American jurisprudence a deeply rooted presumption against the "retroactive application of statutes." *Id*. at 411–12. Citing the Supreme Court, the court explained that "the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place [in order] to avoid the unfairness of imposing new burdens on persons after the fact." *Id*. at 412 (internal citation and quotation marks omitted). The court then raised the specific problems that may arise from the retroactive application of § 1641(g), including but not limited to: (1) the impairment of the rights creditors possessed when they acted, (2) the "increasing [of creditors'] liability for past conduct," and (3) the "imposi[tion of] new duties on transactions already completed." *Id*. (internal quotation marks omitted). Given the problems the retroactive application of § 1641(g) may create and given that Congress never expressed a clear intent to apply to statute retroactively, the court held that the statute does not apply retroactively. *Id*. at 413.

**CONCLUSION:** The 9th Circuit held "§ 1641(g) does not apply retroactively." *Id*.

***Transbay Auto Serv. v. Chevron USA Inc.*, 807 F.3d 1113 (9th Cir. 2015)**

**QUESTION:** Whether "when a party acts in conformity with the contents of a document, such an action constitutes an adoption of the statements contained therein even if the party never" reviewed the document's contents, used the document, or relied on the document." *Id.* at 1118.

**ANALYSIS:** The court began by reiterating its possession test to determine adoption of a statement under FRE Rule 801(d)(2)(B). *Id.* at 1119. The court then noted that this circuit and all other circuits which decided this issue previously held that a party, who relies on a third-party document by submitting the document to another, after reviewing its contents, constitutes an adoptive admission. *Id.* The court noted that the key difference between these previous holdings and the issue before the court in this case rested on whether a party adopts a statement regardless of if that party reviewed the statement prior to handing it over to a third party. *Id.* at 1120. The court explained that, "we do not look to whether the party has affirmatively reviewed the document, but whether 'the surrounding circumstances tie the possessor and the document together in some meaningful way.'" *Id.* at 1121 (quoting *Pilgrim v. Trustees of Tufts College*, 118 F.3d 864 (1st Cir. 1997)). Here, the party gave an independent appraisal to a lender to secure a commercial loan. *Id.* at 1118. The court articulated that this constitutes an adoption of the statements made within the appraisal, regardless of whether the party reviewed the appraisal prior to submitting it to the lender to consider. *Id*.

**CONCLUSION:** The 9th Circuit held that the distinction between a party that personally reviewed the third-party content before submitting it to another and one that did not, is irrelevant as to its admissibility. *Id.* at 1120.

***United States v. James*, 810 F.3d 674 (9th Cir. 2016)**

**QUESTION:** What constitutes physical incapacity under 18 U.S.C. § 2242(2)(B). *Id.* at 676.

**ANALYSIS:** The 9th Circuit found support in differentiating the broader "physically incapable" standard from the narrower "physically helpless" standard, which was relied upon by the district court when it looked to federal applications of § 2242(2)(B). *Id*. at 679. For example, in the past, it had been held, in the context of sentencing, that a defendant had committed an act in violation of § 2242 where the victim "repeatedly gained and lost consciousness" and "was unconscious or nearly so" when the defendant engaged in intercourse with her. *Id*. at 681. These federal cases support the "physically incapable" standard by indicating that a

defendant may be convicted under § 2242(2)(B) where the victim had some awareness of the situation and—while not completely physically helpless—was physically hampered due to sleep, intoxication, or drug use and thereby rendered physically incapable. *Id*.

**CONCLUSION:** The 9th Circuit held that "physically incapable" under § 2242(2)(B) should be defined broadly and not confused with the narrower "physically helpless" standard employed by the district court. *Id*. at 679.

## TENTH CIRCUIT

***A.F. v. Espanola Pub. Schs.*, 801 F.3d 1245 (10th Cir. 2015)**

**QUESTION:** Whether a claimant may sue under the Americans with Disabilities Act (IDEA) when her allegations in her federal court complaint and those in her original administrative complaint are nearly identical, and where said claimant has failed to exhaust available administrative remedies. *Id.* at 1246.

**ANALYSIS:** The 10th Circuit recognized that "it's often possible to pursue claims under the IDEA and other federal statutes seriatim just as [a] plaintiff wishes to do." *Id*. The court noted, however, that there is a caveat that "except that before the filing of a civil action . . . seeking relief that is also available under [IDEA], the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under the [IDEA]." *Id*. (citing 20 U.S.C. § 1415(l)). The 10th Circuit went on to explain that a plaintiff must first exhaust the procedures set forth in subsections (f) and (g) to the same extent as would be required under the IDEA, prior to seeking alternative forms of relief. *Id*. at 1248–49. The court emphasized that mediation where the party settles is not what true meaning of exhausting all administrative procedures available. *Id*.

**CONCLUSION:** The 10th Circuit held that the plaintiff's claim must be dismissed because she failed to exhaust all available administrative remedies prior to initiating her suit in federal court. *Id*. at 1254.

***Grynberg v. Kinder Morgan Energy, L.P.*, 805 F.3d 901 (10th Cir. 2015)**

**QUESTION:** Whether the lower court erred in concluding it lacked diversity jurisdiction holding that the citizenship of a Master Limited Partnership's (MLP) consists of its unitholders' citizenship. *Id.* at 903.

**ANALYSIS:** The Supreme Court has held an unincorporated entity's citizenship is typically determined by its members' citizenship (the "*Chapman* rule"). *Id.* at 905–06. The court has characterized the

*Chapman* rule as a "doctrinal wall," and has applied it to joint stock companies, limited partnership associations, labor unions, and limited partnerships. *Id.* at 905. The court first reasoned, the long-standing rule guiding the jurisdictional citizenship of unincorporated entities, most recently stated in [*Carden v. Arkoma Associates*, 494 U.S. 185, 195, 110 S. Ct. 1015, 108 L. Ed. 2d 157 (1990)], applies to MLPs. *Id.* at 905. The court explained that the narrow exception to this rule does not apply. *Id.* Finally, the court reasoned that the Grynbergs' policy arguments are appropriately addressed by Congress, not the courts. *Id*. at 908.

**CONCLUSION:** The 10th Circuit held that an MLP's citizenship consists of its unitholders' citizenship. *Id*.

## ELEVENTH CIRCUIT

***Alabama v. PCI Gaming Auth.*, 801 F.3d 1278 (11th Cir. 2015)**

**QUESTION:** "[W]hether the *Ex parte Young* doctrine applies when a state sues a tribal official under 18 U.S.C. § 1166 seeking to enjoin class III gaming." *Id.* at 1289.

**ANALYSIS:** The *Ex parte Young* doctrine "recognize[s] an exception to sovereign immunity lawsuits against state officials for prospective declaratory or injunctive relief to stop ongoing violations of federal law," but if Congress creates a detailed remedial scheme to show its intent to displace the *Ex parte Young* doctrine, then the doctrine does not apply to the statute. *Id.* at 1288–89. The court reasoned that Congress did not create a remedial scheme in § 1166, and "[i]n the absence of such remedial regime," the court could not ascertain Congress's intent to displace the *Ex parte Young* doctrine as applied to § 1166. *Id.* 1289–90.

**CONCLUSION:** The 11th Circuit held that "the *Ex parte Young* doctrine applies to a claim under § 1166." *Id.* at 1289.

**QUESTION TWO:** Whether 18 U.S.C. § 1166 provides states with "an express or implied [federal] right of action to sue tribal officials to enjoin unlawful gaming on Indian lands." *Id.* at 1293.

**ANALYSIS:** The 11th Circuit noted that the existence of an expressed or implied statutory right to a cause of action is a question of statutory construction, and the statutory text, structure, and history should be examined to determine if such right exists. *Id.* at 1293–94. The court noted that "§ 1166 lacks any language explicitly creating a federal cause of action for a state to sue to enforce its laws." *Id.* at 1294. The court stated that for § 1166 to create an implied right of action, there must be clear evidence that Congress intended to create such right. *Id.* The court reasoned that "[u]nlike statutes that contain right-creating language,

§ 1166 does not identify a class of persons or entities protected under the statute." *Id.* at 1297. The court also reasoned that because § 1166 "has no provision explicitly creating a federal remedy for violation of a state civil law," the court "must presume [that the omission of a remedial scheme had] to have been intentional." *Id.* at 1299. The court then noted it was "Congress' stated intent that under the [Indian Gaming Regulatory Act] the federal government would be the principal authority regulating Indian gaming." *Id.* The court further stated that the legislative history shows that in creating the Indian Gaming Regulatory Act, Congress intended to strike a balance between the federal, state and tribal interests, and to strike such balance, Congress put limits on the application of state laws to tribal land. *Id.* at 1300.

**CONCLUSION:** The 11th Circuit concluded "that § 1166 does not provide states with either an express or implied right of action to sue tribal officials to enjoin unlawful gaming on Indian lands." *Id.* at 1293.

***Ellis v. Cartoon Network, Inc.*, 803 F.3d 1251 (11th Cir. 2015)**

**QUESTION:** Whether "a person who downloads and uses a free mobile application on his smartphone to view freely available content, without more, is a . . . 'subscriber' (and therefore . . . a 'consumer') under the" Video Privacy Protection Act (VPPA), 18 U.S.C. § 2710. *Id.* at 1252.

**ANALYSIS:** The court began its statutory analysis by examining the ordinary meaning of the word "subscriber." *Id.* at 1255. The court noted that "[a]lthough most definitions of 'subscribe' or 'subscriber' involve payment of some sort, not all do." *Id.* at 1256. Consequently, the court found that payment is only one of the factors a court should consider to determine whether an individual constitutes a "subscriber" under the VPPA. *Id.* The court also noted that the dictionary definitions of the word "subscriber" have the common thread of subscriptions involving some sort of "commitment, relationship, or association (financial or otherwise) between a person and an entity." *Id.*

**CONCLUSION:** The 11th Circuit held that a person who merely downloads and uses a mobile application on their smartphone, at no cost, to freely view available content is not a "subscriber," nor a "consumer," under the VPPA. *Id.* at 1252.

***Quinlan v. Sec'y, United States DOL*, No. 14-12347, 2016 U.S. App. LEXIS 207 (11th Cir. Jan. 8, 2016)**

**QUESTION:** Whether it is appropriate to impute a supervisor's knowledge of a subordinate employee's violative conduct to his employer under Occupational Safety and Health Administration (OSHA) when the supervisor himself is involved in violative conduct. *Id.* at *2.

**ANALYSIS:** The 11th Circuit found that there was no difference between this case and the classic case of a supervisor's knowledge being imputed to an employer that occurs "when the supervisor is on the scene looking on, sees the subordinate employee violating a safety rule, knows there is such a violation, but nonetheless allows it to continue." *Id.* at *20. The court noted that in both this case and the classic case, the supervisor sees the violation of the subordinate, has knowledge a violation is occurring, but nevertheless disregards the safety rule for some reason. *Id.* Furthermore, there is no fundamental unfairness in imputing knowledge of the violation to employer because the secretary of the Department of Labor (the secretary) is not relieved of her burden of proving knowledge. *Id.* at *21. The court determined that the secretary still has the burden of proving employer knowledge either through the supervisor's actual or constructive knowledge or an employer's actual or constructive knowledge of the employee's misconduct. *Id.* at *21–22. In other words, proof of the subordinate employee's misconduct does not prove the employer had knowledge of the misconduct. *Id.* at *22.

**CONCLUSION:** The 11th Circuit held that it is appropriate to impute a supervisor's knowledge of a subordinate's violative conduct to the employer when the supervisor himself is engaging in violative conduct. *Id.* at *23.

***Sovereign Military Hospitaller Order of Saint John v. Fla. Priory of the Knights Hospitallers of the Sovereign Order of Saint John*, 809 F.3d 1171 (11th Cir. 2015)**

**QUESTION:** The 11th Circuit addressed the issue of whether "the statutory defenses in 15 U.S.C.S. §1115(b) of the Lanham Act defeated the presumption of strength [the 11th Circuit] identified in [*Dieter v. B&H Industries of Southwest Florida*, Inc., 880 F.2d 322, 329 (11th Cir. 1989)]?" *Id*. at 1185.

**ANALYSIS:** The 11th Circuit began by analyzing the text of the Lanham Act. *Id*. The court noted that §1115(b) of the statute, the "defenses or defects" section, rebutted "conclusive evidence of the right to use the registered mark." *Id*. The court found the section implicated the validity factor of infringement and in *Dieter* the presumption went to the second element "of infringement—confusion." *Id*. Thus, the court could not "treat the defenses in §1115(b) as defenses to the presumption we recognized in *Dieter* without overriding the plain language of the Lanham Act." *Id*.

**CONCLUSION:** The 11th Circuit found that "[a]lthough *Dieter* itself is in conflict with the statute," the court declined to extend its error any further than necessary." *Id*.

***United States v. Matchett*, 802 F.3d 1185 (11th Cir. 2015)**

**QUESTION:** "[W]hether the vagueness doctrine of the Due Process Clause of the Fifth Amendment applies to the advisory Sentencing Guidelines." *Id*. at 1189.

**ANALYSIS:** The 11th Circuit began by examining the Supreme Court's decision in *Johnson v. United States,* 135 S. Ct. 2551 (2015). *Id.* at 1193–94. In *Johnson*, the Supreme Court held that the residual clause of the Armed Career Criminal Act was unconstitutionally vague. *Id*. at 1193. However, the 11th Circuit noted that *Johnson* was confined to "criminal statutes that define elements of a crime or fix punishments." *Id*. at 1194. Importantly, the court found that the advisory Sentencing Guidelines neither fixes a punishment nor defines an element of a crime. *Id*. Further, the court reasoned that, unlike a criminal statute, a sentencing judge possesses the ability to exercise discretion when administering the Sentencing Guidelines. *Id*. Lastly, because the Sentencing Guidelines are only "advisory," defendants have no expectation of relying on them to "communicate the sentence the district court will impose." *Id*. Thus, there can be no constitutional right to a less discretionary set of Sentencing Guidelines. *Id*. at 1194–95.

**CONCLUSION:** The 11th Circuit held that the Due Process Clause of the Fifth Amendment does not apply to the advisory Sentencing Guidelines. *Id*. at 1196.

***United States v. Puentes*, 803 F.3d 597 (11th Cir. 2015)**

**QUESTION:** Whether the district court exceeded its authority under the Mandatory Victims Restitution Act (MVRA) of 1996, by using Federal Rule of Criminal Procedure 35(b) to eliminate a defendant's obligation to jointly and severally pay mandated restitution. *Id.* at 598.

**ANALYSIS:** The court considered at the language of the MVRA, which mandates restitution for certain crimes despite any other provision of law. *Id.* at 599. The court held that the congressional intent of the MVRA was to trump Rule 35. *Id.* The court found further evidence of such a congressional intent as the MVRA provides an exhaustive list of the ways in which a mandatory restitution can be modified, none of which include modification for Rule 35. *Id.*

**CONCLUSION:** The 11th Circuit held that the district court did not have the legal authority to eliminate a defendant's restitution obligation based on a Rule 35(b) motion as the MVRA was intended to trump Rule 35. *Id*. at 610.

***Villarreal v. R.J. Reynolds Tobacco Co.*, 806 F.3d 1288 (11th Cir. 2015)**

**QUESTION:** Whether § 4(a)(2) of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(a)(2) authorizes disparate impact claims by applicants for employment. *Id*. at 1290.

**ANALYSIS:** The court began by interpreting the plain language of § 4(a)(2). *Id*. at 1292. The court stated that "[i]f the language is clear, then our inquiry ends. If the language is unclear, we see if the agency that enforces the statute has interpreted the ambiguity." *Id*. The court found that the language "any individual" within the statute could reasonably be interpreted to mean current employee or job applicant. *Id*. at 1293. Before turning to the agency's reading, the court considered multiple arguments to emphasize that § 4(a)(2) could be read more than one way. *Id*. The court considered a 1971 Title VII case that analyzed language parallel to that of § 4(a)(2). *Id*. at 1293–94. The case did not directly conclude whether the identical language covered job applicants. *Id*. at 1295. The court also noted that in 1971 Congress amended the parallel language in Title VII to add "or applicants for employment," but did not amend § 4(a)(2) of the ADEA. *Id*. at 1295. Yet, the court chose not to make assumptions about Congress's intentions. *Id*. at 1296. Next, the court noted that other parts of the ADEA distinguish between employee and applicant. *Id*. However, the court reasoned that the specific use of the term "any individual" in § 4(a)(2) may be broad enough to include applicants. *Id*. at 1297. Ultimately, because the text of § 4(a)(2) did not provide clarity on the issue, the court turned towards the Equal Employment Opportunity's (EEOC) current ADEA disparate impact regulation. *Id*. at 1299. The EEOC does not distinguish between prospective and existing employees. *Id*.

**CONCLUSION:** The 11th Circuit held that § 4(a)(2) of the ADEA applies to job applicants because it is consistent with the longstanding position and interpretation of the EEOC. *Id*. at 1303.

***Washington v. SSA*, 806 F.3d 1317 (11th Cir. 2015)**

**QUESTION:** What is the "standard that federal courts apply when reviewing the Appeals Council's refusal to consider additional evidence submitted by the claimant" following the Commissioner of Social Security's denial of disability insurance and supplemental security income? *Id*. at 1320–21.

**ANALYSIS:** The 11th Circuit noted that the 10th, 7th, and 8th Circuits previously held that "whether evidence meets the new, material, and chronologically relevant standard is a question of law" subject to de novo review. *Id.* at 1321 (internal quotations omitted). The 11th Circuit did not

engage in any analysis on the issue, but rather stated that it was in agreement with their sister circuits. *Id*.

**CONCLUSION:** The 11th Circuit held that "when the Appeals Council erroneously refuses to consider evidence, it commits legal error and remand is appropriate." *Id*.