First Impressions

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

***Fed. Home Loan Bank of Boston v. Moody's Corp.*, 821 F.3d 102 (1st Cir. 2016)**

QUESTION: Whether a federal court's authority to transfer a case under 28 U.S.C. § 1631 is limited to instances where there is a lack of subject matter jurisdiction, or if transfer is also permitted where personal jurisdiction is lacking. *Id.* at 118.

ANALYSIS: The 1st Circuit began by examining the plain language of § 1631, which includes the term "want of jurisdiction," and found that the statutory text is not limited to instances where there is a lack of subject matter jurisdiction. *Id.* at 114. The court pointed out that a broad interpretation of "jurisdiction" is further supported when the statute is put into context, as Congress chose not to include the term "subject matter" before "jurisdiction" in § 1631, although it had done so throughout Title 28. *Id*. at 115. The court also noted that throughout its own case law, the term "want of jurisdiction" has never been limited to subject matter jurisdiction, a reading that is consistent with the holdings of other circuit courts that have considered the issue. *Id*. at 117. Finally, the court determined that a broad interpretation of § 1631 advances the legislative purpose of the statute, which leads to "the conclusion that transfer, rather than dismissal, is the option of choice." *Id.* at 119.

CONCLUSION: The 1st Circuit held that § 1631 transfer is permitted "where a court lacks either personal or subject matter jurisdiction." *Id.* at 117.

***Rochester Drug Co-Operative, Inc. v. Warner Chilcott Co.*, 814 F.3d 538 (1st Cir. 2016)**

QUESTION: Whether "settlement agreements are subject to federal antitrust scrutiny where they do not involve reverse payments in pure cash form." *Id.* at 542.

ANALYSIS: The court reasoned that the Supreme Court acknowledged in *FTC v. Activas*, 133 S. Ct. 2223 (2013) that "antitrust scrutiny attaches not only to pure cash reverse payments, but to other forms of reverse payment that induce the generic to abandon a patent challenge, which unreasonably eliminates competition at the expense of consumers." *Rochester Drug Co-Operative*, 814 F.3d at 550. The court further reasoned that "this approach is consistent with antitrust law, which has consistently prioritized substance over form." *Id.* The court then noted that the 3rd Circuit and the "overwhelming majority" of district courts have declined to limit the Supreme Court holding in *Activas* to apply only to cash payments. *Id.*

CONCLUSION: The 1st Circuit held that the Supreme Court holding should be read broadly to apply to all reverse payments, and that parties would be required to plead information sufficient "to estimate the value of the term, at least to the extent of determining whether it is large and unjustified." *Id.* at 552 (internal citations omitted).

***United States v. Almonte-Reyes*, 814 F.3d 24 (1st Cir. 2016)**

QUESTION: "[W]hether a federal sentence may be ordered to be consecutive to another that is anticipated but not yet imposed." *Id.* at 25.

ANALYSIS: The court began by noting that the 4th and 9th Circuits already examined the issue and held that "a district court does not have the power to impose a sentence consecutive to an anticipated but not-yet-determined federal sentence." *Id.* at 28. The 1st Circuit notes that because the pertinent statute, 18 U.S.C. § 3584(a), states "when a term of imprisonment has 'already' been imposed, a federal court has the power to sentence concurrently or consecutively." *Id.* The court further reasoned that "[b]y giving such discretion to the later federal sentencing court, '§ 3584(a) impliedly prohibits' an earlier federal court from making that decision with respect to a future federal sentence." *Id.* As such, the court agreed with the reasoning of the 4th and 9th Circuits. *Id.*

CONCLUSION: The 1st Circuit held that a federal sentence may not be ordered consecutive to another anticipated federal sentence. *Id.* at 25.

***United States v. Ford*, 821 F.3d 63 (1st Cir. 2016)**

QUESTION: Whether, in the general aiding and abetting statute, Congress intended, express or implied, to imprison people even if the person did not possess all of the facts to classify the principal's behavior as criminal. *Id* at 68–69.

ANALYSIS: The court stated that nothing in the language of 18 U.S.C. § 2(a) "expressly addresses the state of mind that a person need possess in order to be guilty of aiding and abetting the commission of a crime." *Id.* at 68. The court reasoned that "[t]he words aids, abets, counsels, commands, induces or procures all suggest that a person violates section 2 only if the person has chosen, with full knowledge, to participate in the illegal scheme." *Id.* at 69 (alteration in original) (internal citations and quotation marks omitted). The court noted that to not require a person be aware of the facts that made the offense criminal would be to "put a person in prison for a crime, without congressional direction, merely because the person was negligent in failing to be aware of the fact that transformed innocent behavior into criminal behavior." *Id.* at 69.

CONCLUSION: The 1st Circuit held that there must be evidence beyond a reasonable doubt that the person was aware of the facts that made

the offense criminal in order to be charged under the general aiding and abetting statute. *Id.* at 74.

***United States v. Wetmore*, 812 F.3d 245 (1st Cir. 2016)**

QUESTION: Pursuant to "[t]he Adam Walsh Child Protection Act (the Act), [which] allows the federal government to seek civil commitment of any 'sexually dangerous person' already in custody of the Bureau of Prisons . . . when a person who has previously been deemed sexually dangerous petitions for release from civil commitment, which party—the committed person or the government—bears the burden of proof?" *Id.* at 246.

ANALYSIS: The court noted that the Act is silent on the question in that "[the Act] states, without elaboration, that the committing court may release the committed person only '[i]f, after the [discharge] hearing, the court finds by a preponderance of the evidence that the person's condition is such that . . . he will not be sexually dangerous to others if released . . . .'" *Id*. at 247 (internal quotation marks omitted). The court looked to other circuits for case law that would provide guidance by analogy. *Id.* The court stated its reasoning rested on the "general precept that a party who seeks the affirmative of an issue at bar bears the burden of proving his petition." *Id*. at 248. The government has the initial burden to demonstrate in the first instance that a person is sexually dangerous. *Id*. Thus, in accordance with district court cases addressing the release from civil commitment of individuals deemed to be dangerous because of mental illness, the 1st Circuit held that the burden should be properly placed on the committed person. *Id.*

CONCLUSION: The 1st Circuit held "that when a person who has been civilly committed as sexually dangerous petitions for relief from his civil commitment under [the Act], he bears the burden of showing by a preponderance of the evidence that he is no longer sexually dangerous within the meaning of [the Act]." *Id.* at 248.

***United States ex rel. Winkelman v. CVS Caremark Corp.*, 827 F.3d 201 (1st Cir. 2016)**

QUESTION: Whether courts must ascertain whether a relator's allegedly new information is sufficiently significant as to fall within the meaning of "materially adds" in the original source exception to the public disclosure bar, § 3730(e)(4)(B)(2). *Id*. at 211.

ANALYSIS: The court stated that "[a]t its most abecedarian level, an addition is material if it is [o]f such a nature that knowledge of the item would affect a person's decision-making, or if it is significant or if it is essential." *Id.* (alteration in original) (internal quotation marks omitted).

The court reasoned that "the dictionary definition comports with the common law understanding of 'material,' which focuses the relevant inquiry on whether a piece of information is sufficiently important to influence the behavior of the recipient." *Id.*

CONCLUSION: The 1st Circuit held that courts must ascertain whether the "allegedly new information is sufficiently significant or essential so as to fall into the narrow category of information that materially adds to what has already been revealed through public disclosures." *Id.*

SECOND CIRCUIT

***Atlantica Holdings, Inc. v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98 (2d Cir. 2016)**

QUESTION: "[W]hether the Foreign Sovereign Immunities Act of 1976 (FSIA) . . . immunizes an instrumentality of a foreign sovereign against claims that it violated federal securities laws by making misrepresentations outside the United States concerning the value of securities purchased by investors within the United States." *Id.* at 102 (internal quotation marks omitted).

ANALYSIS: The court explained that whether a state or federal district court has immunity over a foreign state is dependent on whether one of the FSIA's exceptions to immunity applies. *Id.* at 106. The court further stated that the exception at issue—the commercial-activity exception—contains three clauses: "the action is based [1] upon a commercial activity carried on in the United States by the foreign state; [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." *Id.* The 2nd Circuit determined that although the misrepresentations were made in a foreign country, there was sufficient evidence to show causation of the plaintiff's injury in the United States to overcome FSIA immunity. *Id.* at 116.

CONCLUSION: The 2nd Circuit held a foreign sovereign wealth fund "is not immune from suit under the FSIA." *Id.* at 117.

***Dekalb County Pension Fund v. Transocean Ltd.*, 817 F.3d 393 (2d Cir. 2016)**

QUESTION: Whether § 18(a) of the Securities Exchange Act of 1934 provides "private right[s] of action that involve[s] a claim of fraud, deceit, manipulation, or contrivance," to which a five-year statute of repose under

the Sarbanes-Oxley Act of 2002, codified as 28 U.S.C. § 1658(b), would now apply. *Id.* at 398.

ANALYSIS: The 2nd Circuit found that the definition of "scienter" under § 18(a) corresponds exactly to § 1658(b)'s references to "fraud," "manipulation" and "deceit." *Id.* at 407. The court also noted that § 18(a)'s inclusion of a good-faith defense demonstrates Congress's intention to reach only fraudulent misrepresentations, rather than negligent or innocent ones. *Id.* Lastly, the 2nd Circuit explained that it has previously described a violation of § 18(a) as "fraud" on at least one other occasion. *Id.* Thus, the 2nd Circuit joined the 5th Circuit in concluding that Section 18(a) is governed by § 1658(b). *Id.*

CONCLUSION: Section 18(a) is governed by § 1658(b). *Id.*

***United States v. Derry*, 824 F.3d 299 (2d Cir. 2016)**

QUESTION: "Whether a defendant who has received a sentence modification is eligible for a further modification when, as a result of a subsequent Guidelines amendment, his revised guideline range is lower than that applied at [the] original sentencing, but not lower than the range applied at [the] prior sentence modification." *Id.* at 301.

ANALYSIS: The court first noted that other courts have found "a defendant's sentence is 'based on' the guidelines range for the sentence [currently being served], not the guidelines range used at [the] original sentencing." *Id.* at 307. The court reasoned that a "guideline range that has not been further reduced by an amendment" has a marginal effect on the sentence and does not disadvantage the defendant. *Id*. at 306. The court further reasoned that when a sentence is "based on a guideline range" that has not been lowered by a federal amendment, a defendant is ineligible for a sentence modification. *Id*.

CONCLUSION: The 2nd Circuit held that "a defendant who has received a sentence modification is serving a term of imprisonment that is 'based on' the guideline range applied at [the] most recent sentence modification," rather than the range applied at the original sentencing. *Id*. at 307.

***United States v. Holley,* 813 F.3d 117 (2d. Cir. 2016)**

QUESTION: Whether the Speedy Trial Act's (STA) waiver provision applies where "the defendant [makes] a timely motion to dismiss on STA grounds but fail[s] to challenge a particular period of delay." *Id.* at 121.

ANALYSIS: The court noted that 18 U.S.C. § 3162(a)(2) provides that "[f]ailure of the defendant to move for dismissal prior to trial constitutes waiver and imposes on the defendant the burden of proof of supporting such motion." (internal quotation marks omitted). *Id.* The court reasoned

that when the defendant has failed to support his motion with specifications for a particular period of delay, the STA waiver provision is triggered, which bars a court from reviewing such claim on appeal. *Id.* The court further reasoned that the statute suggests that Congress intended "for the waiver provision to preclude the defendant from making new arguments on appeal." *Id.*

CONCLUSION: The 2nd Circuit held that the defendant waived his claim by failing to raise it on his motion to dismiss before the district court. *Id.* at 119.

THIRD CIRCUIT

***Gourzong v. AG United States*, 826 F.3d 132 (3d Cir. 2016)**

QUESTION: Whether judgments of guilt by special courts-martial are "convictions" under § 237(a)(2)(A)(iii) of the Immigration and Nationality Act (INA). *Id.* at 138.

ANALYSIS: The court noted that several characteristics of special courts-martial compel the finding that they, like general courts-martial, are typically "genuine criminal proceedings." *Id.* at 141. The court examined the manner in which the military characterizes the proceedings, the consequences of a finding of guilt, and the rights available to the accused in determining whether a conviction by special court-martial can be a "conviction" under § 101(a)(48)(A). *Id.*

CONCLUSION: The 3rd Circuit held that convictions by special courts-martial are, as a general matter, convictions for purposes of § 101(a)(48)(A) of the INA. *Id.*

***Hamilton Park Health Care Ctr. Ltd. v. 1199 SEIU United Healthcare Workers E.*, 817 F.3d 857 (3d Cir. 2016)**

QUESTION: Whether a second-generation interest arbitration provision is permissible absent mutual consent. *Id.* at 864.

ANALYSIS: The court noted that under the Federal Arbitration Act (FAA), arbitration "is strictly a matter of contract" and the parties must agree to arbitrate. *Id.* at 864. The court also considered whether under any principle of contract or agency law a party would be required to arbitrate in the future merely because it had agreed to do so in the past. *Id.* at 865. The court reasoned that "because Hamilton Park did not consent to the provision, its inclusion is contrary to both the FAA and the [National Labor Relations Act]." *Id.* at 864.

CONCLUSION: The 3rd Circuit held that second generation interest arbitration provisions are impermissible without mutual consent. *Id.* at 864. Furthermore, the court held that second generation interest

arbitration provisions imposed without consent violate the contract law principles. *Id.*

***In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262 (3d Cir. 2016)**

QUESTION ONE: Whether the Video Privacy Protection Act (the "Act") permits a person to sue only a person who discloses information relating to viewers' consumption of video-related services or if a plaintiff can also sue a person who receives such information. *Id.* at 267.

ANALYSIS: The court noted that the 6th and 7th Circuits viewed subsection (b) of the Act as "mak[ing] certain conduct—the disclosure of personally identifiable information by a video tape service provider—unlawful," and viewed subsection (c) as "creat[ing] a cause of action against persons who engage in such conduct." *Id.* at 280–81 (alteration in original). The court also noted that "if any person could be liable under the Act, there would be no need for the Act to define a [video tape service provider] in the first place." *Id.* at 281 (alteration in original) (internal quotation marks omitted).

CONCLUSION: The 3rd Circuit agreed with the 6th and 7th Circuits and held that "only video tape service providers that disclose personally identifiable information can be liable under subsection (c) of the Act." *Id.*

QUESTION TWO: Whether the Act's prohibition on the disclosure of personally identifiable information applies to static digital identifiers. *Id.* at 267.

ANALYSIS: The court reasoned that "[t]o an average person, an IP address or a digital code in a cookie file would likely be of little help to try to identify an actual person." *Id.* at 283. The court noted that district courts are split on the issue of whether the Video Privacy Protection Act applies to static digital identifiers. *Id.* The court stated that "the proper meaning of the phrase personally identifiable information is not straightforward." *Id.* at 284 (internal quotation marks omitted). As such, the court reviewed the legislative history and noted that "Congress' purpose in passing the Video Privacy Protection Act was quite narrow[—]to prevent disclosures of information that would, with little or no extra effort, permit an ordinary recipient to identify a particular person's video-watching habits." *Id.*

CONCLUSION: The 3rd Circuit held that "personally identifiable information under the Video Privacy Protection Act means the kind of information that would readily permit an ordinary person to identify a specific individual's video-watching behavior," and that static digital identifiers "are simply too far afield from the circumstances that motivated the Act's passage to trigger liability." *Id.* at 290.

QUESTION THREE: Whether a state law claim is preempted by a federal law claim. *Id.* at 291.

ANALYSIS: The court reasoned that it "appl[ies] a general presumption against preemption [and] [i]n areas of traditional state regulation, [it] assumes that a federal statute has not supplanted state law unless Congress has made such an intention clear and manifest." *Id.* (internal quotation marks omitted). The court also noted that "the Supreme Court has . . . made clear that, even when federal laws have preemptive effect in some contexts, states generally retain their right to provide a traditional damages remedy for violations of common-law duties when those duties parallel federal requirements." *Id.*

CONCLUSION: The 3rd Circuit held that a state law claim will be preempted by a federal law claim only if it "is truly inconsistent with the obligations imposed by" the federal claim, but will not be preempted if the state claim "rests on common-law duties that are compatible with those obligations." *Id.* at 292.

***United States ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC*, 812 F.3d 294 (3d Cir. 2016)**

QUESTION: Whether the False Claims Act's amended version of the public disclosure bar and its original source exception present a jurisdictional bar. *Id*. at 296.

ANALYSIS: The court noted that the 4th and 11th Circuits determined that the amended version does not set forth a jurisdictional bar. *Id.* at 300. Both circuits reasoned that, first, the amended provision makes no mention of jurisdiction. *Id.* "Second, in amending the bar, Congress removed the jurisdictional language" from the provision. *Id.* Third, Congress did not change the jurisdictional language in neighboring provisions. *Id*. Lastly, the amended bar allows the government to oppose a court's dismissal if the claim is publically disclosed, which "dispels any notion that the bar is jurisdictional." *Id*.

CONCLUSION: The 3rd Circuit joined with the 4th and 11th Circuits in holding the amended provision does not set forth a jurisdictional bar. *Id*

***United States v. Miller*, 833 F.3d 274 (3d Cir. 2016)**

QUESTION: Whether the district court properly interpreted the statutory definition of "investment adviser" as defined under the Investment Advisers Act of 1940, 15 U.S.C. § 80b-2(a)(11). *Id.* at 279.

ANALYSIS: The court separately addressed each of the defendant's three claims that he failed to meet the definition of an "investment adviser" under the Investment Advisers Act. *Id.* at 280. First, the court determined that the defendant was "in the business" of providing securities because he

"held himself out as a person who provides investment advice." *Id.* at 282. Second, the court reasoned that the defendant did provide advice "for compensation" because of the economic benefit he gained by using investors' accounts for his own purposes. *Id.* Finally, the court reasoned that defendant was an investment adviser despite his "failure to register as such" because registration is not necessary under the Investment Advisers Act. *Id.* at 283.

CONCLUSION: The 3rd Circuit agreed with the district court, and held that the defendant was an investment adviser as defined by the Investment Advisers Act of 1940. *Id.* at 277.

FOURTH CIRCUIT

***United States v. Graham*, 824 F.3d 421 (4th Cir. 2016)**

QUESTION: Whether the "[g]overnment's acquisition of historical [cell-site location information (CSLI)]" under the Stored Communications Act violated the Fourth Amendment. *Id.* at 424.

ANALYSIS: The court began its analysis by reasoning that the third-party doctrine controlled its decision. *Id.* at 427. The court reasoned that cell phone users expose CSLI during the ordinary course of business. *Id.* As such, the court reasoned that cell phone users had voluntarily conveyed the information to the cell phone providers and could claim no expectation of privacy. *Id.* For those reasons, the court held that the government did not violate the Fourth Amendment. *Id.* at 428. The court also noted that its reasoning accords with what the 3rd, 5th, 6th and 11th Circuits have also held. *Id.*

CONCLUSION: The government did not violate the Fourth Amendment when it obtained the CSLI under the Stored Communications Act. *Id.*

***United States v. Ragin*, 820 F.3d 609 (4th Cir. 2016)**

QUESTION: "Whether a defendant's right to effective assistance of counsel is violated when his counsel sleeps during trial." *Id*. at 612.

ANALYSIS: The 4th Circuit stated that representation by counsel "is a fundamental component of our criminal justice system." *Id*. at 617. The court cited to the Supreme Court's "two-part test for deciding ineffective assistance of counsel claims." *Id*. First, the defendant must show a deficient performance on the part of his counsel. *Id*. Second, the defendant must show that counsel's deficient performance "resulted in actual prejudice to the defendant." *Id*. The court noted that its analysis was in line with the reasoning of the 2nd, 5th, 6th and 9th Circuits, which held that "prejudice must be presumed when counsel sleeps either through

a substantial portion of [a defendant's] trial or at a critical time during trial." *Id.* at 619.

CONCLUSION: The 4th Circuit held that "a defendant's Sixth Amendment right to counsel is violated when that defendant's counsel is asleep during a substantial portion of the defendant's trial." *Id*.

***United States v. Under Seal*, 819 F.3d 715 (4th Cir. 2016)**

QUESTION: Whether a judicial remedy exists that would allow juveniles to be prosecuted for murder in aid of racketeering, yet subject to a punishment different than life imprisonment or death, as required by statute. *Id*. at 719–20.

ANALYSIS: The court first noted that the Supreme Court held in *Roper v. Simmons*, 543 U.S. 551 (2005) that it is unconstitutional to sentence juvenile offenders to death, and in *Miller v. Alabama*, 132 S. Ct. 2455 (2012) that it was unconstitutional to sentence juvenile offenders to mandatory life imprisonment. *Under Seal*, 819 F.3d at 717. The court reasoned that in the wake of this decision, it was unclear how, if at all, the government would be able to prosecute juveniles for murder in aid of racketeering as the only two authorized penalties for the crime are life imprisonment or death. *Id*. at 720. The court acknowledged that severing the unconstitutional punishments for murder in aid of racketeering would leave the statute without an applicable penalty provision. *Id*. at 723. But, the court also pointed out that "[g]rafting a newly applicable penalty provision into the murder in aid of racketeering statute . . . also runs counter to the Constitution's guarantee of due process." *Id*. at 726. The court reasoned that such a change to the statutory language would fail to provide a person with "fair notice not only of the conduct that will subject him to punishment, but also the severity of the penalty that a State may impose." *Id*. (internal citations and quotation marks omitted).

CONCLUSION: A juvenile defendant "cannot be prosecuted for murder in aid of racketeering because his conviction would require the court to impose an unconstitutional sentence." *Id*. at 728.

FIFTH CIRCUIT

***Carlson v. Bioremedi Therapeutic Sys.*, 822 F.3d 194 (5th Cir. 2016)**

QUESTION: Whether the court must create a record of its *Daubert* inquiry and make findings about the witness's qualification to give expert testimony. *Id.* at 201.

ANALYSIS: The court noted that three sister circuits have held "that a district court must still perform its gatekeeping function by performing some type of *Daubert* inquiry and by making findings about the witness's

qualifications to give expert testimony." *Id.* The court reasoned that an "expert's testimony must be reliable at each and every step or else it is inadmissible." *Id.* (internal citations and quotation marks omitted).

CONCLUSION: The 5th Circuit agreed with the sister courts in holding that the district court clearly abused its discretion by not conducting a *Daubert* inquiry or making a *Daubert* determination on the record. *Id*.

***Guar. Bank & Tr. Co. v. Agrex, Inc.*, 820 F.3d 790 (5th Cir. 2016)**

QUESTION: Whether a buyer's set-off rights take priority over a lender's production money security interest ("PMSI") in a farmer's crops. *Id*. at 793.

ANALYSIS: The court reasoned that because the PMSI had been perfected by filing a financing statement with the Mississippi Secretary of State, it fell under the protections of the Food Security Act (FSA). *Id*. at 794. The FSA provides that in a state with a centralized filing system, if the buyer fails to register with the Secretary of the State before the purchase of the farm products, and the secured party has filed an effective financing statement, then the buyer takes subject to the security interest. *Id*. at 795. The court followed the 8th Circuit's reasoning that the case was governed by the FSA and not Mississippi Code Annotated § 75-9-404 because the lender was not merely an assignee of the farmer's accounts. *Id*. at 796.

CONCLUSION: The 5th Circuit concluded when the case is governed by the FSA, and the lender filed an effective financing statement and the buyer failed to register, the PMSI takes priority over the buyer's set-off rights. *Id*. at 795.

***Groden v. City of Dallas*, 826 F.3d 280 (5th Cir. 2016)**

QUESTION: Whether a plaintiff is required to "plead the specific identity of the city policymaker" in a claim against a municipality. *Id.* at 284.

ANALYSIS: The court first noted that "the Supreme Court held that when a complaint contains sufficient *factual* allegations, a court should not grant a motion to dismiss for imperfect statement of the legal theory supporting the claim asserted." *Id.* (internal quotations omitted). The court then stated that "the Supreme Court has repeatedly emphasized that the identity of the policymaker is question of law, not of fact—specifically, a question of state law." *Id.* The court acknowledged that "to survive a motion to dismiss, [a plaintiff] need only to plead facts—facts which establish that the challenged policy was promulgated or ratified by the city's policymaker." *Id.* at 285.

CONCLUSION: "[T]he specific identity of the policymaker is a legal question that need not be pled; the complaint need only allege facts that show an official policy, promulgated or ratified by the policymaker, under which the municipality is said to be liable." *Id.* at 283.

***Hernandez v. Pena*, 820 F.3d 782 (5th Cir. 2016)**

QUESTION: Whether the proper "interpretation and application" of the well-settled defense under Article 12 of the Hague Convention considers a mutlifactors. *Id.* at 784.

ANALYSIS: The court began by noting the 2nd and 9th Circuits have applied a multifactor test in assessing whether a child is well-settled in a new environment. *Id.* at 787. The court reasoned that "[t]his approach recognizes that immigration status alone does not necessarily prevent a child from developing significant connections in a new environment, and is consistent with the text of the treaty, the State Department's guidance, and the purpose of the well-settled defense." *Id.* at 788. The court further reasoned that "application of the framework does not assign automatic treatment to any particular type of immigration status," but that a "fact-specific inquiry is necessary in every case." *Id.* at 788–89.

CONCLUSION: The 5th Circuit held that the well-settled defense required a multifactor test which considered: "(1) the child's age; (2) the stability and duration of the child's residence in the new environment; (3) whether the child attends school or day care consistently; (4) whether the child has friends and relatives in the new area; (5) the child's participation in community or extracurricular activities; (6) the respondent's employment and financial stability; and (7) the immigration status of the respondent and child." *Id.* at 787–88.

***JP Morgan Chase Bank, N.A. v. DataTreasury Corp.*, 823 F.3d 1006 (5th Cir. 2016)**

QUESTION: Whether a most favored license ("MFL") clause in a license agreement can apply retroactively when the clause is silent as to retroactivity and where "the parties contemplated the MFL clause to apply where a lump-sum payment could be replaced by a more favorable lump-sum payment." *Id.* at 1014 (internal quotation marks omitted).

ANALYSIS: The court noted that the parties could point to no case that held "amounts paid for a paid-up lump-sum license are nonrefundable." *Id.* Moreover, the court reasoned that "an MFL clause would mean virtually nothing if it did not allow the earlier licensee to obtain a lower license cost, which in turns means nothing if the earlier licensee cannot receive a refund in the amount of the overpayment." *Id.*

CONCLUSION: The 5th Circuit held that an "MFL clause may be applied retroactively and . . . [a party] is entitled to a refund for the amount it overpaid." *Id.* (alteration in original).

***Ponce-Osorio v. Johnson*, 824 F.3d 502 (5th Cir. 2016)**

QUESTION: Whether when the [Board of Immigration Appeals (BIA)] decides some issues but remands for background and security checks as to others, its decision is . . . final for purposes of judicial review." *Id.* at 507.

ANALYSIS: "An order of removal is an administrative order concluding that the alien is deportable or ordering deportation." *Id*. (internal quotation marks omitted). Reinstatement orders "merely reinstate a previously issued order of removal or deportation . . . [and] are subject to judicial review when they are also 'final' orders." *Id.* (internal citations omitted). The 5th Circuit agreed with the 9th and 10th Circuits' analysis, holding that reinstatement orders cannot be final until the reasonable fear and withholding of removal proceedings are complete. *Id*. at 506. This is so because the reinstated removal order cannot be executed until further agency proceedings are complete. *Id.* The court held that withholding-of-removal proceedings are still ongoing and not final, when the BIA remands to the immigration judge for background and security checks. *Id*.

CONCLUSION: The 5th Circuit held that "when the BIA decides some issues but remands for background and security checks as to others, its decision is not final for purposes of judicial review." *Id.* at 507.

***Rodgers v. Lancaster Police & Fire Dep't*, 819 F.3d 205 (5th Cir. 2016)**

QUESTION: Whether "a *pro se* litigant may ever represent an estate in a survival action." *Id.* at 210.

ANALYSIS: The court reasoned that waiving legal representation from a licensed professional turned on the claimant's right to the estate as the sole beneficiary. *Id.* at 211. The court found persuasive the decisions of the 2nd, 3rd, 6th, 7th, 8th and 11th Circuits that held that a rightful claimant may waive attorney representation if he or she possesses the only remaining legal interest at stake. *Id.* at 210–11. The court further reasoned, in such circumstances, the decision to pursue the claim without the guidance of a licensed practitioner falls squarely on the claimant. *Id.* at 211.

CONCLUSION: The 5th Circuit held that "[a] person with capacity under state law to represent an estate in a survival action may proceed *pro*

se if that person is the only beneficiary and the estate has no creditors." *Id*.

***United States v. Hernandez-Hernandez*, 817 F.3d 207 (5th Cir. 2016)**

QUESTION: "Whether [the defendant's] crime of conviction under § 111(a)(1) and (b) for assaulting a federal officer and inflicting bodily injury constitutes a crime of violence under § 2L1.2(b)(1)(A)(ii)." *Id.* at 210.

ANALYSIS: The court first looked at the language of the specific guidelines provision, which explains how the offense level is enhanced under circumstances of violence and prior convictions. *Id.* at 211. The court explained that there are two types of offenses that qualify an enhancement, and the court sought to determine whether one was applicable to the defendant's actions. *Id*. The 5th Circuit's Pattern Jury Instructions use a definition of "bodily injury" that requires defendant's actions to cause physical pain to the victim. *Id*. at 216.

CONCLUSION: The 5th Circuit used the 5th Circuit Pattern Jury Instructions to hold that "conviction under [the statute] necessarily required a finding that [defendant] intentionally used, attempted to use, or threatened to use physical force against the person of another." *Id*. at 217.

***United States v. Mahmood*, 820 F.3d 177 (5th Cir. 2016)**

QUESTION: "Whether actual theft or misappropriation of a person's 'means of identification' is required to satisfy the 'without lawful authority' element of aggravated identity theft proscribed in 18 U.S.C. § 1028A(a)(1)." *Id.* at 187.

ANALYSIS: The court reasoned that because "the plain language of § 1028A unambiguously criminalizes a wider array of conduct than actual theft, [it] need not resort to traditional canons of statutory interpretation to the text of the note or legislative history." *Id.* at 188. The court further determined that "nothing in the plain language of § 1028A indicates that a defendant must have actually stolen his patients' means of identification in order to be convicted of aggravated identity theft." *Id.* at 189.

CONCLUSION: The 5th Circuit held "that § 1028A does not require actual theft or misappropriation of a person's means of identification as an element of aggravated identity theft." *Id.* at 187. It further stated that the statute plainly applies to circumstances . . . where [a physician] gained access to his patients' identifying information lawfully, but then proceeded to use that information unlawfully and in excess of his patients' permission." *Id.* at 189 (alteration in original).

SIXTH CIRCUIT

***Baker Concrete Constr., Inc. v. Reinforced Concrete Contrs. Ass'n*, 820 F.3d 827 (6th Cir. 2016)**

QUESTION: "Whether an employer has the right under the National Labor Relations Act (NLRA) to repudiate both his statutory and contractual obligations under a § 8(f) collective bargaining agreement when the employer does not employ anyone within the relevant bargaining unit." *Id.* at 828 (internal citation marks omitted).

ANALYSIS: The court applied the one-employee-unit rule, stating "if there are no employees within the relevant unit for a collective bargaining agreement, then the agreement is nugatory." *Id.* at 831. The court relied on the decisions of the 7th and 9th Circuits when coming to its conclusion. *Id.* at 830.

CONCLUSION: The 6th Circuit adopted the one-employee-unit rule and held that an employer may repudiate his statutory and contractual obligations under such circumstances. *Id.* at 828.

***Booth v. Comm'r of Soc. Sec.*, 645 Fed. Appx. 455 (6th Cir. 2016)**

QUESTION: Whether the "Commissioner [of Social Security] can be compelled to pay § 406(b) attorney's fees for court representation after [a] claimant's past-due benefits have already been disbursed." *Id.* at 458 (alterations in original).

ANALYSIS: The court reasoned that "section 406(b) provides that fees for court representation are paid out of, and not in addition to, the amount of [the] past-due benefits." *Id.* (internal quotation marks omitted). The court further stated that the Commissioner of Social Security is "immune from claims for payment of attorney's fees out of the Administration's own funds absent a waiver of sovereign immunity . . . ." *Id.* The court determined that "the Commissioner 'may' certify the funds, not 'shall'" and in the event of certification, "will only withhold twenty-five percent of a claimant's benefits award for payment of attorney's fees." *Id.* at 459.

CONCLUSION: The 9th Circuit held that "the Commissioner cannot be compelled to pay § 406(b) attorney's fees for court representation after the claimant's past-due benefits have been disbursed . . . ." *Id.* at 458.

***Braun v. Ultimate Jetcharters, LLC*, 828 F.3d 501 (6th Cir. 2016)**

QUESTION: Whether a district court may amend a judgment under Rule 60(a) to reflect defendant's proper moniker. *Id.* at 515.

ANALYSIS: The court noted that under Rule 60(a), a district court "may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the

record." *Id.* However, Rule 60(a) may not be used in instances where the court changes its mind. *Id.* The court relied upon a decision of the 2nd Circuit when coming to its conclusion. *Id.* at 516.

CONCLUSION: The 6th Circuit held that the Rule 60(a) provided a proper basis for amending the judgment to reflect the defendant's correct moniker because the judgment's listing of defendant's name or legal structure was a simple misnomer. *Id.* at 516–17.

***Graiser v. Visionworks of Am., Inc.*, 819 F.3d 277 (6th Cir. 2016)**

QUESTION ONE: Whether removal was untimely under 28 U.S.C. § 1446(b)(3). *Id*. at 279. "First, what documents, if any, trigger[] § 1446(b)(3)'s thirty-day clock for removal under [Class Action Fairness Act of 2005 (CAFA)]?" *Id*. at 279.

ANALYSIS: "Determining the date upon which a defendant ascertained removability through 'receiving' necessary documents within its exclusive possession—documents that the defendant may have possessed from the beginning of litigation but only 'reviewed' at a later point in time—requires guesswork and involves ambiguity." *Id*. at 283. "[I]f a defendant seeks to remove under § 1446(b)(3) after the filing of the complaint, the district court would need to engage in the difficult and inefficient task of determining 'what the defendant should have discovered' and when this discovery should have occurred." *Id*. at 285.

CONCLUSION: The 6th Circuit held "that § 1446(b)'s thirty-day window for removal under CAFA is triggered when the defendant receives a document *from the plaintiff* from which it can first be ascertained that the case is removable under CAFA." *Id.* at 278.

QUESTION TWO: Whether "§ 1446(b)(3) provide defendants with *one* thirty-day window for removability that begins once *any* ground for removal is discovered, or can a defendant remove upon ascertaining that CAFA jurisdiction exists, even if a thirty-day removal window has expired under a different theory of federal jurisdiction." *Id.* at 279.

ANALYSIS: The court reasoned that "[f]ederal jurisdiction under CAFA, like federal jurisdiction over federal officers, serves different policy purposes than federal jurisdiction over ordinary diversity cases or cases arising under federal-question jurisdiction." *Id*. at 287. The 6th Circuit noted that "Congress clearly 'intended [CAFA] to expand substantially federal court jurisdiction over class actions' and directed that CAFA's 'provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant.'" *Id*.

CONCLUSION: The 6th Circuit held that "the presence of CAFA jurisdiction provides defendants with a new window for removability,

even if the case was originally removable under a different theory of federal jurisdiction." *Id*. at 278.

***Luis v. Zang*, 833 F.3d 619 (6th Cir. 2016)**

QUESTION ONE: Whether a manufactured device "intercepts" data––and therefore violates part of the Wiretap Act, 18 U.S.C. § 2511—when that device "creates and stores a record of whatever is sent to or from the computer in question . . . in near real-time, even while [a] person is still using the computer." *Id.* at 624 (alteration in original) (internal quotation marks omitted).

ANALYSIS: The court determined "that the term 'intercept,' [as noted in § 2510(4)], applies only to electronic communications, not to electronic storage." *Id.* at 627 (alteration in original). The court further reasoned that when a transmission ends, that "communication ceases to be a communication at all . . . [and] becomes part of electronic storage." *Id.* (internal quotation marks omitted). The court stated that it is at this point, "a person cannot 'intercept' the former communication because the term intercept . . . does not apply to electronic storage . . . ." *Id.* The court stated that an intercept "must . . . occur contemporaneously with the transmission of the communication." *Id.*

CONCLUSION: The 9th Circuit held "that, in order for an 'intercept' to occur for purposes of the Wiretap Act, the electronic communication at issue must be acquired contemporaneously with the transmission of that communication." *Id.* at 629.

QUESTION TWO: Whether a citizen has a private cause of action against a defendant for his possession of a wiretapping device pursuant to 18 U.S.C. § 2520 against a manufacturer that violated 18 U.S.C. § 2512(1)(b). *Id.* at 634.

ANALYSIS: The court first explained that § 2520 provides "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of [the Wiretap Act] may in a civil action recover from the person or entity . . . which engaged in that violation such relief as may be appropriate." *Id.* at 635. The court further determined that "possession of a wiretapping device . . . can constitute a violation of the Wiretap Act, . . . but this violation does not give rise to a private cause of action because 'possession' of such a device is distinct from 'intercepting, disclosing, or intentionally using' a communication." *Id.* at 636.

CONCLUSION: The 9th Circuit held that "the phrase 'engaged in that violation' plainly refers . . . [to] the 'violation' as an 'intercept[], disclos[ure], or intentional[] use[]'" and that possession is outside the scope of the statute. *Id.* (alterations in original).

***United States v. Collins*, 828 F.3d 386 (6th Cir. 2016)**

QUESTION: Whether it is proper for a judge to consider the results of a jury poll in sentencing a convicted defendant. *Id.* at 388.

ANALYSIS: The court reasoned that because the district court judge conducted his poll of appropriate sentencing after the jury had rendered its verdict, the judge did not confuse the jury or create undue bias in their decision-making process. *Id.* at 389. The 6th Circuit explained that it was not impermissible for a judge to consider the jury's opinion when deciding upon the defendant's sentencing, because "[f]ederal law provides nearly unfettered scope as to the sources from which a district judge may draw in determining a sentence." *Id*.

CONCLUSION: The 6th Circuit held that it was not impermissible for a district court judge to consider the results of a jury poll when implementing a downward variance on a sentence, and choosing to sentence a defendant to the statutory minimum sentence. *Id.* at 390.

***United States v. Vichitvongsa*, 819 F.3d 260 (6th Cir. 2016)**

QUESTION: "Whether a defendant can be convicted of violating [18 U.S.C.] § 924(c) twice on the sole basis of using the same firearm *one* time to simultaneously further *two* different conspiracies." *Id*. at 266 (emphasis in original).

ANALYSIS: The court analogized the defendant's conduct to a prior case in the same circuit where "agents executed a search warrant at [a defendant's] home and found two firearms and two different controlled substances." *Id.* at 266–67. The defendant there "took *one* affirmative firearm act (possessing guns) while simultaneously committing *two* predicate offenses (possessing two controlled substances), and this was not enough to substantiate *two* § 924(c) convictions. Similarly, in each robbery, [the defendant in the previous case] took *one* affirmative act (brandishing a handgun) while simultaneously committing *two* predicate offenses (conspiring to commit Hobbs Act robbery and to traffic drugs), and this does not support *two* § 924(c) convictions." *Id.* at 267 (emphasis in original).

CONCLUSION: The 6th Circuit agreed with the 2nd, 5th, 8th, 10th and D.C. Circuits by holding that "the simultaneous violation of two federal conspiracy statutes cannot support two § 924(c) charges on the sole basis of one firearm use." *Id.* at 264.

SEVENTH CIRCUIT

***United States v. Seals*, 813 F.3d 1038 (7th Cir. 2016)**

QUESTION: Whether § 1B1.3(a) of the Sentencing Guidelines limits the application of sentencing enhancements to conduct related to the "offense of conviction." *Id.* at 1045.

ANALYSIS: The 7th Circuit began by noting the "undeniable" connection between § 1B1.3(a) and both sentencing enhancements. *Id.* at 1045–46. Specifically, the court recognized that § 1B1.3(a) "narrows the scope of behavior that is relevant[,]" where §§ 2K2.1(b)(6)(B) and 3C1.2 are applied as enhancements to a defendant's sentence. *Id.* at 1047. Relying on the "plain language of the Guidelines [and] decisions from numerous other circuits," the court reasoned that application of these sentencing enhancements requires a district court to make certain factual findings that demonstrate a connection between the conduct contemplated by the enhancements and the offense for which the defendant was convicted. *Id.* at 1045.

CONCLUSION: The 7th Circuit held that § 1B1.3(a) "limits the application of §§ 2K2.1(b)(6)(B) and 3C1.2 to conducted [sic] related to the offense of conviction." *Id.* at 1046.

***Doe v. Vill. Of Deerfield*, 819 F.3d. 372 (7th Cir. 2016)**

QUESTION: "[W]hether an order denying leave to proceed anonymously is immediately appealable" under the collateral order doctrine. *Id.* at 374.

ANALYSIS: The court first noted that although "[the court's] jurisdiction is [generally] limited to final decisions of district courts . . . the collateral order doctrine [allows a] 'small class' of non-final orders [to be] deemed final and immediately appealable." *Id.* at 375. Next the court stated that to "fall within the collateral order doctrine, the non-final order must: (1) be conclusive on the issue presented; (2) resolve an important question separate from the merits of the underlying action; and (3) be 'effectively unreviewable' on an appeal from the final judgment of the underlying action." *Id.* The court noted that, when "determining whether an order falls under the collateral order doctrine, [the court must] examine 'the entire category to which a claim belongs,' rather than 'engag[ing] in an individualized jurisdictional inquiry." *Id.* at 375–76. The court reasoned that, as a class, denials of motions for leave "preclude a party's ability to proceed anonymously," do not have bearing on the underlying action, and "if parties were required to litigate the case through to a final judgment on the merits utilizing their final names, the question of whether anonymity is proper would be rendered moot." *Id.* at 376.

CONCLUSION: The 7th Circuit held that orders denying motions for leave to proceed anonymously are immediately appealable to the circuit court of appeals pursuant to the collateral order doctrine. *Id.*

***United States v. Marcotte*, 835 F.3d 652 (7th Cir. 2016)**

QUESTION: Whether "18 U.S.C. § 3147, through § 3C1.3 of the Sentencing Guidelines, can enhance a sentence for the crime of failing to appear under 18 U.S.C. § 3146." *Id.* at 653.

ANALYSIS: The court began its analysis by noting that the 1st, 4th, 5th, 6th, and 9th Circuits have all held that § 3147 can enhance a sentence for the crime of failing to appear. *Id.* The court then stated that "[w]hen a statute is unambiguous, [its] inquiry 'starts and stops' with the text." *Id.* at 656. The court further reasoned that the statute was "plain and unambiguous" in its language as it provides "a defendant . . . 'convicted of an offense committed while released under this chapter [Chapter 207] shall' be subject to additional punishment of no more than 10 years." *Id.* The court also noted that the defendant failed to appear for sentencing, which is an offense that falls under the unambiguous language of the statute, which properly justified a longer sentence. *Id.*

CONCLUSION: The 7th Circuit held that "18 U.S.C. § 3147, through § 3C1.3 of the Sentencing Guidelines, [unambiguously] can enhance a sentence for the crime of failing to appear under 18 U.S.C. § 3146." *Id.* at 658.

***United States v. Weimert*, 819 F.3d 351 (7th Cir. 2016)**

QUESTION: Whether the wire fraud statutes "can be stretched to criminalize deception about a party's negotiating positions." *Id*. at 357.

ANALYSIS: In evaluating this issue, the court considered the scope of a fiduciary duty when a corporate officer is negotiating his own compensation with the corporation. *Id*. at 368. The Delaware courts state that "an officer may negotiate his or her own employment agreement as long as the process involves negotiations performed in an adversarial and arms-length manner." *Id*. A Texas court shared a similar approach, maintaining that an officer negotiating his employment terms acts in an individual capacity because the company and employee are adverse in this context. *Id*. A Florida appellate court, however, held that a city attorney "breached his fiduciary duty in negotiating a generous severance term in his own employment contract with the city." *Id*. at 369.

CONCLUSION: The 7th Circuit held that, because "civil corporate law standards of fiduciary duty did not provide a clear answer for a situation like this," the facts of the case did not amount to wire fraud. *Id*.

EIGHTH CIRCUIT

***IBEW Local 98 Pension Fund v. Best Buy Co.*, 818 F.3d 775 (8th Cir. 2016)**

QUESTION: Whether the district court properly applied the "price impact analysis" mandated by the Supreme Court's decision in *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2015), when it found a satisfaction of the predominance requirement for class action certification. *IBEW Local 98 Pension Fund*, 818 F.3d at 783.

ANALYSIS: The Supreme Court, on an issue similar to the one present in this case, held that "plaintiffs may invoke a rebuttable fraud-on-the-market presumption of reliance." *Id*. at 779. The court explained that "[t]he presumption is based on the theory 'that the market price of shares traded on well-developed markets reflects all publicly available information,' and therefore '[a]n investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price.'" *Id*. at 779 (internal citations omitted). Plaintiff must demonstrate "(1) that the alleged misrepresentations were publicly known, (2) that they were material, (3) that the stock traded in an efficient market, and (4) that the plaintiff traded the stock between the time the misrepresentations were made and when the truth was revealed." *Id*. at 779. Finally, "'[i]f a defendant rebuts this presumption . . . ' a suit cannot proceed as a class action" because individual questions of reliance will predominate over common questions of law and fact. *Id*. at 779 (internal citations omitted).

CONCLUSION: The 8th Circuit found that here that the district court erred because "defendants rebutted [plaintiff's] presumptions by submitting direct evidence (the opinions of both parties' experts) that severed any link between the alleged conference call misrepresentations and the stock price at which plaintiffs purchased." *Id*. at 783.

***Mickelson v. County of Ramsey*, 823 F.3d 918 (8th Cir. 2016)**

QUESTION: "[W]hether . . . [a] county [violated] the arrestees' constitutional rights by collecting the . . . fee at booking without affording a pre-deprivation hearing." *Id*. at 923.

ANALYSIS: The court reasoned that "the private interest at stake—the lost use of the . . . booking fee taken from each arrestee—is 'small in absolute and relative terms.'" *Id.* at 924. The court noted that the county's interest in collecting the fees at booking is substantial. *Id.* at 925. The court further reasoned that "[a]lthough a pre-deprivation hearing offers 'the best means of ascertaining truth and minimizing the risk of error,'" the Supreme Court has recognized the "'ordinary principle' . . . that 'something less than an evidentiary hearing' [may be] sufficient prior to adverse administrative action." *Id.* at 926.

CONCLUSION: The 8th Circuit concluded that a pre-deprivation hearing is not required to collect a fee at booking and that a post-deprivation remedy may suffice. *Id.* at 927.

***Olson v. Push, Inc.*, 640 Fed. Appx. 567 (8th Cir. 2016)**

QUESTION: Whether the definition of "employer" in the Minnesota Drug and Alcohol Testing in the Workplace Act (DATWA) includes all entities doing business in Minnesota. *Id.* at 569.

ANALYSIS: The 8th Circuit reasoned that the Supreme Court of Minnesota would not read into DATWA a requirement that was purposely or inadvertently omitted by the legislature. *Id.* at 570. The court also noted that other Minnesota employee-protection statutes made use of clarifying and distinguishing language in order to define or to refer to pertinent terms. *Id.* The court further reasoned that a broad interpretation of "employer" is compatible with DATWA's purpose protecting employees when subject to employer-required drug and alcohol testing. *Id.* at 570–71.

CONCLUSION: The 8th Circuit held that the word "employer" in Minnesota's DATWA statute applied to all entities doing business in Minnesota. *Id.* at 571.

NINTH CIRCUIT

***Consumer Fin. Prot. Bureau v. Gordon*, 819 F.3d 1179 (9th Cir. 2016)**

QUESTION: Whether the appointment of a federal director by the President, pursuant to his recess-appointment power, is valid under the Constitution and did not divest the court of jurisdiction. *Id.* at 1187–89.

ANALYSIS: The court noted that "no court, including the Supreme Court, has ever suggested that Article II problems nullify Article III jurisdiction." *Id.* at 1190. The court further reasoned that where an Executive Branch agency has an interest in having a federal law enforced, the court has standing under Article III. *Id.* at 1184.

CONCLUSION: The 9th Circuit held that the appointment of the federal director was valid under Article II of the Constitution and the court's jurisdiction was not divested because the agency had an interest in having the federal law enforced and had standing under Article III of the Constitution. *Id.* at 1190.

***Douglas v. Cal. Office of Admin. Hearings*, 650 Fed. Appx. 312 (9th Cir. 2016)**

QUESTION: Whether "parents who disagree with [California Children's Services] determination can seek review of that decision in a

due process hearing under California's implementation of the Individuals with Disabilities Education Act." *Id.* at 314.

ANALYSIS: The court reasoned that the Department of Health Care Services exclusion of administrative law judges from appellate proceedings exceeded the intentions of the California Legislature. *Id.* at 315. The court noted that although not "medically trained, [administrative law judges] are triers of fact capable of weighing evidence and reaching factual conclusions." *Id.* The court further reasoned that the Individuals with Disabilities Education Act contained adequate procedural safeguards reserving due process hearings to resolve such conflict. *Id.*

CONCLUSION: The 9th Circuit held "a parent may initiate a due process hearing to seek review of [California Children's Services] determination of medical necessity in a child's [individualized education program]." *Id.* at 314.

***Flores v. City of San Gabriel*, 824 F.3d 890 (9th Cir. 2016)**

QUESTION: Whether cash-in-lieu of benefits payments may be excluded from the regular rate of pay pursuant to § 207(e)(2) of the Fair Labor Standards Act (FLSA). *Id.* at 895.

ANALYSIS: The court's interpretation of § 207(e)(2) is similar to the Department of Labor's, as set forth in 29 C.F.R. § 778.224. *Id.* at 898. "Under § 778.224(a), a payment may not be excluded from the regular rate of pay pursuant to § 207(e)(2) if it is generally understood as compensation for work, even though the payment is not directly tied to specific hours worked by an employee." *Id*. The court then looked to its previous holding, that "the question of whether a particular payment falls within the 'other similar payments' clause does not turn on whether the payment is tied to an hourly wage, but instead turns on whether the payment is a form of compensation for performing work." *Id*. at 899. Finally, the court stated, "the FLSA's inclusion of a separate exemption specifically addressing benefits, § 207(e)(4), [and] suggests that payments related to benefits would otherwise be considered compensation." *Id*. at 900.

CONCLUSION: The 9th Circuit "conclude[d] that the City's cash-in-lieu of benefits payments may not be excluded under § 207(e)(2) and therefore must be included in the calculation of the Plaintiffs' regular rate of pay." *Id*. at 898.

***Flores v. First Hawaiian Bank*, 642 F. App'x 696 (9th Cir. 2016)**

QUESTION: Whether "suing on a certificate of deposits requires not only an unequivocal demand but also a refusal." *Id.* at 698.

ANALYSIS: The court first pointed out that "every court to consider what constitutes a demand in the context of suing on a certificate of deposit

requires not only an unequivocal demand, but also a refusal." *Id*. at 697–98 (internal quotation marks omitted). Here, the court noted that its should look to the highest state court when dealing with an issue of first impression, in this case, the law of the Commonwealth of the Northern Mariana Islands ("CNMI"). *Id.* at 698. The court then reasoned that the CNMI Supreme Court would follow the general rule, which is "a refusal is required to begin the statute of limitations after a demand for payment of a certificate of deposit has been made." *Id.*

CONCLUSION: The 9th Circuit held that both a demand and refusal are required "to begin the statute of limitations after a demand for payment of a certificate of deposit has been made." *Id.*

***Hernandez v. Williams*, 829 F.3d 1068 (9th Cir. 2016)**

QUESTION: Whether the phrase "the initial communication," as it is used in Fair Debt Collection Practices Act (FDCPA) under 15 U.S.C. § 1692g(a), refers to the first communication sent by the initial debt collector who tries to collect, or to the first communication sent by *any* debt collectors, who attempt to collect on a debt. *Id*. at 1070.

ANALYSIS: The 9th Circuit began by examining the text of § 1692g(a), noting that Congress did not provide a definition of the term "the initial communication" in promulgating the FDCPA. *Id.* at 1073–74. The court reasoned that when the term is viewed in isolation, inclusion of "the" before "initial communication" would suggest "a single" communication. *Id.* at 1074. Alternatively, the court noted that when the phrase "*the* initial communication," is read in conjunction with "a debt collector," the text would appear to indicate that "Congress may have intended to impose the [requirement] on *any* debt collector . . . ." *Id.* (emphasis added). Ultimately, the court found ambiguity in the language of § 1692g(a), as the term "the initial communication" could be subjected to multiple interpretations. *Id.* at 1075. The court then looked to the broader scope of the FDCPA to provide statutory context, and found that use of the term "a debt collector" throughout the Act indicated the intent of Congress to broadly impose its requirements on *any* debt collector. *Id*. Finally, the court considered the purpose of the FDCPA and determined that the statute must be "liberally construed" to safeguard the consumer from "abusive debt collection practices." *Id.* at 1078–79.

CONCLUSION: In applying tools of statutory interpretation, the 9th Circuit held that the FDCPA unambiguously imposes requirements on "any debt collector—first or subsequent . . . in connection with the collection of any debt." *Id*. at 1080.

***Lenz v. Universal Music Corp.*, 815 F.3d 1145 (9th Cir. 2016)**

QUESTION: "Whether 17 U.S.C. § 512(c)(3)(A)(v) requires copyright holders to consider whether the potentially infringing material is a fair use of a copyright under 17 U.S.C. § 107 before issuing a takedown notification." *Id.* at 1151.

ANALYSIS: Before beginning its analysis, the court remarked that the issue had not yet been addressed in any other circuit. *Id.* The court first noted that the term "authorized by law" was not defined in the statute. *Id.* at 1152. The court next reasoned that the defendant's position conflated two separate concepts of an affirmative defense: "an affirmative defense that is labeled as such due to the procedural posture of the case, and an affirmative defense that excuses impermissible conduct." *Id.* Since the statute expressly authorized fair use, the court viewed it as incorrect to label fair use as an affirmative defense. *Id.* at 1153. Even if fair use was labeled as an affirmative defense, the court reasoned that the nature of copyright law required that it be "treated differently than traditional affirmative defenses." *Id*. at 1153.

CONCLUSION: The 9th Circuit held that "because 17 U.S.C. § 107 created a type of non-infringing use, fair use is 'authorized by the law' and a copyright holder must consider the existence of fair use before sending a takedown notification under § 512(c)." *Id.*

***McIndoe v. Huntington Ingalls Inc.*, 817 F.3d 1170 (9th Cir. 2016)**

QUESTION: "Whether a naval warship is to be a considered a 'product'" in the context of federal maritime products liability actions. *Id.* at 1173.

ANALYSIS: The court stated that the general aim of strict liability is to place the responsibility on the party most able to prevent the harm caused by dangerous products. *Id.* This goal "would be advanced little by imposing liability on the builder of a custom-ordered naval ship." *Id*. The court noted that "a ship built under government contract may not even be designed by the builder but instead by the government itself or another outside professional." *Id*. The court further reasoned that "the shipbuilder does not manufacture—and has little ability to control the quality of—the many thousands of component parts installed on each ship, let alone to account in its pricing for the virtually unlimited liability that would flow from a rule holding it strictly liable for their dangers." *Id.* at 1174.

CONCLUSION: The 9th Circuit held that an action for strict products liability premised upon the notion that the warships in question are themselves "products" under maritime law could not be sustained. *Id.*

***Oregon Rest. & Lodging Ass'n v. Perez*, 816 F.3d 1080 (9th Cir. 2016)**

QUESTION: "[W]hether the [Department of Labor (DOL)] may regulate the tip pooling practices of employers who do not take a tip credit." *Id.* at 1086.

ANALYSIS: The court first explained that in a prior case, it found § 203(m) of the Fair Labor Standards Act (FLSA) silent as to whether the DOL could regulate tip pooling practices of employers who did not take a tip credit. *Id.* The court further highlighted what the Supreme Court made clear in *Christensen v. Harris County*, 529 U.S. 576 (2000), that "an employment practice does not violate the FLSA unless the FLSA *prohibits* it." *Oregon Rest. & Lodging*, 816 F.3d at 1086 (quoting Christensen, 529 U.S. at 588). The court noted, however, that since the conclusion of *Christensen*, the DOL issued a formal rule "that extended the tip pool restrictions of section 203(m) to all employers, not just those who take a tip credit." *Id.* at 1082–83. Therefore, the court reasoned that since the DOL regulation specifically addressed the issue, the court can make a formal ruling in the case and is not bound by its previous ruling. *Id.*

CONCLUSION: The 9th Circuit held that "section 203(m)'s clear silence as to employers who do not take a tip credit has left room for the DOL to promulgate" its new regulation. *Id.* at 1088.

***Stacy v. Colvin*, 825 F.3d 563 (9th Cir. 2016)**

QUESTION: Whether "the law of the case doctrine and the rule of mandate appl[ies] to social security administrative remands from federal court in the same way they would apply to any other case." *Id*. at 566.

ANALYSIS: The 9th Circuit examined the law of the case doctrine and the rule of mandate separately. *Id*. at 567–69. The court noted that the law of the case doctrine "is concerned primarily with efficiency, and should not be applied when the evidence on remand is substantially different, when the controlling law has changed, or when applying the doctrine would be unjust." *Id*. at 567 (internal citations omitted). The court then examined the rule of mandate, and determined that if an appellate court delivers a mandate to the district court, the lower court must execute mandate, as it "cannot vary or examine that mandate for any other purpose other than executing it." *Id*. at 568 (internal citations omitted).

CONCLUSION: The 9th Circuit held "that both the law of the case doctrine and the rule of mandate apply in the social security context." *Id*. at 567.

***United States v. Grovo*, 826 F.3d 1207 (9th Cir. 2016)**

QUESTION: Whether the definition of "advertisement" under 18 U.S.C. § 2251(d) includes unbroadcasted and non-public content. *Id.* at 1217–18.

ANALYSIS: The court first noted that "[n]one of [the dictionary] definitions limit an advertisement to publications in the press or broadcasts over the air." *Id.* at 1217. The court observed that while a majority of the definitions cited involve some form of public notice or calling the public's attention to something, they do not require that an "advertisement" be targeted to the entire public. *Id.* at 1218. The 9th Circuit reasoned that the means by which an advertisement or broadcast is relayed are not the definitive feature, so long as the advertisement actually brings attention to its subject or makes a particular thing known. *Id.*

CONCLUSION: The 9th Circuit held that an advertisement does not have to be published in the press or broadcasted over the air and need only be relayed to a particular subset of the public in order for there to be a conviction under the statute. *Id.* at 1218–19.

***United States v. Reza-Ramos*, 816 F.3d 1110 (9th Cir. 2016)**

QUESTION: Whether the government or the defendant has the burden of proving the victim is an Indian or non-Indian "when the government charges a defendant with a federal crime made applicable to Indian country under the Indian General Crimes Act, 18 U.S.C. § 1152." *Id.* at 1119.

ANALYSIS: The court noted that the statute contains two exceptions: one statutory and one judicial. *Id.* The statutory exception provides that the statute does not apply when both the perpetrator and the victim of the crime are Indians. *Id.* The judge-made exception provides that federal criminal law does not apply when the perpetrator and victim are non-Indians and the crime occurred in Indian country. *Id.* at 1120. The court explained that because the statutory exception is an affirmative defense, the burden of proof lies with the defendant. *Id.* However, the judicial exception is jurisdictional, therefore, "the government must prove the jurisdictional element in a federal criminal statute . . . like any other element of the offense." *Id.*

CONCLUSION: The 9th Circuit held that the government must prove the judicial exception because it is a jurisdictional element to a criminal statute. *Id.* at 1119.

TENTH CIRCUIT

***Sierra Club v. Okla. Gas & Elec. Co.*, 816 F.3d 666 (10th Cir. 2016)**

QUESTION: Whether "the statute of limitations for unpermitted construction or modification in violation of 42 U.S.C. § 7475(a) [is] tolled for so long as the construction or modification continues." *Id.* at 676.

ANALYSIS: The court reasoned that construction violates § 7475 when the entire process of construction constitutes one act and it is "characterized as a single, continuing violation." *Id.* at 672. The court noted that the cause of action specified in § 7475 accrues at the beginning of construction or modification. *Id.* at 673. The 10th Circuit then reasoned that claims brought within five years of the completion of construction, but outside of five years of the beginning of the construction, are time-barred through the statute of limitations in 28 U.S.C § 2462. *Id.*

CONCLUSION: The 10th Circuit held that the cause of action and five-year statute of limitations period in § 2462 for a civil citizen-suit against a defendant that modifies a facility in violation of § 7475(a) begins to run when a modification is commenced, and is not tolled for the duration of the modification. *Id.*

***United States v. Iverson*, 818 F.3d 1015 (10th Cir. 2016)**

QUESTION: "Whether statements in the [Federal Deposit Insurance Corporation (FDIC)] certificate[s] and on the website . . . [fall] within an exception to the hearsay rule." *Id.* at 1019–20.

ANALYSIS: The court began by explaining that while this issue is a matter of first impression in the 10th Circuit, three other circuits have held that FDIC insurance certificates are admissible as evidence and are not inadmissible hearsay, yet all for different reasons. *Id.* at 1020. The 1st Circuit came to the conclusion under the business-record exception, the 6th Circuit held they were both business and public records, and the 9th Circuit held that they were a verbal act. *Id.* In disagreeing with the 9th Circuit, the court stated that "[t]he rule against hearsay does not apply to 'verbal acts . . . in which the statement itself affects the legal rights of the parties or is a circumstance bearing on conduct affecting their rights.'" *Id.* The court found that "[e]ven if the FDIC certificate is merely evidence of—that is, an assertion of—coverage, it easily qualifies as a public record under Fed. R. Evid. 803(8), because it officially reports that the FDIC has initiated coverage" and is thus admissible. *Id.* at 1021. The public-records exception also applies to the website because "the website information is 'a record or statement of [the FDIC]'" under Fed. R. Evid. 803(8). *Id.* Further, the court reasoned that just because the information comes from a website, "[t]heir electronic format does not, by itself, prevent them from qualifying as public records." *Id.* at 1022.

CONCLUSION: The 10th Circuit followed its sister circuits by holding that the FDIC certificate is not inadmissible hearsay, but the 10th Circuit's reasoning differed from its sister circuits because it held that "the certificate clearly sets out the FDIC's action . . . [and] [t]he certificate therefore clearly satisfies" the public records exception to the hearsay rule. *Id.* at 1021.

***United States v. Smith*, 815 F.3d 671 (10th Cir. 2016)**

QUESTION: Whether the proper unit of prosecution, mandated by the Double Jeopardy Clause, for distribution of child pornography, pursuant to 18 U.S.C.S. § 2252 (a)(2)-(b), is each instance in which another individual downloads an image from a defendant's shared folder through a peer-to-peer network. *Id.* at 675.

ANALYSIS: The court first noted that it has "held that all the defendant had to do [to be prosecuted pursuant to § 2252 (a)(2)] in the file sharing context was to make the files [containing child pornography] on his computer available for others through the file sharing program." *Id.* at 676. The court then stated that its analysis in previous holdings concerning child pornography in the peer-to-peer network context focused on the actions of the defendant. *Id.* at 677. The court noted that the statute equates the offenses of distributing and attempted distribution of child pornography. *Id.* The court also stated that "[s]everal circuits have made clear that distribution occurs when pornographic materials are transferred to or downloaded by another person and no circuit has held that a defendant can be convicted under § 2252 in the absence of a download or transfer of materials by another person." *Id.*

CONCLUSION: The 10th Circuit held that the unit of prosecution for distributing child pornography in the peer-to-peer network context, is "each actual delivery of pornographic images." *Id.*

***United States v. Supreme Court of N.M.*, 824 F.3d 1263 (10th Cir. 2016)**

QUESTION: Whether New Mexico Rule of Professional Conduct 16-308(E) is preempted with respect to federal prosecutors practicing before grand juries. *Id.* at 1267.

ANALYSIS: The court reasoned that "the Framers envisioned that the federal grand jury would possess a broad range of discretion," and that "the grand jury's function is to inquire into all information that might possibly bear on its investigation." *Id.* at 1298 (internal quotations omitted). The court further noted that "a grand jury may issue subpoenas that do not meet the stringent requirements imposed on trial subpoenas." *Id.* at 1299. The court found that Rule 16-308(E), which requires that "an attorney subpoena [be] essential and that . . . [there is] no other feasible

alternative source from which to obtain the information," is a higher bar than the federal requirements. *Id.* at 1300–01 (internal quotations omitted).

CONCLUSION: The 10th Circuit held that Rule 16-308(E) is pre-empted in the grand-jury context because it "create[s] an obstacle to the accomplishment and execution of the federal grand jury's constitutionally authorized investigative function." *Id.* at 1299 (internal quotations omitted).

ELEVENTH CIRCUIT

***Bishop v. Ross Earle & Bonan, P.A.*, 817 F.3d 1268 (11th Cir. 2016)**

QUESTION ONE: "[W]hether a debt-collection letter sent to the consumer's attorney—rather than directly to the consumer—qualifies as a 'communication with a consumer' so as to trigger § 1692g of the [Fair Debt Collection Practices Act (FDCPA)]." *Id*. at 1271 (internal quotation marks omitted).

ANALYSIS: The court began its analysis by looking to the specific provision of the FDCPA. Section 1692g defines the term "consumer" as "any natural person obligated or allegedly obligated to pay any debt." *Id*. at 1272. The court then found the term "communication" to be defined as "the conveying of information regarding a debt directly or *indirectly* to any person through any medium." *Id*. (emphasis added). The court stated that "[t]his conclusion flows from a commonsense understanding of the attorney-client relationship." *Id*. Two important goals of the FDCPA encourage the involvement of attorneys: "to eliminate abusive debt collection practices" and "to protect the consumer against debt collection abuses." *Id.* at 1273. Additionally, the court noted that "[t]he attorney is a conduit to the consumer; thus, a debt collection letter sent to the consumer's attorney is an indirect communication with the consumer." *Id*. at 1272.

CONCLUSION: The 11th Circuit held "that a debt-collection notice sent to a consumer's attorney is just such an 'indirect' communication" as provided by in the FDCPA. *Id.* at 1272 (internal quotation marks omitted).

QUESTION TWO: "[W]hether omitting the 'in writing' requirement set forth in § 1692g amounts to waiver of that requirement by the debt collector, and, if so, whether such a waiver advances the purpose of the FDCPA." *Id*. at 1271 (internal quotation marks omitted).

ANALYSIS: The court reasoned that "the debt collector 'shall' notify the consumer of her right to dispute the debt in writing . . . likewise, the consumer has a right to verification only if she disputes the debt in writing." *Id.* at 1274 (internal quotations omitted). The court noted that

"[n]othing in the statute suggests that debt collectors have discretion to relax these requirements." *Id*. Further, the FDCPA lays out remedies for violation of the statute, thus eliminating the need to allow for a waiver remedy. *Id.*

CONCLUSION: The 11th Circuit held that it "will not judicially fashion a 'wavier remedy' for violations of § 1692g when the FDCPA identifies civil liability as the remedy for noncompliance." *Id*. (internal quotations omitted).

QUESTION THREE: "[W]hether omission of the 'in writing' requirement states a claim for 'false, deceptive, or misleading' behavior in violation of § 1692e (internal quotations omitted)." *Id*. at 1271.

ANALYSIS: The court began by explaining that "[w]hen evaluating a communication under § 1692e, the court asks whether the 'least sophisticated consumer' would be deceived or misled by the communication at issue." *Id*. at 1274 (internal citations omitted). The court noted that "[t]he 'least sophisticated consumer' can be presumed to possess a rudimentary amount of information about the world and a willingness to read a collection notice with some care." *Id*. at 1275 (internal citations omitted). This standard "has an objective component in that while protecting naive consumers, the standard also prevents liability for bizarre or idiosyncratic interpretations of collection notices by preserving a quotient of reasonableness." *Id*. at 1275. The court found there was no basis in the FDCPA to treat false statements made by lawyers differently from false statements made by consumers themselves. *Id*. Neither the "competent lawyer" nor the "least sophisticated consumer" could be said to have notice of the "in writing" requirement after receiving a letter like the one alleged. *Id*.

CONCLUSION: The 11th Circuit held that the omission of the "in writing" requirement does state "a claim for 'false, deceptive, or misleading' behavior under § 1692e." *Id*. at 1277 (internal citations omitted).

***Evanto v. Fannie Mae*, 814 F.3d 1295 (11th Cir. 2016)**

QUESTION: "[W]hether an assignee can be held liable under the Truth in Lending Act for a servicer's failure to provide the borrower with a payoff balance." *Id*. at 1297.

ANALYSIS: The court first noted that under the Truth in Lending Act, an action against an assignee for a creditor's obligation to provide a timely payoff balance could be brought if two requirements are met: (1) "the violation for which such action or proceeding is brought is apparent on the face of the disclosure statement provided in connection with such transaction . . . [,]" and (2) "the assignment to the assignee was voluntary."

Id. (internal quotation marks omitted). The court interpreted "disclosure statement" to mean a document detailing the terms of the loan, before the credit is extended; therefore, this excludes the payoff balance. *Id*. at 1298. The court then noted that its interpretation of "disclosure statement" was "consistent with how courts have used the term." *Id*. For example, the 3rd Circuit stated that the disclosure statement is furnished "as an incident to the extension of credit," and the 2nd, 7th and 8th Circuits, consistent with the court, have referred to a disclosure statement as "a document provided at or before closing." *Id*. at 1298–99 (internal citations omitted).

CONCLUSION: The 11th Circuit held that an assignee cannot be held liable under the Truth in Lending Act for a servicer's failure to provide the borrower with a payoff balance because failure to provide a payoff balance is "not a violation apparent on the face of the disclosure statement in connection with such transaction pursuant to [the Truth in Lending Act]." *Id*. at 1297 (internal quotations omitted).

***Foudy v. Miami-Dade Cnty.*, 823 F.3d 590 (11th Cir. 2016)**

QUESTION: "Whether the statute of limitations in 28 U.S.C. § 1658(a) accrues when the alleged [Driver's Privacy Protection Act (DPPA)] violation occurs or at the time of discovery." *Id*. at 591.

ANALYSIS: The court adopted the 8th Circuit's definition of "accrues," which held that accrual occurs when the alleged violation occurs. *Id*. at 594. The court explained that when there is no direction in the statute as to the time of accrual, "the court should not graft a discovery rule onto a statute of limitations." *Id.* at 593–94. Further the court noted, "the alleged DPPA violations are not by their nature self-concealing, nor do they cry out for application of the discovery rule." *Id.* at 594 (internal citations omitted).

CONCLUSION: The 11th Circuit held that "the statute of limitations for a DPPA claim 'accrues' under § 1658(a) when the alleged violation occurs." *Id*. at 594.

***Peterson v. Comm'r*, 827 F.3d 968 (11th Cir. 2016)**

QUESTION: Whether a taxpayer is bound by the characterization of payments as deferred compensation thereby invoking a self-employment tax. *Id.* at 970.

ANALYSIS: The court first noted that other courts have found that "[w]hen a taxpayer characterizes a transaction in a certain form, the Commissioner may bind the taxpayer to that form for tax purposes." *Id.* at 987. The court reasoned that "while a taxpayer is free to organize his affairs as he chooses, nevertheless, once having done so, he must accept the tax consequences of his choice." *Id*. at 988.

CONCLUSION: The 11th Circuit held that a taxpayer is bound by the characterization of past payments when assessing whether the payments are subject to a self-employment tax. *Id.* at 993.

***Pioch v. IBEX Engineering Services, Inc.*, 825 F.3d 1264 (11th Cir. 2016)**

QUESTION: Whether an employee who is otherwise exempt from Fair Labor Standards Act (FLSA) coverage, pursuant to the computer-employee exemption of 29 U.S.C. § 213(a)(17), may be considered non-exempt for a three-week period during which his employer failed to pay him. *Id.* at 1269.

ANALYSIS: The court noted that no circuit court has ever expressly analyzed this question. *Id*. However, this circuit, along with the 1st and 6th Circuits have considered the related question of whether failure to pay an otherwise exempt salaried employee, as opposed to an hourly computer-employee, entitled said employee to the minimum-wage protections of the FLSA for the period during which payment was not made. *Id*. These decisions, though distinguishable, nevertheless had the effect of guiding the court to decide that an exempt computer-employee is not entitled to the FLSA protections that a non-exempt employee would receive. *Id.* at 1270. The court reasoned that the congressional intent of the FLSA was to protect minimum-wage employees, not those exempt employees paid far more than the statutory bar, seeking to utilize the FLSA to settle contract disputes about owed back wages. *Id.*

CONCLUSION: The 11th Circuit held that an exempt computer-employee is not entitled to the FLSA protections that a non-exempt employee would receive. *Id.*

***Reganit v. Sec'y*, 814 F.3d 1253 (11th Cir. 2016)**

QUESTION: "Whether [a] grant of medical parole under [8 U.S.C.] § 1182(d)(5) altered [an alien] crewman['s] status." *Id*. at 1258.

ANALYSIS: The court first noted that, under applicable statutes and regulations, an alien crewman is prohibited from "bypass[ing] the statutory bar on his adjustment of status merely by the fortuity of a subsequent medical parole to treat an illness arising while serving as a crew member." *Id*. Next, the court acknowledged that nothing in the applicable statutes and regulations imply that an alien crewman, admitted into the United States to work on board a ship, may become eligible for adjustment of status because he receives medical parole during his employment. *Id*. The court reasoned that because of "their relatively easy access to the United States, alien crewmen who have been admitted for the limited purpose of pursuing their occupation are prohibited from taking

advantage of this access to later adjust status." *Id*. at 1259 (internal quotation marks omitted).

CONCLUSION: "[A]n alien crewman granted medical parole pursuant to 8 C.F.R. § 253.1(e) does not cease being a crewman and thereby rid himself of the statutory bar on adjustment of status." *Id*. at 1258.

***Romano-Murphy v. Comm'r of the IRS*, 816 F.3d 707 (11th Cir. 2016)**

QUESTION: Whether a taxpayer is entitled to a "pre-assessment determination of her liability by the [Internal Revenue Service (IRS)] under 26 U.S.C. § 6672 if she files a timely protest." *Id.* at 710.

ANALYSIS: The court first looked at the language of § 6672 and determined that "although [the statute] does not contain a subsection concerning a pre-assessment hearing or determination of liability, subsection (b)(3) of the statute . . . does presuppose that there will be pre-assessment determination at some point if a taxpayer files a timely protest." *Id.* at 715. The court noted that "[s]tatutory silence on the details as to how these procedures are to occur does not require [it] to . . . let the IRS act in an arbitrary fashion." *Id.* at 716. The 11th Circuit went on to explain that because "a taxpayer's failure to challenge the proposed liability or amount prior to assessment has preclusive effect at a later [collection due process] hearing, it is difficult to understand how or why the IRS would not be under an obligation to make a final determination when a timely protest is made." *Id.* at 717.

CONCLUSION: The 11th Circuit held that a "taxpayer is entitled to a pre-assessment administrative determination by the IRS of her proposed liability for trust fund taxes if she files a timely protest." *Id.* at 721.

***United States v. Baston*, 818 F.3d 651 (11th Cir. 2016)**

QUESTION: "Whether an award of restitution for extraterritorial conduct exceeds the power of Congress under Article I of the Constitution, . . . and the Due Process Clause of the Fifth Amendment." *Id.* at 657.

ANALYSIS: The court found that "nothing in the Foreign Commerce Clause limits Congress's authority to enact extraterritorial criminal laws." *Id.* at 667. The court reasoned that, similar to the Interstate Commerce Clause, "Congress's power under the Foreign Commerce Clause includes at least the power to regulate the 'channels' of commerce between the United States and other countries, the 'instrumentalities' of commerce between the United States and other countries, and activities that have a 'substantial effect' on commerce between the United States and other countries." *Id.* at 668. Additionally, the court reasoned that "[c]ompliance

with international law satisfies due process because it puts a defendant 'on notice' that he could be subjected to the jurisdiction of the United States." *Id.* at 669. The court further reasoned that "exercising extraterritorial jurisdiction . . . is consistent with international law" because "[u]nder the 'protective principle' of international law, a country can enact extraterritorial criminal laws to punish conduct that 'threatens its security as a state or the operation of its governmental functions' and 'is generally recognized as a crime under the law of states that have reasonably developed legal systems.'" *Id.* at 670.

CONCLUSION: The 11th Circuit held that Congress has the power to award restitution for extraterritorial conduct even when the conduct occurs exclusively in another country. *Id.* at 671.

***United States v. Caldwell*, No. 15-14422, 2016 U.S. App. LEXIS 12405 (11th Cir. July 5, 2016)**

QUESTION ONE: Whether statutory language criminalizing certain activities relating to child pornography lacks adequate specificity rendering "the statute unconstitutionally vague" under the Fifth Amendment. *Id.* at *2.

ANALYSIS: The court reasoned that the test "for whether the vagueness doctrine voids a law is whether the law is so incoherent that it either 'denies fair notice to defendants' or 'invites arbitrary enforcement by judges.'" *Id*. at *3 (internal quotation marks omitted). The court noted that the "[defendant] does not show that either executive or judicial interpretations of this term have been at all inconsistent, unpredictable, or arbitrary." *Id.* at *5. The court also noted that "the language of [the statute] can be read as applied in a coherent way." *Id.* at *5.

CONCLUSION: The 11th Circuit held the statutory use of "relating to" is not "so vague that it fails to give ordinary people fair notice of the conduct it punishes[,]" and does not threaten arbitrary enforcement and, therefore, is constitutional. *Id.* (internal citations omitted).

QUESTION TWO: Whether the rule of lenity voids statutory language criminalizing certain activities relating to child pornography due to the inadequate specificity. *Id.* at *3.

ANALYSIS: The court reasoned that the rule of lenity "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *Id.* (internal citations omitted). The court pointed to other recent decisions which found that the lenity argument lacked traction given a "sensible grammatical principle buttressed by the statute's text and structure." *Id.* at *4.

CONCLUSION: The 11th Circuit held the statute "can be read and applied in a coherent way" and, therefore, the lenity argument failed. *Id.*

***United States v. Smith*, 821 F.3d 1293 (11th Cir. 2016)**

QUESTION: "[W]hether a state employee can, after he has been fired, waive his *Garrity* rights and allow his prior compelled and protected statements to be used by the federal government in a criminal investigation." *Id.* at 1296.

ANALYSIS: The court reasoned that "*Garrity* protections—which derive from the Fifth Amendment—are no exception to the general rule" that a person can waive his Fifth Amendment rights if he does so voluntarily, knowingly, and intelligently. *Id.* at 1304. The court further reasoned that *Garrity* rights are similar to Fifth Amendment rights because "if the totality of the circumstances surrounding the investigation reveals both an uncoerced choice and the requisite level of comprehension, a court may conclude that the Fifth Amendment rights have been waived." *Id.*

CONCLUSION: The 11th Circuit held "that *Garrity* rights may be waived in such circumstances, as long as the employee's waiver is voluntary, knowing, and intelligent." *Id.* at 1296.

***United States v. Warren*, 820 F.3d 406 (11th Cir. 2016)**

QUESTION: Whether a statutory sentencing increase applies "when only one of two or more serial numbers on a gun has been altered or obliterated." *Id*. at 407.

ANALYSIS: The court noted that the sentencing guidelines "require only that the firearm in question 'had an altered or obliterated serial number.'" *Id*. at 408. The court reasoned that the use of 'an' is merely a synonym for 'any' or 'one.' *Id*. The court further reasoned that the sentencing enhancement applies either when any serial number on a gun has been altered or obliterated or when just one serial number has been altered or obliterated. *Id.*

CONCLUSION: The 11th Circuit held that the sentencing enhancement applies in cases where a defendant clearly satisfies the plain language of the statute. *Id*.

D.C. CIRCUIT

***Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review*, 830 F.3d 667 (D.C. Cir. 2016)**

QUESTION: Whether the government can redact non-responsive information from a responsive record to a Freedom of Information Act (FOIA) request. *Id.* at 677.

ANALYSIS: The court noted that "once an agency identifies a record it deems responsive to a FOIA request, the statute compels disclosure of

the responsive record . . . [but] the agency may redact information falling within a statutory exemption." *Id.* The D.C. Circuit explained that by expressly allowing for—and only for—deletion of the portions of a responsive record which are exempt, . . . the statute reinforces the absence of any authority to delete portions of a responsive record which are not exempt." *Id.* at 678 (internal quotation marks omitted). The court reasoned that because "Congress determined that the statutory exemptions sufficiently cover the types of information which it is appropriate for the government to redact from a responsive document" it follows that "the only information the agency may redact from that record is that falling within one of the statutory exemptions." *Id.* at 677–79.

CONCLUSION: The D.C. Circuit held that it was improper to redact non-responsive information from responsive records to a FOIA request. *Id.* at 679.

***Canning v. NLRB*, 823 F.3d 76 (D.C. Cir. 2016)**

QUESTION: Whether the court's decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), "permits a properly reconstituted [National Labor Relations] Board to reconsider the merits of the case." *Canning*, 823 F.3d at 79.

ANALYSIS: The court noted that the 4th, 7th and 8th Circuits have "rejected substantially identical challenges to other [National Labor Relations] Board orders[,]" where the petitioner seeks for the courts to review the Board's decision. *Id*. at 78. The court further noted that "it is not totally consistent with common sense to suggest that when a petition has been filed with an administrative agency and that agency reached a decision but a court vacated the decision for reasons unrelated to the merits of the petition, the merits issues in the case must remain forever undecided." *Id.* at 80.

CONCLUSION: The D.C. Circuit agreed with the 4th, 7th and 8th Circuits that a properly reconstituted Board may reconsider the merits of a case, even if there is no mention of remand. *Id.* at 78.