First Impressions

The following pages contain brief summaries of issues of first impression identified by federal court of appeals opinions announced between January 1, 2017 and August 17, 2017. 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

***United States v. Gordon*, 852 F.3d 126 (1st Cir. 2017)**

QUESTION: Whether, in its application of a guideline contained in U.S.S.G. § 4B1.3 app. n.2(A), "a district court must find that a defendant's net, rather than gross, income from a criminal activity" exceeded a threshold amount before applying a "criminal livelihood [sentencing] enhancement" under U.S.S.G. § 2D1.1(b)(15)(E). *Id.* at 127–29.

ANALYSIS: The 1st Circuit noted that the text of U.S.S.G. § 4B1.3 app. n.2(A) provided "a sufficient basis" for sole reliance on gross income in applying the guideline. *Id.* at 131. This interpretation was supported by the guideline's lack of discussion on how to calculate net income, what is considered a deductible expense "for purposes of calculating" net income, how taxes should be treated, or how to "distinguish between a defendant's expenses and the manner in which he chooses to distribute, spend, or reinvest his profits." *Id.* The court then noted the guideline's lack of discussion on which party has the "burden of proving a defendant's net income." *Id.* at 131. The court noted that the 5th, 6th, and 2nd Circuits have held that "district courts permissibly considered only . . . gross income . . . in applying § 4B1.3 app. n.2(A)." *Id.* at 132 (internal citations omitted). However, the court also noted a 7th Circuit decision, which was "the only circuit case to" require a calculation of defendant's net income. *Id.* at 132. The court proceeded to distinguish the 7th Circuit case from the present case by noting that it applied a version of § 4B1.3 that "has been significantly amended" since the case was decided and that it ruled on matters that "[have] no bearing on . . . the question at issue here." *Id.* at 133. The court stressed that the Commission's amendments to § 4B1.3 in 2010 occurred after it was settled that "the majority approach to the 'income' issue was the gross-income approach." *Id.* The court noted that the Commission's decision to leave the term "income" in the statute supports a reading that the statute requires a gross-income approach. *Id.*

CONCLUSION: The 1st Circuit held that an interpretation of § 4B1.3 app. n.2(A) that would require a gross-income, rather than a net-income, approach is correct. *Id.* at 134.

***United States v. Cox*, 851 F.3d 113 (1st Cir. 2017)**

QUESTION: Whether a court may "order forfeiture of the proceeds from uncharged conduct that was part of the same fraudulent scheme alleged in the counts of conviction." *Id.* at 128.

ANALYSIS: The court highlighted that "[t]he relevant language from [the forfeiture] statutes is broadly framed to reach property beyond the amounts alleged in the count(s) of conviction." *Id.* The court noted that 18 U.S.C. § 981(a)(2) subjects "any property constituting, or derived from,

proceeds the person obtained directly or indirectly, as a result of certain specified offenses" to forfeiture. *Id.* The 1st Circuit considered the approaches of the 7th and 9th Circuits, which relied on this statutory language to find that funds that were both involved and uninvolved in the fraudulent scheme charged were subject to forfeiture. *Id.*

CONCLUSION: The 1st Circuit held that the proceeds from uncharged relevant conduct that was part of a scheme to defraud can be properly included in a forfeiture award. *Id.* at 129.

***United States v. Ortiz-Vega*, 860 F.3d 20 (1st Cir. 2017)**

QUESTION: Whether a district court "should rule on an ineffective assistance claim prior to sentencing and if so, under what circumstances." *Id.* at 29.

ANALYSIS: The court noted that the 11th and 9th Circuits have ruled on the precise issue before the court, and found their decisions to be persuasive. *Id.* at 29–31. The court recognized that, although the appellate courts typically do not hear ineffective assistance claims on direct appeal, a trial court does not need to "require a defendant to use his one [28 U.S.C. § 2255] motion to raise an ineffective assistance claim post judgement, particularly when the district court is in a position to take evidence." *Id.* at 31. The 1st Circuit determined that district court should consider; (1) whether the court would need to relieve the defendant's attorney or appoint new counsel to properly adjudicate the merits of the claim; (2) whether the defendant's claim is broad based; (3) whether the evidentiary record is "sorely lacking;" and (4) whether the interests of justice and judicial economy "would be served by delaying the trial proceedings to conduct an immediate hearing on an under-developed motion." *Id.* at 30–31.

CONCLUSION: The 1st Circuit held that "when a claim of ineffective assistance of counsel is first raised in the district court prior to the judgement of conviction, the district court may, and at times should, consider the claim at that point in the proceeding." *Id.* at 30.

***González v. Vélez,* 864 F.3d 45 (1st Cir. 2017)**

QUESTION: Whether the Civil Service Reform Act ("CSRA") and Title VII of the Civil Rights Act of 1964, taken together, "preclude a civil Racketeer Influenced and Corrupt Organizations Act ("RICO") action brought by a federal employee against their coworker and supervisors." *Id.* at 55.

ANALYSIS: The 1st Circuit noted that numerous district courts have held that CRSA precludes a civil RICO action under these circumstances. *Id.* The court reasoned that these district court decisions are consistent with the 1st Circuit's own case law which hold that the CSRA as the

exclusive approach for disputing adverse claims of discrimination in federal employment. *Id.* The court further reasoned that the United States Supreme Court has held that Title VII "provides the exclusive judicial remedy for claims of discrimination in federal employment." *Id.*

CONCLUSION: The 5th Circuit held "that the CRSA and Title VII, taken together, preclude a civil RICO action." *Id* at 55.

***Oliveira v. New Prime, Inc.*, 857 F.3d 7 (1st Cir. 2017)**

QUESTION: "[W]hether the [Federal Arbitration Act (FAA)] exempt[s] . . . transportation-worker agreements that establish or purport to establish independent-contractor relationships[.]" *Id.* at 16.

ANALYSIS: The court noted a series of various district court decisions holding that independent-contractor agreements are not contracts of employment that are exempt from the FAA because of the "strong and liberal federal policy favoring arbitral dispute resolution[.]" *Id.* at 17–18 (citation omitted). The court acknowledged that no circuit has weighed in, but disagreed with the weight of district court holdings. *Id.* at 18–19. The court reasoned that the ordinary meaning of the term "contracts of employment" refers to any agreements to do work. *Id.* at 20.

CONCLUSION: The 1st Circuit held that transportation-worker agreements are exempt from the FAA regardless of whether they refer to an independent-contractor relationship. *Id.* at 22.

***Buntin v. City of Bos.*, 857 F.3d 69 (1st Cir. 2017)**

QUESTION: Whether the United States Supreme Court holding in *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989)—that 42 U.S.C. § 1981 "provides no implied private right of action for damages against state actors"— has since been reversed by the Civil Rights Act of 1991 ("the 1991 Act"). *Buntin*, 857 F.3d at 73.

ANALYSIS: The 1st Circuit explained that "[t]wo years after *Jett*, § 1981 was amended by the [the 1991 Act]," which added two new subsections to "expand[] the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." *Id.* (internal citations and quotation marks omitted). The court acknowledged that although nine circuits have addressed the issue at hand, "[o]nly the [9th] Circuit has held that held that Congress implicitly overruled *Jett* by adding the new § 1981(c) via the 1991 Act." *Id.* at 74. The court then looked to "the statutory text and structure of the § 1981 amendments," and determined that the 1991 Act created no new "implied remedy against state actors independent of § 1983 . . . ." *Id.* at 75. The court further noted that the House Judiciary Committee's Report explicitly mentioned certain Supreme Court decisions, but made no mention of *Jett*. *Id.*

CONCLUSION: The 1st Circuit concluded "that § 1983 remains the exclusive federal damages remedy for § 1981 violations by state actors." *Id.* (internal citations and quotation marks omitted).

***Denault v. Ahern*, 857 F.3d 76 (1st Cir. 2017)**

QUESTION: Whether the government's retention of personal property after a lawful initial seizure constitutes a Fourth Amendment violation. *Id.* at 83.

ANALYSIS: The court noted that the 2nd, 6th and 7th Circuits held that government retention of property after a lawful seizure does not constitute a Fourth Amendment violation. *Id.* The court then explained that the Fourth Amendment is not the proper channel to address such claims. *Id.* at 84. The court reasoned that Fifth Amendment challenges are more proper because of the Fifth Amendment's express protection of an individual's property, pointing to the Takings Clause of the Fifth Amendment. *Id.* The court further reasoned that the Takings Clause's mandate of just compensation for the seizure of private property may provide recourse for these claims. *Id.*

CONCLUSION: The 1st Circuit held that the Fourth Amendment does not provide recourse for the government's retention of property that was legally seized under the Fourth Amendment and, rather, that Fifth Amendment challenges are proper for these claims. *Id.* at 83–84.

SECOND CIRCUIT

***United States v. Barret*, 848 F.3d 524 (2d Cir. 2017)**

QUESTION: "[W]hether a district court may permit the testimony of co-defendants who change their pleas to guilty mid-trial and testify for the government . . . ." *Id.* at 532.

ANALYSIS: The court noted that "it is well-recognized that the testimony of codefendants after negotiating a mid-trial plea bargain is admissible in certain instances for limited purposes." *Id.* (internal quotation marks omitted). The court reasoned that prejudice to co-defendants can be limited by limiting the witness's testimony to events in which he participated not to include defense planning, advising the jury that such testimony cannot be used to draw inferences about co-defendants' guilt, and advising the jury not to give undue weight to the witness's testimony. *Id.* at 534. The court further reasoned that the other courts to consider this question have held such a witness's testimony to be admissible so long as it does not result in undue prejudice to co-defendants. *Id.* at 532.

CONCLUSION: The 2nd Circuit held that a "district court may allow such testimony, but must take appropriate steps to avoid causing unfair prejudice to the remaining co-defendants." *Id.*

***Crupar-Weinmann v. Paris Baguette Am., Inc.*, 861 F.3d 76 (2d Cir. 2017)**

QUESTION: "When does a bare procedural violation of [the Fair and Accurate Credit Transactions Act of 2003 (FACTA)] constitute an injury in fact sufficient for standing to bring suit in federal court?" *Id.* at 77.

ANALYSIS: The 2nd Circuit reasoned that "the critical question for standing is 'whether the particular procedural violations alleged in this case entail *a degree of risk* sufficient to meet the concreteness requirement.'" *Id.* at 80 (internal citations omitted) (emphasis in original). Based on legislative intent, the court found that the procedural violation did not entail a sufficient degree of risk. *Id.* at 81.

CONCLUSION: The 2nd Circuit joined the 7th Circuit, holding that "the printing of an expiration date on an otherwise properly redacted receipt does not constitute an injury in fact sufficient to establish Article III standing to bring a claim alleging a bare procedural violation of FACTA." *Id.* at 82.

***Shultz v. Congregation Shearith Israel*, 2017 U.S. App. LEXIS 14764 (2d Cir. 2017)**

QUESTION: Whether a notice of termination is "itself an adverse employment action, despite its later revocation." *Id.* at *8.

ANALYSIS: The court relied on United States Supreme Court rulings that held that "a discrimination claim accrues upon notice of termination, rather than upon the implementation of that decision," and that this "necessarily implies that the notification of termination qualifies as an adverse employment action." *Id.* at *12. While the Supreme Court has not directly addressed whether a rescinded termination is an adverse employment action, "the conclusion that the notice of termination itself gives rise to a claim follows ineluctably from the Court's rulings regarding the limitations period." *Id.*

CONCLUSION: The 2nd Circuit held that a rescinded notice of termination qualifies as an adverse employment action. *Id.* at *8.

THIRD CIRCUIT

***Fields v. City of Philadelphia*, 862 F.3d 353 (3d Cir. 2017)**

QUESTION: Whether the "First Amendment protects the act of photographing, filming, or otherwise recording police officers conducting their official duties in public." *Id.* at 358.

ANALYSIS: The 3rd Circuit noted that "[w]here District Courts in our circuit have held in favor of the First Amendment right, Defendants also distinguish those cases for requiring expressive act or intent, not just recording alone." *Id.* at 362. Additionally, the court reasoned that "[they] could not say that the state of the law at the time of our cases (2012 and 2013) gave fair warning so that every reasonable officer knew that, absent some sort of expressive intent, recording public police activity was constitutionally protected." *Id.*

CONCLUSION: The 3rd Circuit held that "the officers [were] entitled to qualified immunity." *Id.* at 355.

***Doe v. Mercy Catholic Med. Ctr.*, 850 F.3d 545 (3d Cir. 2017)**

QUESTION: Whether "[a hospital's] operation of a residency program makes it an 'education program or activity' under Title IX." *Id.* at 552.

ANALYSIS: The 3rd Circuit noted that the 2nd Circuit held that "a 'program or activity' under § 1687 is an 'education program or activity' under § 1681(a) if it has 'features such that one could reasonably consider its mission to be, at least in part, educational.'" *Id.* at 555. The 3rd Circuit agreed with the 2nd Circuit, and found that "Title IX's text and structure" line up with construing a program as educational if it has features that a reasonably person could consider its mission to be partially educational. *Id.*

CONCLUSION: The 3rd Circuit held that "a 'program or activity' under § 1687 is an 'education program or activity' under § 1681(a) if it has 'features such that one could reasonably consider its mission to be, at least in part, educational.'" *Id.* (internal emphasis omitted).

***United States ex rel. Petras v. Simparel, Inc.*, 857 F.3d 497 (3d Cir. 2017)**

QUESTION: Whether the Small Business Administration ("SBA"), when acting as a receiver for a private entity, is acting as the government. *Id.* at 502.

ANALYSIS: The 3rd Circuit reasoned that "when a federally chartered – but private – entity is placed into receivership, the relevant federal agency, acting as receiver, 'takes over the day-to-day operations and assumes the powers of shareholders, board of directors, and management.'" *Id.* at 503 (internal citations omitted). Therefore, the entity does not exert any government authority. *Id.* The court further reasoned that the SBA, in acquiring all rights, privileges, and authorities of a private entity for the purpose of marshalling and liquidating assets of that company, "temporarily stepped into" the "shoes" of the private

company solely to wind it up. *Id.* at 504. The court noted that the 5th and 9th Circuit have both reasoned and held the same way. *Id.* at 503.

CONCLUSION: The 3rd Circuit held that that the SBA, when acting as a receiver under the circumstances, is not acting as the government. *Id.*

***Real Alts., Inc. v. Sec'y of HHS*, No. 16-1275, 2017 U.S. App. LEXIS 14361 (3d Cir. Aug. 4, 2017)**

QUESTION: "[W]hether employees, who oppose contraceptives on religious grounds but work for secular employers, experience a substantial burden on their religious exercise when the Government regulates group health care plans and health care insurance providers by requiring them to offer health insurance coverage that includes coverage for services the employees find incompatible with their religious beliefs." *Id.* at *29–30.

ANALYSIS: The court reasoned that an employee's religious objection to the "mandated provision of contraceptive services" must "not coerce the individuals to violate their religious beliefs or deny them the rights, benefits, and privileges enjoyed by other citizens—even if the challenged Government action would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs." *Id.* at *34. (internal citations and quotations omitted). The court further reasoned that the Contraceptive Mandate does not coerce individuals to violate their religious beliefs or deny them their rights as the Contraceptive Mandate merely "increases the number of choices an employee has when he or she purchases health insurance." *Id.* at *41–42. In short, the Contraceptive Mandate "requires nothing of the employees that implicates their religious beliefs as stated." *Id.* at *42.

CONCLUSION: The 3rd Circuit ruled that the Contraceptive Mandate did not violate the Religious Freedom Restoration Act because the employees failed to demonstrate "a substantial burden on their religious beliefs." *Id.* at *50.

***Klaas v. Shovlin*, 858 F.3d 820 (3d Cir. 2017)**

QUESTION ONE: "[W]hether bankruptcy courts have discretion to grant a brief grace period and discharge debtors who cure an arrearage in their payment plan shortly after the expiration of the plan term . . . " *Id.* at 823.

ANALYSIS: The court focused on the text of the Bankruptcy Code, specifically, " . . . [11 U.S.C. § 1307], which governs the Bankruptcy Court's power to grant a dismissal, and [11 U.S.C. § 1328], which governs its power to issue a completion discharge." *Id.* at 828–29. The court noted that § 1307 uses permissive language, such as "may," not "must." *Id.* at 829. Additionally, § 1328 " . . . directs bankruptcy courts to issue a

completion discharge if the debtor has completed 'all payments under the plan,' [§ 1328(a)], without an express requirement that such payments were made within five years." *Id.*

CONCLUSION: The 3rd Circuit held that bankruptcy courts do have discretion to allow for a brief grace period for debtors to cure an arrearage.

QUESTION TWO: Whether there are specific factors for a bankruptcy court to consider when exercising discretion relating to granting a grace period. *Id.* at 823.

ANALYSIS: The court relied on a previous bankruptcy court decision which identified four factors to consider: (1) the length of time to complete the plan?; (2) whether the debtor diligently made plan payments?; (3) the time elapsed since confirmation before dismissal is sought?; and "(4) If the plan cannot be completed on time due to a large prepetition claim, was the debtor culpable in failing to properly schedule the claim?" *Id.* at 832. The court stated that while those factors offered a helpful starting point, they do not account for certain additional factors the court deemed relevant, such as the "materiality of the default or whether allowing a cure would prejudice any creditors." *Id.* In addition, the court looked to case law and stated that other considerations include "any prejudice the plaintiff will suffer if the default is lifted, as well as the defaulting defendant's ability to present a meritorious defense, the excusability or culpability of the defendant's conduct, and the effectiveness of applying alternative sanctions." *Id.*

CONCLUSION: The 3rd Circuit held that there are five factors a bankruptcy court should consider when deciding whether to allow for a grace period; First, "whether the debtor substantially complied with the plan, including the debtor's diligence in making prior payments." *Id.* at 832. Second, "the feasibility of completing the plan if permitted, including the length of time needed and amount of arrearage due." *Id.* Third, "whether allowing a cure would prejudice any creditors," and fourth "whether the debtor's conduct is excusable or culpable, taking into account the cause of the shortfall and the timeliness of notice to the debtor." *Id.* Finally, "the availability and relative equities of other remedies, including conversion and hardship discharge." *Id.*

***Pearson v. Prison Health Serv.*, 850 F.3d 526 (3d Cir. 2017)**

QUESTION: "[W]hether and when medical expert testimony may be necessary to create a triable issue on the subjective prong of a deliberate indifference case." *Id.* at 535.

ANALYSIS: The court considered the subjective nature of the issue of indifference and how it can be proven through witness testimony as well as circumstantial evidence. *Id.* Additionally, " . . . when medical care is

provided, [the court] presume[s] that the treatment of a prisoner is proper absent evidence that it violates professional standards of care." *Id.* Finally, " . . . the mere receipt of inadequate medical care does not itself amount to deliberate indifference-the defendant must also act with the requisite state of mind when providing that inadequate care." *Id.* Based on these factors in an adequacy of medical care case, " . . . as laymen, the jury would not be in a position to determine that the particular treatment or diagnosis fell below a professional standard of care." *Id.* at 536.

CONCLUSION: The 3rd Circuit held that " . . . medical expert testimony may be necessary in some adequacy of care cases when the propriety of a particular diagnosis or course of treatment would not be apparent to a layperson." *Id.* at 537.

***Revock v. Cowpet Bay W. Condo. Ass'n*, 853 F.3d 96 (3d Cir. 2017)**

QUESTION: "[W]hether claims under the Fair Housing Act survive the death of a party." *Id.* at 105.

ANALYSIS: The court noted that the district court incorrectly applied 42 U.S.C. § 1988(a) to the Fair Housing Act. *Id.* The court concluded that both the statutory text and legislative history indicate § 1988(a) has always applied to designated statutes only, not including the Fair Housing Act. *Id*. at 106. The court further reasoned that this is an issue where a uniform federal common law rule is proper to fulfill the purpose of the statute. *Id.* at 109. Therefore, the court applied a common law rule of survival, allowing the survival of remedial but not penal claims. *Id.* The court further concluded that Congress intended for the Fair Housing Act to have broad remedial intent. *Id.* at 110.

CONCLUSION: The 3rd Circuit held that under the common law rule, Fair Housing Act claims survive the death of a party. *Id.*

FOURTH CIRCUIT

***Patterson v. Comm'r of SSA*, 846 F.3d 656 (4th Cir. 2017)**

QUESTION: "[W]hether an Administrative Law Judge's ('ALJ') failure to follow the special technique required by 20 C.F.R. § 404.1520a when evaluating a claimant's mental impairment requires remand or may constitute harmless error." *Id.* at 657.

ANALYSIS: The court reasoned that "the special-technique regulation's plain language describes what the [Social Security Administration ('SSA')] must do." *Id.* at 661. The court noted that the SSA codifying the regulation process contradicts the argument that the SSA only wanted to offer decision makers nonbinding guidance because they went through the process of issuing binding guidance. *Id.* The court further reasoned that the weight of authority suggests that a "failure to

properly document application of the special technique will rarely, if ever, be harmless because . . . it hinders judicial review." *Id.* at 662.

CONCLUSION: The court held "that such an error does not automatically require remand, but that the error was not harmless on these facts." *Id.* at 657. The court reversed the district court's order and remanded to the ALJ "for appropriate review of [the claimant's] mental impairment. *Id.*

***United States v. Maclaren*, 866 F.3d 212 (4th Cir. 2017)**

QUESTION: Whether a sexually dangerous defendant must "state with particularity 'the extent to which . . . Respondent's psychological/psychiatric condition has improved since he was committed' and 'what, if anything, Respondent has done to meet the conditions of release specified in § 4248(d)(2)'" to succeed on a motion for a discharge hearing. *Id.* at 216 (internal citations omitted).

ANALYSIS: The court noted that the controlling statute does not state what a defendant must demonstrate to succeed on his or her motion for a discharge hearing. *Id.* at 217. The court reasoned that it would be illogical to require identical evidentiary burdens for both the motion for a discharge hearing and the hearing itself when Congress only defined the evidentiary burdens applied at the hearing and did not suggest using identical burdens. *Id.* The court likened the procedural posture in a motion for a discharge hearing to a civil plaintiff attempting to overcome a motion to dismiss. *Id.*

CONCLUSION: The 4th Circuit held that the plausibility-pleading framework should be applied while assessing a motion for a discharge hearing. *Id.* The court also held that a motion for a discharge hearing should be granted only "if the motion contains sufficient factual matter, accepted as true, to state a claim for discharge that is plausible on its face" and instructed courts to construe these facts "in the light most favorable to the detainee. *Id.* at 218.

***Int'l Refugee Assistance Project v. Trump,* 857 F.3d 554 (4th Cir. 2017)**

QUESTION: Whether Executive Order No. 13780 (EO-2) should be reviewed under the Establishment Clause doctrine, when plaintiffs allege, with particularity, that an immigration action was proffered in bad faith as a guise for its religious purpose. *Id*. at 592.

ANALYSIS: The 4th Circuit reasoned that the "[p]laintiffs must plausibly allege with sufficient particularity" that the reason for the action was proffered in bad faith. *Id.* at 591. The court stated that the plaintiffs displayed more than enough findings that the true purpose behind EO-2 is an anti-Muslim religious one. *Id.* The court noted that the plaintiffs successfully identified evidence in the form of campaigning statements,

subsequent advisor statements, and the issuance of EO-1. *Id.* The court further reasoned that there was insufficient evidence that EO-2 was intended to address national security concerns. *Id.* at 592.

CONCLUSION: The 4th Circuit held that the plaintiffs made extensive showings that the governments alleged national security purpose in issuing EO-2 was done so in bad faith and therefore, the Establishment Clause doctrine applied when reviewing its constitutionality. *Id.* at 593.

***Padilla v. Troxell*, 850 F.3d 168 (4th Cir. 2017)**

QUESTION: The 4th Circuit construed the affirmative defense of consent or acquiescence under the Hague Convention, as implemented by the International Child Abduction Remedies Act ("ICARA"). *Id.* at 175.

ANALYSIS: The court determined that to establish consent, the court should "focus on the parties' conduct *prior* to the removal or retention," but that conduct *after* removal was also capable of informing whether there was consent at the time of removal. *Id.* at 176 (emphasis in original). The court reasoned that to determine subjective intent to consent by a preponderance of the evidence was "fact-intensive" and factual and credibility determinations were crucial. *Id.* The 4th Circuit further reasoned that the district court would be in the best position to make credibility determinations. *Id.*

CONCLUSION: The 4th Circuit affirmed on the dispositive basis of the consent defense, and therefore declined to consider whether the record also supports a finding that Petitioner acquiesced in the removal or retention of child. *Id.*

FIFTH CIRCUIT

***United States v. Chapman*, 851 F.3d 363 (5th Cir. 2017)**

QUESTION: Whether a court must apply the rule of lenity to reorder two convictions in the same proceeding so that the minimum sentence of 25 years for a second conviction under 18 U.S.C. § 924(c) is applied to the conviction ordinarily carrying a longer minimum sentence. *Id.* at 373.

ANALYSIS: The court noted that the mandatory minimum sentences for two first convictions of different crimes under § 924(c) are five and ten years, and if there is a second conviction of any crime under § 924(c), the mandatory minimum sentence is 25 years. *Id.* at 372–73. The court also noted that the United States Supreme Court has defined "conviction" as "the finding of guilty by a judge or jury," but did not address how to determine which conviction is the second conviction to then apply the 25-year mandatory minimum under § 924(c), when a judge has no way of knowing which conviction a jury arrives at first in secret deliberations. *Id.* at 373. The 5th Circuit joined sister circuits and applied the rule of lenity,

which serves as a tool of statutory interpretation and "requires ambiguous criminal laws to be interpreted in favor of the defendants." *Id.*

CONCLUSION: The 5th Circuit held that the conviction with the lowest mandatory minimum sentence serves as the first conviction under § 924(c) for purposes of imposing the 25-year enhanced penalty to the second conviction. *Id.* at 374.

***Whitaker v. Collier*, 862 F.3d 490 (5th Cir. 2017)**

QUESTION: Whether a method of execution claim brought under the Eighth Amendment can survive a motion to dismiss by alleging that single test of execution drugs before delivery to a prison presents a substantial risk of serious harm. *Id.* at 498.

ANALYSIS: The 5th Circuit discussed an earlier case where plaintiffs sought a stay of execution because the drugs that were going to be used had not been retested, but the court denied the stay because plaintiffs were unable to show that the drug would cause "unnecessarily severe pain that is sure, very likely, and imminent." *Id.* The 5th Circuit noted that the 8th and 11th Circuits have used a similar test to dispose of method of execution claims. *Id.* at 498–99. The 5th Circuit agreed specifically with the 8th Circuit, which held that allegations about the potential adverse effects of pentobarbital "were too speculative to survive a motion to dismiss" because all of the risks alleged by plaintiffs were hypothetical situations. *Id.* at 499.

CONCLUSION: The 5th Circuit found that since pleading hypothetical risks was insufficient to state a method of execution claim, a claim that additional testing of a drug to find a currently unknown risk cannot survive a motion to dismiss. *Id.*

***McLin v. Ard*, 866 F.3d 682 (5th Cir. 2017)**

QUESTION: "Whether voluntary surrender to an arrest warrant constitutes a seizure." *Id.* at 692.

ANALYSIS: The 5th Circuit noted that the 10th and 11th Circuits " . . . relied on [*Albright v. Oliver*, 510 U.S. 266 (1994)] to hold that a state official's acceptance of a voluntary surrender to an arrest warrant constitutes a seizure." *Ard*, 866 F.3d at 692. The 5th Circuit additionally reasoned that "[a]t the moment the officer(s) accepted [complainant's] surrender by exercising authority consistent with those warrants, no reasonable person would have believed that he was . . . free to leave." *Id.* at 693.

CONCLUSION: The court held that the complainant was "seized under the Fourth Amendment." *Id.* at 694.

***United States ex rel. Vavra v. Kellogg Brown & Root, Inc.*, 848 F.3d 366 (5th Cir. 2017)**

QUESTION ONE: What the proper standard is for imputing knowledge under the Anti-Kickback Act (AKA). *Id.* at 371.

ANALYSIS: The court noted that the "goal is to determine whether an employee's knowledge may be fairly imputed to the corporation," and that the analysis must involve "developing the evidence, both factual and expert, regarding the employees' job titles, their actual responsibilities, and their overall place within the company." *Id.* at 374–75.

CONCLUSION: The 5th Circuit held that the proper test for imputing knowledge under the AKA is that "corporations are liable 'only for the knowing violations of those employees whose authority, responsibility, or managerial role within the corporation is such that their knowledge is imputable to the corporation.'" *Id.* at 375.

QUESTION TWO: Whether the AKA "require[s] proof of a connection between the alleged kickback and a specific instance of favorable treatment." *Id.* at 371.

ANALYSIS: The court determined that the line between illegal and legal gift giving becomes difficult to define if a connection between the gift and identifiable treatment is not required. *Id.* at 378. The court found that kickbacks have the "goal of obtaining or rewarding 'favorable treatment,'" and "requires a pursuit of more than building better customer relations in the abstract." *Id.*

CONCLUSION: The statutory language of "favorable treatment . . . requires a link between the kickback and some benefit being sought or already received." *Id.*

QUESTION THREE: Whether 31 U.S.C. § 3731(c), a subsection of the False Claims Act (FCA), permits relation back for only FCA claims. *Id.* at 381.

ANALYSIS: The court found that the plain language of § 3731 permits the government to add "*any additional* claims." *Id.* at 382 (emphasis in original). The court reasoned that when read naturally, "the word 'any' has an expansive meaning." *Id.* at 383.

CONCLUSION: The 5th Circuit held that "claims" under § 3731(c) of the FCA permits relation back for non-FCA claims. *Id.* at 384.

***Turner v. Driver*, 848 F.3d 678 (5th Cir. 2017)**

QUESTION: Whether the right to record the police exists and is protected by the First Amendment. *Id.* at 687.

ANALYSIS: The court first noted that the First Amendment protects the broader right of freedom of speech and freedom of the press. *Id.* at 688. The court then stated that the principles underlying the First

Amendment support the particular right to film the police. *Id.* at 689. The court further noted that protecting the right to film the police promotes First Amendment principles. *Id.* at 690.

CONCLUSION: The court agreed with every circuit that has ruled on this question and concluded that "the First Amendment protects the right to record the police," and that the right is "subject to reasonable time, place, and manner restrictions." *Id.*

***United States v. Sanchez-Villarreal*, 857 F.3d 714 (5th Cir. 2017)**

QUESTION: Whether Amendment 794 to the United States Sentencing Guidelines ("USSG") is clarifying rather than substantive such that it can be applied retroactively. *Id.* at 718.

ANALYSIS: The court first noted that the 6th, 9th, and 11th Circuits recently determined that Amendment 794 was only clarifying, and thus retroactively applicable. *Id.* at 720. The court also noted that neither party pointed to any contrary authority. *Id*. In order to make its own determination, the court looked to several, non-determinative factors. *Id.* First, "whether the Commission expressly characterizes the amendment as clarifying," and second, "whether the amendment is intended to address a circuit split, which generally indicates that the amendment is substantive, not clarifying." *Id.* Third, "whether the amendment is listed . . . as being retroactively applicable," and fourth, "whether the amendment alters the language of the commentary rather than the language of the Guideline itself, which may suggest that it is clarifying." *Id.*

CONCLUSION: The 5th Circuit held that Amendment 794 is clarifying and, therefore, could be applied retroactively. *Id.* at 721.

***Vine v. PLS Fin. Servs.*, 689 F. App'x 800 (5th Cir. May 19, 2017)**

QUESTION: Whether the defendant "sufficiently implemented the criminal justice system to its own benefit such that its conduct constitutes a substantial invocation of the judicial process . . . ." *Id.* at 804.

ANALYSIS: The court reasoned that the unique situation of a civil debt causing both a criminal proceeding and civil action leads the court to "consider the critical role that the Defendant played in the criminal proceedings as the complainant." *Id.* at 806. The court noted that the complainant, although not a named party in a criminal proceeding, has a personal interest in the outcome of the proceeding. *Id.* The court reasoned that the role the complainant plays must be considered. *Id.* If the complainant is driving the judicial process for its own benefit, then this is a misuse of the criminal justice system. *Id.*

CONCLUSION: The 5th Circuit held that when a complainant's allegations are false, and it is clear that the goal is to use the criminal

justice system to benefit itself, then such a complaint does not "constitute a substantial invocation of the judicial process." *Id.* at 805–07.

***United States v. Sanchez-Villarreal*, 857 F.3d 714 (5th Cir. 2017)**

QUESTION: Whether Amendment 794 to U.S.S.G. § 3B1.2 was "intended only to *clarify*, rather than effect substantive changes," and thus retroactively applicable. *Id.* 719–20 (emphasis in original).

ANALYSIS: The court first noted that the 6th, 9th, and 11th Circuits "held that Amendment 794 is a clarifying amendment and thus retroactively applicable." *Id.* at 720. The court then analyzed several, non-determinative factors used to determine "whether an amendment to the Guidelines is clarifying or substantive . . . ." *Id.* The court specifically noted that "the amendment alters only the text of the commentary and does not change the text of the Guideline itself," and that " . . . the 'Reasons for Amendment' section explains that the amended commentary was issued to better reflect the Commission's intent and provide 'additional guidance to sentencing courts.'" *Id.* (internal citations omitted). The court acknowledged that although the amendment was not listed as retroactively applicable, the court had previously held that "a Guidelines amendment was clarifying even though it was not designated as applying retroactively . . . ." *Id.*

CONCLUSION: The 5th Circuit concluded that Amendment 794 is clarifying. *Id.* at 721.

***United States ex rel. Brooks v. Ormsby*, 2017 U.S.App. LEXIS 13106 (5th Cir. July 20, 2017)**

QUESTION: Whether non-lawyers are permitted to *pro se* bring a *quit tam* action as relator of the United States. *Id.* at *1–2.

ANALYSIS: The court reasons that *pro se* representation is not permissible when one brings an action solely as relator for a non-intervening party. *Id.* at *2. The court explained that the individual characteristics of *pro se* representation are abridged when the interests of a non-intervening party are at stake. *Id.* Thus, a licensed and qualified attorney is required when the interests of a non-intervening party are at stake. *Id.*

CONCLUSION: The 5th Circuit held that an individual is not permitted to bring an action *pro se* as relator for a non-intervening party and must find a licensed attorney to bring the action on her behalf. *Id.*

***United States v. Nesmith*, 866 F.3d 677 (5th Cir. 2017)**

QUESTION: "[W]hether the test for application of the sadism enhancement is subjective or objective." *Id.* at 679.

ANALYSIS: The court noted that the 2nd, 3rd, 4th, 6th, 7th, and 8th Circuits have held that the determination of whether the sadism enhancement applies is an objective inquiry." *Id.* at 680. The court expressed that there was no "compelling reason to create a circuit split." *Id.*

CONCLUSION: The 5th Circuit held that "an objective standard governs the assessment of whether an image portrays sadistic conduct under [18 U.S.C.S. app. § 2G2.1(b)(4)]," and thus, "an image portrays sadistic conduct where it depicts conduct that an objective observer would perceive as causing the victim in the image physical or emotional pain contemporaneously with the image's creation." *Id.* 679–81.

***United States v. Guillen-Cruz*, 853 F.3d 768 (5th Cir. 2017)**

QUESTION: "[W]hether a conviction under 22 U.S.C. § 2778(b)(2) and (c) constitutes an aggravated felony as defined by 8 U.S.C. § 1101(a)(43)(C)."

ANALYSIS: The 5th Circuit first determined that the relevant sentencing provision adopts the definition of "aggravated felony" as provided in 8 U.S.C. § 1101(a)(43), which states, "illicit trafficking in firearms or destructive devices (as defined in [18 U.S.C. § 921]) or in explosive materials (as defined in [18 U.S.C. § 841(c)])." *Id.* at 772 (internal quotations omitted). After next defining the relevant meaning of a "firearm," the court explained that "[a] magazine is an element of a firearm that houses ammunition," and therefore is not "a 'firearm' or 'the frame or receiver' of a firearm or a 'muffler or firearm silencer,'" nor is it "a 'destructive device' for purposes of § 921(a)(4)(A)." *Id.* (internal citations omitted). Moreover, the court noted that "[a]rticles on the Munitions List include items that clearly do not fit within the relevant definitions, such as '[w]arships and other combatant vessels,' and '[r]adar systems and equipment.'" *Id.* at 773 (internal citations omitted).

CONCLUSION: The 5th Circuit held that "it is indisputably clear from a reading of the plain statutory language that a conviction for exporting an item on the Munitions List is not an aggravated felony." *Id.* (internal citations and quotations omitted).

SIXTH CIRCUIT

***Mich. Flyer LLC v. Wayne Cnty. Airport Auth.*, 860 F.3d 425 (6th Cir. 2017)**

QUESTION: Whether "the district court abused its discretion by finding that its decision was not an intervening change in controlling law and Plaintiffs' strategic decision not to request leave until after adverse judgment was entered did not result in manifest injustice." *Id.* at 431.

ANALYSIS: The court first rejected the plaintiffs' argument that "[FED. R. CIV. P.] 59(e) relief is warranted because the district court interpreted 'individual' under the [Americans with Disabilities Act (ADA)] for the first time." *Id.* The court noted that the argument is unpersuasive because it would grant the losing party in every case of first impression the right for relief under Rule 59. *Id*. at 431–32. The court further reasoned that manifest injustice is not present "when a losing party attempts to 'correct what has–in hindsight–turned out to be a poor strategic decision.'" *Id.* at 432. The court also noted that had the district court granted the motion to reopen, then it would have participated in a situation enabling Plaintiffs to "use the court as a sounding board to discover holes in their arguments, ..." *Id.* at 431 (internal citations omitted).

CONCLUSION: The court held that the district court did not abuse its discretion and the motion to reopen was properly denied. *Id.* at 431.

***United States v. Lively*, 852 F.3d 549 (6th Cir. 2017)**

QUESTION: Whether, under 18 U.S.C. § 2251(a), "an individual produce[s] child pornography when he copies visual depictions of child pornography onto a hard drive that has a nexus to interstate or foreign commerce." *Id.* at 559 (internal quotations omitted).

ANALYSIS: The 6th Circuit noted that the 1st, 2nd, 4th, 5th, 7th, 9th and 10th Circuits have determined that "'producing' under §§ 2251, 2252, and 2252A—all of which share § 2256's definition of 'producing'—encompasses copying images onto a hard drive or other digital storage device." *Id.* at 560. The court noted that the 10th Circuit retreated from its previous opposing stance "in light of this widespread consensus." *Id.* The court reasoned that the term "produce" is "sufficiently broad, and sufficiently non-technical, to encompass copying images onto a hard drive," and found the other circuits' identical majority view persuasive. *Id.*

CONCLUSION: The court joined the consensus of the other circuits and held that "'producing' child pornography, as used in § 2251(a) encompasses copying images onto a hard drive." *Id.*

***Gazeli v. Session*, 856 F.3d 1101 (6th Cir. 2017)**

QUESTION: Whether 8 CFR § 1245.2(a)(1)(ii) impermissibly interferes with an alien's right to apply for adjustment of status during removal proceedings, pursuant to 8 U.S.C. § 1255(a), by granting exclusive jurisdiction of such claims to the United States Citizen and Immigration Service (USCIS) rather than immigration judges. *Id.* at 1108.

ANALYSIS: The court noted that § 1255(a) plainly grants paroled aliens the right to apply for adjustment of status. *Id.* The court reasoned

that, while aliens facing removal proceedings must be provided a forum to adjudicate adjustment-of-status claims, the statute's text does not require a particular forum. *Id.* The court further reasoned that § 1245.2(a)(1)(ii) is "not 'arbitrary, capricious, or manifestly contrary to the statute.'" *Id.* at 1109.

CONCLUSION: The 6th Circuit held that § 1245.2(a)(1)(ii) is an "appropriate exercise of the Attorney General's authority to implement the [Immigration and Nationality Act]." *Id.*

***Davenport v. Lockwood, Andrews & Newnam, Inc.*, 854 F.3d 905 (6th Cir. 2017)**

QUESTION: Whether this case presents a "tru[e] local controversy," or if the claims "filed asserting the same or similar factual allegations against many of the defendants . . . " in this case prior to the current claim are instead considered "copycat class actions," which subsection (ii) of the Class Action Fairness Act (CAFA) seeks to prevent. *Id.* at 908–09.

ANALYSIS: The court first looked to CAFA, and determined that the plain language of the statute indicates that "[t]he local controversy exception will apply only if no other similar class action was brought against any of the defendants in the instant action during the three years preceding the filing of [the] case." *Id.* at 909. The 9th Circuit then analyzed the policy considerations, and found that even though CAFA was meant to "eliminate copycat, or near copycat, suits in multiple forums," it was also "enacted to broaden the availability of diversity-jurisdiction for class-action suits." *Id.* at 910. Finally, the court noted that the cases cited by "both the district court and the plaintiffs [] support a finding that the local controversy exception must apply here." *Id.*

CONCLUSION: The court stated that because the facts indicate that "multiple class actions ha[d] been filed in the three years preceding the . . . filing of this suit," the local controversy exception did not apply. *Id.* at 911.

***Kaminski v. Coulter*, 865 F.3d 339 (6th Cir. July 25, 2017)**

QUESTION: Whether an alleged violation under the Contracts Clause of the United States Constitution "is cognizable as a [42 U.S.C. § 1983] claim." *Id.* at 346.

ANALYSIS: The court noted the 4th Circuit's view "that alleged Contracts Clause violations . . . could not give rise to a viable § 1983 claim," and the 9th Circuit's view that "a violation of the Contracts Clause can give rise to a cause of action under § 1983." *Id.* at 351. The court explained that the 4th Circuit's view "better reconcile[s] the United States Supreme Court's holdings in *Carter v. Greenhow*, 114 U.S. 317 (1885)

and *Dennis v. Higgins*, 498 U.S. 439 (1991) with the text and history of § 1983." *Coulter*, 865 F.3d at 347. The court further reasoned that the 4th Circuit's view better comports with the time-honored principle that it is [the Supreme Court's] prerogative alone to overrule one of its precedents. *Id.* (internal quotation marks omitted).

CONCLUSION: The 6th Circuit held that "an alleged Contracts Clause violation cannot give rise to a cause of action under § 1983." *Id.*

***United States v. Andrews*, 857 F.3d 734 (6th Cir. 2017)**

QUESTION ONE: Whether a *de novo* standard of review applies to whether a district court accepted a guilty plea prior to a motion to withdraw an unaccepted plea. *Id.* at 739–40.

ANALYSIS: The court noted that the 5th, 8th, and D.C. Circuits have adopted *de novo* review, and no circuit has adopted abuse-of-discretion review alone. *Id.* at 739. The court reasoned that an abuse-of-discretion would only allow the appellate court to review the district court's acceptance under the district court's own interpretation. *Id.* (internal quotations and citation omitted). In addition, the court pointed out that defendants have an "absolute right to withdraw an unaccepted guilty plea." *Id.*

CONCLUSION: The 6th Circuit held that it will evaluate whether a district court accepted a guilty plea under a *de novo* standard of review. *Id.* at 739–40.

QUESTION TWO: Whether a district court's conditional acceptance of a guilty plea closes the defendant's window of opportunity to withdraw an unaccepted plea under Federal Rule of Criminal Procedure 11. *Id.*

ANALYSIS: The court noted that a proper Rule 11 colloquy presumptively forms an acceptance. *Id.* at 740. The court noted, however, that the 7th and 8th Circuits have held that an explicitly deferred acceptance does not constitute acceptance of a plea. *Id.* The court noted that referring to an additional step before acceptance suggests deferred acceptance. *Id.* at 740–41.

CONCLUSION: The 6th Circuit held that when a district court, on the record, "explicitly defers any acceptance of a plea until a later point in time, the plea has not been accepted" under Rule 11. *Id.* at 741.

***Lee v. Cleveland Clinic Found.*, 676 F. App'x 488 (6th Cir. 2017)**

QUESTION: "[W]hether a suspension without pay must be served, or simply issued, to constitute an adverse employment action." *Id.* at 497.

ANALYSIS: The court noted that other "[c]ircuits have persuasively held that service of a suspension is a requirement if it is to rise to the level of an adverse employment action." *Id.* The court also observed that this

view aligned with the United States Supreme Court's ruling that "discrimination must involve a 'tangible' employment action that 'in most cases inflicts direct economic harm.'" *Id.* (internal citations omitted). The 6th Circuit reasoned that "[f]ailure to allow that harm to manifest prevents the tangible employment action from taking place." *Id.*

CONCLUSION: The 6th Circuit held that without service, a suspension without pay is not an adverse employment action. *Id.*

***Byrne v. United States,* 857 F.3d 319 (6th Cir. 2017)**

QUESTION: "[W]hat constitutes reckless disregard for purposes of [16 U.S.C § 6672(a)] . . . ." *Id.* at 328.

ANALYSIS: The court noted that the 2nd Circuit found "an exception to § 6672(a) liability when a responsible person believed that the taxes were in fact being paid, so long as that belief was, in the circumstances, a reasonable one." *Id.* (internal quotations omitted). The court noted that the 5th Circuit adopted a similar holding. *Id.* The court then noted the First and Seventh Circuits' various factual scenarios for identifying willfulness. *Id.* Moreover, the 6th Circuit emphasized the need to "balance the government's prerogative to recover that which is owed with limiting liability for that recovery to those who are personally at fault." *Id.* at 328–29. In support of adopting the 2nd Circuit's exception, the 6th Circuit reasoned that the narrow exception will not permit evasion of liability by corporate officers merely because they compartmentalized responsibilities. *Id.* at 329. Instead, the court noted that "this exception limits liability to those who, under the circumstances, failed to take reasonable steps to ensure payment of trust-fund taxes after having received notice that those taxes were not being paid." *Id.*

CONCLUSION: The 6th Circuit adopted the 2nd Circuit's "reasonable cause" exception and held that a responsible person will not be liable under § 6672(a) if it can be established by a preponderance of the evidence that the person reasonably believed that trust-fund taxes were being paid. *Id.*

***Sanders v. Jones*, 845 F.3d 721 (6th Cir. 2017)**

QUESTION: "[W]hether malicious prosecution remains a viable claim where a plaintiff was indicted by a grand jury, given that *Rehberg v. Paulk*, 566 U.S. 356 (2012) lends absolute immunity to grand jury testimony." *Jones*, 845 F.3d at 731.

ANALYSIS: The court noted that 6th Circuit "precedent indicates that a plaintiff who was indicted by a grand jury can overcome the presumption of probable cause only by evidence that the defendant made false statements to the grand jury." *Id.* at 732. However, under *Rehberg*, evidence from a grand jury witness's testimony cannot be used by a

plaintiff to support any claim involving the initiation of prosecution. *Id.* There is no exception for false testimony. *Id.* Therefore, a grand jury witness faced with a malicious prosecution claim is protected by absolute immunity under *Rehberg*. *Id.* The court reasoned that this would be consistent with the 6th Circuit's original approach, barring malicious prosecution claims when the plaintiff has been indicted by a grand jury. *Id.* at 734.

CONCLUSION: The 6th Circuit held that *Rehberg* precludes a plaintiff's malicious prosecution claim when plaintiff cannot rebut the indictment's presumption of probable cause without using grand jury testimony. *Id.* at 723.

SEVENTH CIRCUIT

***In re Mathias*, No. 16-3808, 2017 U.S. App. LEXIS 14803 (7th Cir. 2017)**

QUESTION: Whether the venue provision of the Employee Retirement Income Security Act (ERISA) "precludes enforcement of a forum-selection clause in an employee-benefits plan." *Id.* at *1.

ANALYSIS: The court noted the 6th Circuit's earlier analysis of this question, which found that ERISA's venue provision does not explicitly grant the right to bypass a forum-selection clause. *Id.* at *11–12. The 7th Circuit agreed with the 6th Circuit's analysis because it was "faithful to the statutory text and not inconsistent with the broader statutory policy of maintaining access to federal court." *Id.* at *12. The court reasoned that ERISA was built around what is written in the documents, so employers are given significant leeway in the how they design benefits plans. *Id.* at *13. The 7th Circuit also reasoned that forum-selection clauses are supported by ERISA because they "promote uniformity in plan administration and reduce administration costs." *Id.* at *15.

CONCLUSION: The 7th Circuit held that "ERISA's venue provision does not invalidate a forum-selection clause contained in plan documents." *Id.* at *1.

***P.H. Glatfelter Co. v. Windward Prospects Ltd.*, 847 F.3d 452 (7th Cir. 2017)**

QUESTION: "[W]hether one may appeal an order in an ancillary action entered in a district court located in the same circuit as the district court handling the main action." *Id.* at 456.

ANALYSIS: The court noted that other circuits have considered the issue and "held such orders interlocutory and not immediately appealable." *Id.* The 2nd Circuit, recognizing the need to avoid "piecemeal proceedings," determined that "a circuit court can consider any

appeal on discovery issues at the same time as the appeal from the judgment in the underlying action." *Id.* Further, the 9th and 10th Circuits reached a similar conclusion in holding that "appellate review of the order denying discovery will not be foreclosed [because the same circuit will have jurisdiction to review both]." *Id.*

CONCLUSION: The 7th Circuit concluded that "[FED. R. CIV. P. 45(f)] allows for consolidation of motions in a single appropriate court." *Id.* at 458.

***Doermer v. Callen*, 847 F.3d 522 (7th Cir. 2017)**

QUESTION: Whether the Indiana Nonprofit Corporation Act authorizes a non-member director's derivative action. *Id.* at 528.

ANALYSIS: Initially, the court examined whether Indiana case law supports the proposition that a non-member director can bring a derivative action. *Id.* at 528. In a past 7th Circuit case, an equitable derivative remedy was recognized, where none was expressly provided for under the predecessor to the Nonprofit Corporation Act. *Id.* The 7th Circuit distinguished this case on the basis that the plaintiffs were members of the organization, and therefore the case did not even "hint a non-member would have standing to bring an equitable action." *Id.* at 529. The court distinguished another case because the plaintiff was a shareholder, in addition to a director, who could vindicate a corporation's rights. *Id.* The court further reasoned that a non-member derivative action would be barred by the Federal Rules of Civil Procedure, which specifically require that plaintiff be a "shareholder or member at the time of the transaction complained of." *Id.* (internal quotations omitted). Finally, the court noted that the Indiana procedural rules also do not give a plaintiff standing to bring a non-member derivative action, as those rules echo the federal requirement in that a plaintiff must be a "a shareholder or member or holder of an interest." *Id.*

CONCLUSION: The 7th Circuit held that a non-member lacked standing to bring a derivative action. *Id.* at 532.

***Our Country Home Enters. v. Commissioner*, 855 F.3d 773 (7th Cir. 2017)**

QUESTION: "[W]hether [a taxpayer] may challenge its liability for a tax penalty in a Collection Due Process (CDP) hearing after having unsuccessfully challenged its liability for that penalty in an administrative hearing before the Internal Revenue Service (IRS) Office of Appeals." *Id.* at 777 (internal quotation marks omitted).

ANALYSIS: The court noted that a taxpayer may challenge the tax liability at a CDP hearing "so long as the taxpayer did not otherwise have

the opportunity to dispute such tax liability." *Id.* at 784 (internal quotation marks omitted). The court offered two possible interpretations of the phrase: "opportunity to dispute." *Id.* The first interpretation is that the phrase refers to judicial proceedings. *Id*. at 790. The alternative interpretation is that the phrase encompasses both judicial and administrative proceedings. *Id.* The court adopted the second interpretation as consistent with CDP policy ensuring that a taxpayer will always have some forum, whether judicial or administrative, to challenge a tax before paying it. *Id.* The court also reasoned that a taxpayer will have "participated meaningfully" through an administrative hearing. *Id.* at 791.

CONCLUSION: The 7th Circuit held that a second challenge to tax liability after a prior unsuccessful challenge in an administrative hearing is precluded. *Id.* at 783.

EIGHTH CIRCUIT

***Kokocinski v. Collins*, 850 F.3d 354 (8th Cir. 2017)**

QUESTION: Whether various motions "for relief from, or to amend, [a] judgment" can be considered as a single "motion seeking voluntary dismissal of a shareholder's derivative action under [FED. R. CIV. P. 23.1(c)], borrowing from Rule 56 procedures." *Id.* at 360.

ANALYSIS: The court noted that the 1st Circuit relied on Delaware state court precedent in holding that district court decisions on these motions must be reviewed *de novo*, while the motions must be considered as one "hybrid summary judgment motion for dismissal." *Id.* Similarly, the 6th and 9th Circuits regard these motions as a single Rule 56 motion, and review *de novo*. *Id.* The 8th Circuit agreed with the 11th Circuit and does not construe the motions as falling under Rule 12(b)(6), nor does it place the motions "into the summary-judgment box." *Id.*

CONCLUSION: The court held that it is not "proper to construe the defendants' motion to terminate as one arising under Rule 56." *Id.* Instead, Rule 23.1 is proper due to voluntary dismissal being very similar to "a corporate defendant's motion to terminate litigation which it possesses the right to pursue," and "in absence of a better fit" Rule 23.1 is the best option. *Id.*

***Dakotas & W. Minn. Elec. Indus. Health & Welfare Fund v. First Agency, Inc.*, 865 F.3d 1098 (8th Cir. 2017)**

QUESTION: Whether an Employee Retirement Income Security Act (ERISA) complaint seeking a declaratory judgment to enforce the coordination of benefits (COB) "terms of its plan is an equitable claim seeking remedies typically available in equity." *Id.* at 1101.

ANALYSIS: The court analyzed the historical context of equitable relief and found the sought relief at issue to be "an equitable claim seeking remedies typically available in equity and therefore available under § 502(a)(3)." *Id.* at 1103. The court reasoned that the judicial ruling sought was one that is "traditionally available in courts of equity by a bill for instructions." *Id.* The court further reasoned that declaratory judgment is "consistent with the plain language of § 502(a)(3) . . . [and] with the broad purposes of ERISA." *Id.* at 1104.

CONCLUSION: The 8th Circuit held that section 502(a)(3) "allow[s] an ERISA plan to bring a declaratory judgment action to determine the extent of its liability." *Id.* (internal citations and quotations omitted).

***Catamaran Corp. v. Towncrest Pharmacy*, 864 F.3d 966 (8th Cir. 2017)**

QUESTION: "Whether a court or an arbitrator should determine whether an arbitration agreement authorizes class arbitration." *Id.* at 969.

ANALYSIS: The 8th Circuit reasoned that there are various differences between bilateral and class arbitration. *Id.* The court identified four different factors: "(1) the benefits of arbitration are substantially lessened in a class arbitration proceeding; (2) confidentiality is lost or becomes more difficult; (3) class arbitration brings the bet-the-company stakes of class-action litigation into . . . arbitration without the safety net of multilayered judicial review; (4) class arbitration raises important due process concerns." *Id.* at 971–72. The court also noted the importance of procedural formalities in class arbitration. *Id.* Lastly, the court held that both due process and confidentiality concerns are neglected when parties agree to arbitrate class-actions. *Id.* at 972.

CONCLUSION: The 8th Circuit held that the court should determine whether an arbitration agreement authorizes class arbitration, because of the fundamental differences between bilateral and class arbitration. *Id.* at 969.

***Sciaroni v. Consumer (In re Target Corp. Customer Data Sec. Breach Litig.)*, 847 F.3d 608 (8th Cir. 2017)**

QUESTION: "[W]hether costs associated with delays in administering a class action settlement for the length of a class member's appeal may be included in an appeal bond under Federal Rule of Appellate Procedure 7." *Id.* at 614.

ANALYSIS: The 8th Circuit first explained that Rule 7 "allows a district court to require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal." *Id.* (internal citations and quotations omitted). The court then noted that the 6th, 9th, 10th, 11th, and D.C. Circuits "generally limit 'costs on appeal'

to 'costs that a successful appellate litigant can recover pursuant to a specific rule or statute.'" *Id.* at 615 (internal citations omitted). The court found this approach sensible and fair, explaining further that "[b]y linking the amount of the bond to the amount the appellee stands to have reimbursed, the rule secures the compensation due to successful appellees while avoiding creating 'an impermissible barrier to appeal' through overly burdensome bonds." *Id.*

CONCLUSION: The 8th Circuit held that "'costs on appeal' for Rule 7 purposes include only those costs that the prevailing appellate litigant can recover under a specific rule or statute applicable to the case at hand." *Id.*

***DeCrow v. N.D. Workforce Safety & Ins. Fund*, 864 F.3d 989 (8th Cir. 2017)**

QUESTION: "[W]hether North Dakota may enforce the suspend-and-reimburse provisions of N.D.C.C. § 65-05-05(2) when the practical effect is to preclude the plaintiff from receiving supplemental benefits that Colorado is constitutionally entitled to provide." *Id.* at 992.

ANALYSIS: The court found that the North Dakota sought to ensure that the recipient was not receiving benefits from multiple jurisdictions and North Dakota workers' compensation would be suspended if the claimant was waiting for a decision for compensation from another state. *Id.* at 991. The court noted that "[t]he constitutionality of that provision was well established—the Full Faith and Credit Clause does not require a State to substitute for its own statute, applicable to persons and events within it, the statute of another State reflecting a conflicting and opposed policy." *Id.* (internal citations and quotations omitted). The court rejected that this issue has anything to do with Equal Protection or Substantive Due Process. *Id.* at 993.

CONCLUSION: The 8th Circuit held that North Dakota may enforce the suspend-and-reimburse provisions of its workers' compensation statute. *Id.* at 992.

NINTH CIRCUIT

***Am. Acad. of Implant Dentistry v. Parker*, 860 F.3d 300 (5th Cir. 2017)**

QUESTION: Whether TEX. ADMIN. CODE § 108.54, which prevents dentists from advertising as "specialists" in areas of practice not approved by the American Dental Association (ADA), violates an individual's First or Fourteenth Amendment Rights. *Id.* at 304.

ANALYSIS: The 5th Circuit noted that the commercial speech at issue here was protected under the First Amendment because it concerned lawful activity and was not be misleading. *Id.* at 307–09. The 5th Circuit

found that the Texas State Dental Board of Dental Examiner's (the "Board") interests satisfied *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980) because "the Board has a substantial interest in 'ensuring the accuracy of commercial information in the marketplace, establishing uniform standards for certification and protecting consumers from misleading professional advertisements.'" *Parker*, 860 F.3d at 309. The 5th Circuit further found that the Board did not identify real harm as to the "relationship between the harm that underlies the State's interest and the means identified by the State to advance that interest." *Id.* at 311. The 5th Circuit found that the Board may "propose appropriate restrictions in the area of dental specialist advertising", but the Board did not meet its burden in this particular case. *Id*. at 312.

CONCLUSION: The 5th Circuit held the Texas law unconstitutional and "that the Board has not met its burden on the record before us to demonstrate that Section 108.54, as applied to these plaintiffs, satisfies *Central Hudson*'s test for regulation of commercial speech." *Id.* at 312.

***United States v. Hankins*, 858 F.3d 1273 (9th Cir. 2017)**

QUESTION: "[W]hether a defendant may discharge a restitution judgement based on a private settlement between the victim and the defendant." *Id.* at 1275.

ANALYSIS: The court noted that the 6th Circuit held that private settlements should not be allowed because restitution is a sentencing tool required by the Mandatory Victims Restitution Act and cannot be thwarted by private individuals. *Id.* at 1277. The court also noted that the 5th and 8th Circuits have followed this reasoning, while the 2nd, 6th, and 9th Circuits have held that restitution is still an option even if a private settlement was reached prior to sentencing. *Id.* The court warned that coercion and collusion may result in agreements to discharge restitution liability if these agreements were permitted. *Id.* at 1277–78.

CONCLUSION: The 9th Circuit held that because restitution is a matter of criminal sentencing, private settlement agreements cannot discharge it. *Id.* at 1277.

***Syed v. M-I, Ltd. Liab. Co.*, 853 F.3d 492 (9th Cir. 2017)**

QUESTION: "[W]hether a prospective employer may satisfy the Fair Credit Reporting Act's ("FCRA") disclosure requirements by providing a job applicant with a disclosure that 'a consumer report may be obtained for employment purposes' which simultaneously serves as a liability waiver for the prospective employer and others." *Id.* at 495–96.

ANALYSIS: The 9th Circuit first examined the text of 15 U.S.C. § 1681b(b)(2)(A). *Id.* at 500. The statute provides that a consumer report may not be procured without a "clear and conspicuous [written] disclosure [that is within] . . . a document [consisting] solely of the disclosure." *Id.* at 497 (internal quotations omitted). In its statutory analysis, the court determined that the "meaning of 'solely' is 'alone; singly' or 'entirely; exclusively.'" *Id.* at 500. Thus, the court found that this section "unambiguously requires a document that 'consists solely of the disclosure.'" *Id.* The court then held that "subsection (ii) of the provision[, which] provides that the consumer may authorize the procurement of a consumer report on the document containing the disclosure," does not invalidate its decision that the document contain only the disclosure. *Id.* In making this holding, the court reasoned that the "authorization clause is an express exception to the requirement that the document consist 'solely of the disclosure'" and that the clauses "work in tandem to further" Congress's purpose in enacting the statute. *Id.* at 501. The court concluded its analysis by holding that the language does not explicitly permit inclusion of a liability waiver, since Congress "told us exactly what it meant when it described the authorization as encompassing only 'the procurement of [a consumer] report.'" *Id.* at 502. The court opined that this interpretation of the statute is impermissible due to the conflicting meanings of "authorize" and "waive." *Id.* The court also declined to rule on whether the inclusion of a waiver is permissible if a disclosure is still "'clear and conspicuous,'" limiting its decision to whether "[inclusion of] the waiver violated the statute's 'solely' requirement." *Id.* at 503.

CONCLUSION: The 9th Circuit concluded that § 1681b(b)(2)(A) "unambiguously bars the inclusion of a liability waiver on the same document as a disclosure." *Id.* at 507.

***Ctr. for Biological Diversity v. United States EPA*, 847 F.3d 1075 (9th Cir. 2017)**

QUESTION: Whether a six-year statute of limitations applies when a plaintiff alleges a violation by the EPA of the Endangered Species Act's (ESA) procedural requirements when no statute of limitations time frame is enumerated in the statute. *Id.* at 1087.

ANALYSIS: The 9th Circuit reasoned that "when a statute does not specify a limitations period, federal courts must apply the general statute of limitations that most closely addresses the basis for the plaintiff's claim. *Id.* The court stated that it previously held that the "limitations period for claims sounding in contract and quasi-contract was governed by the six-year statute of limitations set forth in 28 U.S.C. § 2415(a)." *Id.*

Additionally, the court previously held that the "six-year statute of limitations set forth in 28 U.S.C. § 2401(a) provided the limitations period for actions brought pursuant to the Administrative Procedure Act ('APA')." *Id.*

CONCLUSION: The 9th Circuit held that when a plaintiff alleges that "any agency failed to comply with the ESA's procedural requirements, we apply the general six-year statute of limitations set forth in 28 U.S.C. § 2401(a)." *Id.*

***Amphastar Pharm. Inc. v. Aventis Pharma SA*, 856 F.3d 696 (9th Cir. 2017)**

QUESTION: Whether § 3730(d)(4) of the False Claims Act "contains an independent grant of jurisdiction" allowing a district court to grant a request for attorneys' fees by qui tam plaintiffs where the underlying action was dismissed for lack of subject matter jurisdiction. *Id.* at 710.

ANALYSIS: The court noted that other courts to consider the issue concluded that "§ 3730(d)(4) provides an independent grant of jurisdiction to award attorneys' fees even if the underlying action is dismissed for lack of jurisdiction." *Id.* The court reasoned that such a bar to requests for attorney's fees due to a lack of subject matter jurisdiction would undermine Congress's objective in deterring frivolous litigation. *Id.*

CONCLUSION: The 9th Circuit held that "§ 3730(d)(4) contains an independent grant of subject matter jurisdiction at least to the extent that a court is able to award attorneys' fees even where the issue is whether the court had subject matter jurisdiction at all." *Id.* at 711.

***Chugach Mgmt. Servs. v. Jetnil*, 863 F.3d 1168 (9th Cir. 2017)**

QUESTION: "Whether the zone of special danger doctrine can apply to local nationals." *Id.* at 1174.

ANALYSIS: The court first looked at the "plain language of the [Defense Base Act (DBA)]," and found that it did not "distinguish between employees sent abroad from their home country and local nationals." *Id.* Upon reviewing the legislative history of the DBA, the 9th Circuit determined that "Congress implicitly endorsed application of the zone of special danger doctrine to local nationals." *Id.* Next, the court looked at the pertinent United States Supreme Court case, *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951), and found that the Supreme Court "[did] not distinguish between employees sent abroad from their home country and local nationals working in remote areas as to employees working away from their home country." *Jetnil*, 863 F.3d at 1175. Finally, the 9th Circuit reasoned that not applying the doctrine to local nationals "would lead to irrational results and contradictory case law." *Id.*

CONCLUSION: The 9th Circuit held that "the zone of special danger doctrine can apply to local nationals working in their home countries." *Id.* at 1177.

***Spencer v. Peters*, 857 F.3d 789 (9th Cir. 2017)**

QUESTION: Whether a plaintiff must prove "a lack of probable cause to prosecute a defendant [as] an element of a deliberate-fabrication claim" against a police officer. *Id.* at 801.

ANALYSIS: The court noted that the 2nd and 3rd Circuits (the only ones to have decided on the issue) determined that a lack of probable cause is not an element of a deliberate-fabrication claim. *Id.* The court was persuaded by the 3rd Circuit's argument that "no sensible concept of ordered liberty is consistent with law enforcement cooking up its own evidence." *Id.* (quoting *Halsey v. Pfeiffer*, 750 F.3d 273, 292–93 (3d Cir. 2014)).

CONCLUSION: The 9th Circuit concluded that "a lack of probable cause to prosecute a defendant is not an element of a deliberate-fabrication claim." *Peters*, 857 F.3d at 801.

***SEC v. World Capital Mkt., Inc.*, 864 F.3d 996 (9th Cir. 2017)**

QUESTION: "Whether putative relief defendants may divest a district court of jurisdiction to proceed against them using summary procedures simply by asserting a claim of entitlement to the disputed funds in their possession." *Id.* at 999.

ANALYSIS: The court began its analysis by noting that in order to "assert jurisdiction over—and ultimately obtain disgorgement from—[] relief defendants, the [Securities and Exchange Commission (SEC)] [i]s required to demonstrate that [the relief defendants] (1) received ill-gotten funds and (2) do not have a legitimate claim to those funds." *Id.* at 1004. The relief defendants asserted that "once they advanced a facially colorable claim to the disputed funds, . . . the district court was immediately divested of jurisdiction." *Id.* The court disagreed, reasoning that if they acquiesced to the defendant's position then "any third party with a custodial claim to the proceeds of securities violations committed by others would be able to defeat relief defendant jurisdiction 'simply by stating a claim of ownership, however specious.'" *Id.* at 1005.

CONCLUSION: The 2nd Circuit joined the 4th Circuit holding that "[r]elief defendants cannot defeat jurisdiction simply by asserting an ownership interest in the disputed funds; rather, . . . they must assert an interest both recognized in law and valid in fact." *Id.* (internal citations and quotation marks omitted).

***United States v. Hankins*, 858 F.3d 1273 (9th Cir. 2017)**

QUESTION: "[W]hether a defendant may discharge a restitution judgement based on a private settlement between the victim and the defendant." *Id.* at 1275.

ANALYSIS: The court noted that the 6th Circuit held that private settlements should not be allowed because restitution is a sentencing tool required by the Mandatory Victims Restitution Act and cannot be thwarted by private individuals. *Id.* at 1277. The court also noted that the 5th and 8th Circuits have followed this reasoning. In addition, the 2nd, 6th, and 9th Circuits have held that restitution is still an option even if a private settlement was reached prior to sentencing. *Id.* The court warned that coercion and collusion may result in agreements to discharge restitution liability if these agreements were permitted. *Id.* at 1277–78.

CONCLUSION: The 9th Circuit held that because restitution is a matter of criminal sentencing, private settlement agreements cannot discharge it. *Id.* at 1277.

***Ramsey v. Muna*, 849 F.3d 858 (9th Cir. 2017)**

QUESTION: Whether the Commonwealth of the Northern Mariana Islands "retained its sovereign immunity with respect to claims arising under Commonwealth law." *Id.* at 860.

ANALYSIS: The court relied on United States Supreme Court precedent that ruled that "Puerto Rico and Hawaii, both United States territories at the time, enjoyed sovereign immunity from suits arising under their own laws." *Id.* The court also focused on Supreme Court cases that held that a State's "waiver of sovereign immunity must be unequivocal" to be upheld, and concluded that the Commonwealth's Covenant was not unequivocal. *Id.* at 860–61.

CONCLUSION: The 9th Circuit held that the Commonwealth of the Northern Mariana Islands "may not be sued without its consent on claims arising under its own laws." *Id.*

***Avila v. Spokane Sch. Dist. 81*, 852 F.3d 936 (9th Cir. 2017)**

QUESTION: Whether the Individuals with Disabilities Education Act (IDEA) statute of limitations ambiguity between 20 U.S.C. § 1415(b)(6)(B) and 20 U.S.C. § 1415(f)(3)(C) should be reconciled by applying the discovery rule—"when a plaintiff discovers, or reasonably could have discovered, his claim." *Id.* at 940

ANALYSIS: The 9th Circuit first noted that the 3rd Circuit concluded "that the IDEA's statute of limitations requires courts to apply the discovery rule described in § 1415(f)(3)(C)." *Id.* at 940–41. The court also explained that both sections "include language pegging the limitations

period to the date on which the parent or agency 'knew or should have known about the alleged action that forms the basis of the complaint,' not the date on which the action occurred." *Id.* at 941–42. The court further analyzed the text and purpose of the IDEA and the Department of Education's interpretation of the Act, noting the support for the discovery rule.

CONCLUSION: The 9th Circuit held that "the IDEA's statute of limitations requires courts to apply the discovery rule without limiting redressability to the two-year period that precedes the date when the parent or agency knew or should have known about the alleged action that forms the basis of the complaint." *Id.* at 944 (internal citations and quotation marks omitted).

***Partida v. United States DOJ (In re Partida)*, 862 F.3d 909 (9th Cir. 2017)**

QUESTION: "[W]hether the Bankruptcy Code's automatic stay provision, 11 U.S.C. § 362, operates to prevent the government's collection of criminal restitution under the Mandatory Victims Restitution Act ('MVRA')." *Id.* at 911.

ANALYSIS: The court first noted that the Bankruptcy Appellate Panel (BAP) held that that the MVRA's enforcement provision overrides an automatic stay on collection action. *Id.* at 912. The 9th Circuit agreed, explaining that the plain language of the MVRA makes clear that despite any federal laws to the contrary, the government can collect restitution. *Id.* The court also noted that Congress intended the MVRA to "ensure that criminals pay full restitution to their victims for all damages caused as a result of the crime," regardless of the criminals' economic status. *Id.* at 913. In addition, the court explained that the MVRA provides for enforcement in accordance with federal practices and procedures to allow the government to collect under the Federal Debt Collection Practices Act (FDCPA). *Id.* at 913. The court acknowledged that the 2nd and 6th circuits have considered the same question, and both have concluded that the government can collect restitution despite the automatic stay. *Id.*

CONCLUSION: The 9th Circuit concluded that there had been no violation of the automatic stay because the MVRA trumps the automatic stay.

***Sato v. Orange Cty. Dep't of Educ.*, 861 F.3d 923 (9th Cir. 2017)**

QUESTION: Whether Assembly Bill 97 (AB 97) mandates that Orange County Department of Education (OCDE) "is to be treated as an arm of the State partaking of the State's Eleventh Amendment immunity, or instead is to be treated as a municipal corporation or other political

subdivision to which the Eleventh Amendment does not extend." *Id.* at 928.

ANALYSIS: The 9th Circuit first explained that the California legislature enacted AB 97 as a major reform package "to streamline public education financing and decentralize education governance." *Id.* at 926. The court explained that "California school districts and county offices of education (COEs) are 'arms of the state' entitled to state sovereign immunity," but that "[s]tate sovereign immunity does not extend to county and municipal governments, unless state law treats them as arms of the state." *Id.* 926–28. Accordingly, the court examined the following five factors: "(1) whether a money judgment would be satisfied out of state funds, (2) whether the entity performs central government functions, (3) whether the entity may sue or be sued, (4) whether the entity has the power to take property in its own name or only the name of the state, and (5) the corporate status of the entity." *Id.* at 928. The court found that the first (which the court noted to be the most important factor), second and fifth factors weighed in favor of "Eleventh Amendment immunity for OCDE," while the third and fourth factors weighed to the opposite. *Id.* at 928–34. Specifically, regarding the first factor, the court stated "state and local funds are still 'hopelessly intertwined,' and 'any change in the allocation of property tax revenue has a direct effect on the allocation of state funds.'" *Id.* at 932 (internal citations omitted). Moreover, regarding the second factor, the court reiterated that "California law treats public schooling as a statewide or central governmental function." *Id.* at 933.

CONCLUSION: The 9th Circuit held that "California school districts and COEs, including defendant OCDE, remain arms of the state and continue to enjoy Eleventh Amendment immunity." *Id.* at 934.

***United States v. Washington*, 853 F.3d 946 (9th Cir. 2017)**

QUESTION: Whether, when the United States files suit, a defendant's counterclaim for injunctive relief constitutes "recoupment" that precludes the United States from enjoying sovereign immunity. *Id.* at 968.

ANALYSIS: The 9th Circuit first noted that "when the United States files suit, consent to counterclaims seeking offset or recoupment will be inferred." *Id.* The court adopted the 10th Circuit's criteria for recoupment claims and stated, "[t]o constitute a claim in recoupment, a defendant's claim must (1) arise from the same transaction or occurrence as the plaintiff's suit; (2) seek relief of the same kind or nature as the plaintiff's suit; and (3) seek an amount not in excess of the plaintiff's claim." *Id.* (internal citations omitted). The court explained that "the remedy (the 'amount') sought by the United States and by the defendant in recoupment must be monetary." *Id.* The court acknowledged that while recoupment

can affect a monetary award, "[i]t cannot result in an affirmative monetary judgment in favor of the party asserting the claim," and that no case law has applied recoupment "to non-monetary relief such as an injunction." *Id.* at 968–69.

CONCLUSION: The 9th Circuit concluded that "Washington's cross-request for an injunction thus does not qualify as a claim for recoupment and is barred by sovereign immunity." *Id.* at 969.

***Chan Healthcare Group, PS v. Liberty Mut. Fire Ins. Co.*, 844 F.3d 1133 (9th Cir. 2017)**

QUESTION: Whether an appellate court is permitted to review a district court's order remanding a class action, when the "asserted basis for jurisdiction is a federal question rather than traditional diversity or [Class Action Fairness Act (CAFA)] minimal diversity jurisdiction." *Id*. at 1137.

ANALYSIS: The court reasoned that the "removal of a case under this section" language in §1453(c) must be read within the limitations established by the CAFA. *Id.* at 1138. CAFA only grants appellate review to cases brought under diversity jurisdiction. *Id.* The court also noted that neither of the exceptions under 28 U.S.C. § 1453(b) applied to federal question cases. *Id.* at 1139. The court further reasoned that its interpretation of 28 U.S.C. § 1453(c) mirrored that of the 5th, 6th, and 8th Circuits. *Id.* at 1140.

CONCLUSION: The 9th Circuit held that the Class Action Fairness Act, 28 U.S.C.S. § 1453(c)(1) excludes the removal of class actions when the basis of jurisdiction is federal question jurisdiction. *Id.* at 1141.

***Sanjaa v. Sessions*, 863 F.3d 1161 (9th Cir. 2017)**

QUESTION: "Whether the witness-protection provisions in Article 24 of the [United Nations Convention Against Transnational Organized Crime (UN-CATOC)] provide an independent basis for relief from [alien] removal." *Id.* at 1166.

ANALYSIS: The court noted that the 2nd Circuit has held "witness protection provisions do not provide an independent basis for relief from removal." *Id.* The 9th Circuit reasoned that the plain language of the UN-CATOC does not support an interpretation that the provisions in Article 24 are self-executing. *Id.* at 1166. Furthermore, the court concluded executive regulations supported the 9th Circuit's analysis because the regulations implemented the provisions according to a natural reading of Article 24. *Id.*

CONCLUSION: The 9th Circuit held that the "UN-CATOC does not provide an independent basis for relief from removal in immigration proceedings." *Id.*

***Brunozzi v. Cable Communs., Inc.*, 851 F.3d 990 (9th Cir. 2017)**

QUESTION: Whether the term "reported" in an Oregon labor law statute requires an employee to inform an external authority or whether informing a supervisor is sufficient. *Id.* at 998.

ANALYSIS: The court first examined the statute's text and context. *Id.* at 998. In doing so, the court analyzed the dictionary definition and context of "report" and found that the legislature intended to use its ordinary meaning. *Id.* This finding supports the argument that the term includes both external and internal violation reports. *Id.* at 999. Next, the court analyzed the legislative history and found that Senators and Representatives sought to encourage reporting among private employees without repercussion so that the employers can fix the problem internally. *Id.* at 1000.

CONCLUSION: Considering the text and legislative history of the statute, the 9th Circuit held that the term "reported" meant "a report of information to either an external or internal authority." *Id.*

TENTH CIRCUIT

***Sinclair Wyo. Ref. Co. v. United States EPA*, No. 16-9532, 2017 U.S. App. LEXIS 15192 (10th Cir. Aug. 15, 2017)**

QUESTION: Whether the 42 U.S.C. § 7545(o)(9)(B)(i)'s small refinery exemption "require[s] a threat to a refinery's survival." *Id.* at *2.

ANALYSIS: The 10th Circuit first pointed to the text of § 7545(o)(9)(B)(i), which provides that a small refinery may be exempt from the Renewable Fuel Standards (RFS) program if participation in this program will cause it to suffer a "disproportionate economic hardship." *Id.* at *13. The court then noted that the EPA, after interpreting the text, concluded that a small refinery exemption cannot be granted "unless there is a threat to the refinery's long-term viability." *Id.* at *22. The court then began its analysis of the statute's terms by defining "a 'hardship' [as] something that 'makes one's life hard or difficult – not just something that makes continued existence impossible," while defining "viability . . . [as] the ability to continue or be continued; the state of being financially stable." *Id.* at *22–23 (internal quotations omitted). The court thus held that the equal treatment of "hardship" and "viability" in an interpretation of the exemption was "transform[ing the] . . . text into something far beyond what Congress plausibly intended." *Id.* at *24. The court also noted that the statute requires a consideration of the "'disproportionate'

impact of the RFS program" on a small refinery, "which inherently requires a comparative evaluation" of that refinery to other refineries. *Id.* at *25. Thus, under the statute, the court held that an evaluation solely consisting of the refinery seeking exemption is incorrect. *Id.* The court also opined that, based on "contextual clues in the statutory scheme," if Congress intended for a viability test to be included in the statute, it would have made this intention clear. *Id.* at *25–26. The court concluded its analysis by distinguishing its case from other cases where the D.C. Circuit and 8th Circuit upheld EPA interpretations where the EPA read viability requirements into the statute. *Id.* at *26–28. In concluding that those cases were not applicable, the court reasoned that the D.C. and 8th Circuits applied *Chevron* deference to the EPA interpretations in their decisions and that, in both cases, different arguments about the EPA's statutory interpretations were raised than those the 10th Circuit were considering. *Id.*

CONCLUSION: The 10th Circuit concluded that reading a viability requirement into § 7545(o)(9)(B)(i) is an incorrect interpretation of the statute. *Id.* at *29.

***Belnap v. Iasis Healthcare*, 844 F.3d 1272 (10th Cir. 2017)**

QUESTION: Whether a court is obligated to "decline to reach the merits of an arbitrability dispute regarding . . . " claims arising from contracts in which the parties assent to arbitrate the arbitrability of disputes. *Id.* at 1290.

ANALYSIS: The court agreed with the 1st, 2nd, 4th, 8th, 9th, 11th and D.C. Circuits' holdings that "if a court finds evidence of clear and unmistakable intent to arbitrate arbitrability, it must allow and arbitrator to decide issues of arbitrability in the first instance." *Id.* at 1292. The court found this position to be consistent with the general language from the United States Supreme Court. *Id.* at 1292.

CONCLUSION: The 10th Circuit held that the agreement to arbitrate arbitrability compels the court "to grant the motion to compel arbitration as to *all* of the claims . . . ." *Id.* at 1292–93 (emphasis in original).

***Ellis v. Raemisch,* No. 15-1088, 2017 U.S. App. LEXIS 12242 (10th Cir. May 11, 2017)**

QUESTION: "[W]hether [Colorado Appellate] Rule 51.1 permits state prisoners to exhaust all available state remedies without seeking discretionary relief from the [Colorado Supreme Court]. *Id.* at 14.

ANALYSIS: The 10th Circuit stated, "all of our sister circuits who have considered analogous exhaustion questions under rules like Rule 51.1 have concluded that they do permit state prisoners to effect exhaustion of

available state remedies." *Id.* at 23. The court reasoned that while the Supreme Court has not directly addressed this issue, the Supreme Court has suggested in a prior decision that "failing to give effect for exhaustion purposes to state rules like Colorado's Rule 51.1 might not serve the interests of comity that underlay [the Supreme Court's holding]." *Id.* at 35. The 10th Circuit noted the Supreme Court's emphasis on the comity interests underlying the exhaustion doctrine, in which state procedural rules should be respected. *Id.* at 24.

CONCLUSION: The 10th Circuit held that Rule 51.1 permits state prisoners to exhaust all available state remedies without seeking discretionary relief from the Colorado Supreme Court. *Id.* at 23.

***Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 847 F.3d 1221 (10th Cir. 2017)**

QUESTION: Whether the coordinated acts of sister subsidiaries wholly owned by the same parent as those of a single enterprise, are capable of conspiring under § 2 of the Sherman Act. *Id.* at 1234.

ANALYSIS: The court explained that a conspiracy claim arising under § 2 of the Sherman Act requires at least two participants. *Id.* at 1235. The court noted that § 1 of the Sherman Act holds that wholly related corporations forms a single-entity and are thus unable to conspire. *Id.* The court then explained that "[i]t would be anomalous to hold that wholly related corporations constitute a single entity, and so cannot form a conspiracy, for purposes of § 1, but that the same corporations constitute separate entities, and so can form a conspiracy for purposes of § 2." *Id.*

CONCLUSION: The 10th Circuit held that the single-enterprise theory, which states that wholly related corporations are unable to conspire under § 2 is a viable theory. *Id.* at 1231.

ELEVENTH CIRCUIT

***Fuhr v. Credit Suisse AG*, No. 15-15355, 2017 U.S. App. LEXIS 7715 (11th Cir. May 2, 2017)**

QUESTION: "[W]hether a party may appeal from a district court's order denying its motion to quash a [28 U.S.C. § 1782] subpoena." *Id.* at *9.

ANALYSIS: The 11th Circuit first noted that it had appellate jurisdiction over the final decisions of district courts and that discovery orders are generally not considered final. *Id.* at *8. The court then acknowledged that, despite this general rule, the 4th, 10th, 9th, 7th, 3rd and 2nd Circuits have held that a district court's § 1782 order pertaining to the use of discovery in a foreign tribunal is instantly appealable. *Id*. at *8 n. 6. The court specifically addressed the 9th Circuit's decision in *In*

re 840 140th Ave. NE, 634 F.3d 557 (9th Cir. 2011), since it found the 9th Circuit's reasoning to be "particularly . . . sound and persuasive." *Fuhr*, No. 15-15355, 2017 U.S. App. LEXIS 7715, at *9–11. The 9th Circuit highlighted that § 1782 orders by district courts are final since these are discovery orders for cases tried in foreign tribunals. *Id.* at *9 (quoting *In re 840 140th Ave.*, 634 F.3d at 566). Therefore, the 9th Circuit reasoned that § 1782 orders are final because "there is no further case or controversy before the [district] court" after the order is entered. *Id.* (internal quotations omitted).

CONCLUSION: The 11th Circuit concluded that "proceedings brought under § 1782 [rulings on motions to quash subpoenas] . . . resolve the entire case or controversy before the court, and so are 'final' in a jurisdictional sense," thereby giving the court jurisdiction over an immediate appeal of that ruling. *Id.* at *7.

***Foudy v. Indian River Cnty. Sheriff's Office*, 845 F.3d 1117 (11th Cir. 2017)**

QUESTION: "Whether a [42 U.S.C. § 1983] claim for breach of the [Driver's Privacy Protection Act (DPPA)] accrues at the time the alleged violations are or should have been discovered or, alternatively, at the time the violations occur." *Id.* at 1122.

ANALYSIS: The court noted that the United States Supreme Court held that when a § 1983 claim arises under a federal statute enacted after December 1, 1990, which does not provide its own limitations period, the limitations period in 28 U.S.C. § 1658 governs. *Id.* at 1123–24. Therefore, the court found that the DPPA is governed by § 1658, as is the § 1983 claim based on the DPPA. *Id.* at 1124. The court noted that under § 1658, a DPPA cause of action accrues when the violation occurs. *Id.*

CONCLUSION: The 11th Circuit held that "a § 1983 claim based solely on the DPPA accrues at the same time as one bought under the underlying statute itself: upon the occurrence of the alleged violation." *Id.*

***Wortley v. Bakst*, 844 F.3d 1313 (11th Cir. 2017)**

QUESTION: Whether 28 U.S.C. § 158(d)(2)(A) gives an appellate court jurisdiction "to hear a direct appeal from the bankruptcy court of an unauthorized order that has not been initially reviewed by the district court." *Id.* at 1321.

ANALYSIS: The 11th Circuit had to determine whether a report with proposed conclusions of law constitutes a judgement, order or decree because, under § 158(d)(2)(A), appellate jurisdiction is limited to certified "'judgment[s], order[s], or decree[s]' of both 'final' and 'interlocutory' varieties." *Id.* The court found that the words "'judgment, order, or

decree' . . . share, as their common denominator, the notion of a decision carrying some kind of command or adjudicative consequence." *Id.* In contrast, proposed findings of fact or conclusions of law do not constitute a judicial decision with legal effect. *Id.* at 1321–22. Since the bankruptcy courts' "ability to fully hear and determine cases does not extend to non-core proceedings," only the district court is vested with adjudicatory authority, absent consent. *Id* at 1322.

CONCLUSION: The 11th Circuit held that § 158(d)(2)(A) does not give an appellate court jurisdiction to consider, "on a direct certified appeal, the merits of an unauthorized bankruptcy court order entered without consent in a related non-core proceeding, unless it has first been reviewed by the district court as a report with proposed findings of fact and/or conclusions of law." *Id.*

***Brown Jordan Int'l, Inc. v. Carmicle*, 846 F.3d 1167 (11th Cir. 2017)**

QUESTION: Whether a claimed "loss," pursuant to § 1030(e)(11) of the Computer Fraud and Abuse Act, must "stem from an 'interruption of service' to be compensable." *Id.* at 1179.

ANALYSIS: The court noted that "the statutory definition includes two separate types of loss: (1) reasonable costs incurred in connection with such activities as responding to a violation, assessing the damage done, and restoring the affected data, program system, or information to its condition prior to the violation; and (2) any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service." *Id.* at 1174. The court reasoned that a "'[l]oss' includes the direct costs of responding to the violation in the first portion of the definition, and consequential damages resulting from interruption of service in the second." *Id.* The court further reasoned that, because the statute is constructed disjunctively, the first type of loss does not require an "interruption of service." *Id.*

CONCLUSION: The 11th Circuit held that a "loss" need not arise as a result of an "interruption of service" to be compensable under the Computer Fraud and Abuse Act. *Id.* at 1179.

***United States v. Poignant*, 676 F. App'x 832 (11th Cir. 2017)**

QUESTION: Whether the district court's re-imposition of a prohibition on possessing visual depictions of adults engaged in sexually explicit conduct as a condition of supervised release for a defendant convicted of enticement of a minor was an abuse of discretion. *Id.* at 835.

ANALYSIS: The court recognized that a district court may order special conditions of supervised release so long as each condition: (1) is reasonably related to the nature of the circumstances of the offense; (2)

involves no greater deprivation of liberty than necessary and (3) is consistent with the pertinent policies of the Sentencing Commission. *Id.* at 834. The court reasoned that the prohibition on viewing sexually explicit visuals of adults was reasonably related to the nature and circumstances of the offense because the defendant's internet activity led him to commit the offense for which he was convicted. *Id.* at 836. The court further reasoned that the defendant was not deprived of liberty to a greater extent than necessary because the supervised release condition was not too broad or vague that a court could not determine if it was reasonably related to sentencing factors. *Id.* at 834–36.

CONCLUSION: The 11th Circuit held that the district court did not abuse its discretion where the special condition on supervised release was reasonably related to the sentencing factors and did not impinge on defendant's rights. *Id.* at 836.

***Vanover v. NCO Fin. Servs.*, 857 F.3d 833 (11th Cir. 2017)**

QUESTION: "Whether a complaint may be dismissed for asserting claims which could and should have been presented in an earlier-filed complaint . . . ." *Id.* at 836.

ANALYSIS: The court noted the 10th Circuit's position that "[t]he rule against claim-splitting requires a plaintiff to assert all of its causes of action arising from a common set of facts in one lawsuit," and further noted that the 2nd Circuit had adopted a similar position. *Id.* at 841 (internal citations omitted). The court stated that the 10th Circuit's test for claim-splitting "is not whether there is finality of judgment, but whether the first suit, assuming it were final, would preclude the second suit." *Id.* (internal citations omitted). The court agreed that the 10th Circuit's test "makes sense, given that the claim-splitting rule exists to allow district courts to manage their docket and dispense with duplicative litigation." *Id.* (internal citations omitted). The court also acknowledged the 5th Circuit's use of the "transactional test," in which " . . . [t]he critical issue is whether the two actions under consideration are based on the *same nucleus of operative facts*." *Id.* at 842 (internal citations omitted) (emphasis in original). The 11th Circuit further noted the 10th Circuit's analysis that "[u]nder the transactional test, a new action will be permitted only where it raises *new and independent* claims, not part of the previous transaction, based on the new facts." *Id.* (internal citations omitted) (emphasis in original).

CONCLUSION: The 11th Circuit concluded that a complaint may be dismissed for asserting claims which "involve[] the same parties and their privies," and " . . . arise from the same transaction or series of transactions." *Id.* at 841–42.

***Meeks v. Ocwen Loan Servicing LLC*, 681 Fed. Appx. 791 (11th Cir. 2017)**

QUESTION: Whether a "Certified Receipt qualifies as a 'written response acknowledging receipt'" under Regulation X. *Id.* at 793.

ANALYSIS: The court considered the "undisputed facts" of the case, "where [the plaintiff]'s attorney sent the [request for information (RFI)] on behalf of [the plaintiff] as a borrower and [the plaintiff]'s attorneys unquestionably received the Certified Receipt in response signed by [the defendant]'s agent." *Id.*

CONCLUSION: The 11th Circuit held that a Certified Receipt does meet the Regulation X "written response" requirement. *Id.*

***SEC v. Wells Fargo Bank, N.A.*, 848 F.3d 1339 (11th Cir. 2017)**

QUESTION: "[W]hether . . . a district court may extinguish a non-party's pre-existing rights to property under the administration of the equity receivership if that non-party fails to comply with the court's orders regarding filing of proofs of claim." *Id.* at 1341.

ANALYSIS: The court reasoned that "a district court has broad powers and wide discretion to determine relief in an equity receivership." *Id.* at 1343–44. The court noted that "a receiver appointed by a federal court takes property subject to all liens, priorities, or privileges existing or accruing under the laws of the state," but beyond this rule, there is no authority of the district court to extinguish a secured creditor's pre-existing rights to property. *Id.* at 1344. The court further determined that the district court cannot order a secured creditor to file proof of claim, or determine that a secured creditor loses its secured state-law property right that existed prior to a receiver being appointed. *Id.* at 1345.

CONCLUSION: The 11th Circuit held that the district court may not extinguish a non-party's pre-existing rights to property. *Id.* at 1341.

***United States v. Collins*, 854 F.3d 1324 (11th Cir. 2017)**

QUESTION: Whether "sentencing courts must apply the categorical approach to determine whether an offense was an 'offense against property' for purposes of [the Mandatory Victims Restitution Act, 18 U.S.C. § 3663A(c)(1)(A)(ii)]." *Id.* at 1334–35.

ANALYSIS: The 11th Circuit explained that the "'categorical approach' . . . considers only the elements of the offense of conviction." *Id.* at 1329. The court noted that the statute "uses language that the [United States Supreme Court] has previously said suggests consideration of the underlying conduct." *Id.* at 1334. The court specifically referenced the Supreme Court's focus on the word "elements" when it ultimately adopted

the categorical approach for another statute. *Id.* The 11th Circuit distinguished its case, however, because the statute at issue "does not define an 'offense against property' by referring to the 'element[s]' of the offense," but rather, "it describes an 'offense against property' by reference to how it was 'committed'—specifically, it specifies that an 'offense against property' 'include[s] any offense committed by fraud or deceit.'" *Id.* (internal citations omitted). The court further noted that a number of its sister circuits "have focused on the conduct underlying the offense of conviction instead of the elements of the crime." *Id.* at 1335 (internal citations omitted).

CONCLUSION: The 11th Circuit "decline[d] to apply the categorical approach to determine whether a conviction qualifies as an 'offense against property' under § 3663A(c)(1)(A)(ii)." *Id.*

D.C. CIRCUIT

***Livnat v. Palestinian Auth.*, 851 F.3d 45 (D.C. Cir. 2017)**

QUESTION: Whether "non-sovereign foreign government[s]" are "persons" under the Fifth Amendment's Due Process Clause for purposes of personal jurisdiction. *Id.* at 52.

ANALYSIS: The court reasoned that foreign "states," "nations," "governments," or "sovereigns" are not covered by the Due Process Clause of the Fifth Amendment. *Id.* at 49–50. The court also noted that the 2nd Circuit recently determined that only "separate sovereigns, recognized by the United States government as sovereigns, are foreign states left unprotected by the Due Process Clause." *Id.*

CONCLUSION: The D.C. Circuit agreed with the 2nd Circuit in holding that non-sovereign foreign governments are "persons" under the Fifth Amendment, but posited that "while the [2nd] Circuit uses political recognition as the sole definition of sovereignty for due-process purposes, we leave open whether additional considerations could be relevant in future cases." *Id.*

***Citizens for Responsibility & Ethics in v. United States DOJ*, 846 F.3d 1235 (D.C. Cir. 2017)**

QUESTION: "[W]hether [Citizens for Responsibility and Ethics in Washington (CREW)] can pursue [its] suit under the [Administrative Procedure Act (APA)] because [the Freedom of Information Act (FOIA)] does not provide an 'adequate remedy.'" *Id.* 1241.

ANALYSIS: The D.C. Circuit first explained that if "CREW may obtain the relief it wants under FOIA . . . then [the court] need not explore what 'adequate' means under the APA." *Id.* The court analyzed United States Supreme Court and D.C. Circuit precedent to determine that

"FOIA makes available all the relief sought by CREW except disclosure to the public[.]" *Id.* at 1241–44. The court next recognized that the law only requires an adequate alternative, not necessarily relief identical to that of the APA. *Id.* at 1245. The court found that while district courts have no authority under FOIA to order an agency to publicize documents and indices, the courts can order agencies to deliver them to a plaintiff. *Id.* at 1243. Furnishing the documents to a plaintiff was enough such that there was no significant gap between the relief afforded by the FOIA and the APA. *Id.* at 1246.

CONCLUSION: The D.C. Circuit held that an agency cannot pursue a claim under the APA because the FOIA offers an "adequate remedy." *Id.* at 1246.

FEDERAL CIRCUIT

***Parrott v. Shulkin*, 851 F.3d 1242 (Fed. Cir. 2017)**

QUESTION: Whether "the local [Consumer Price Index (CPI)] approach, if one is available, is more consistent with the [Equal Access to Justice Act (EAJA)] than the national approach." *Id.* at 1249.

ANALYSIS: The court reasoned that "[t]he local CPI approach gives the most effect to the statutory text." *Id.* The court explained, "EAJA expressly defines recoverable attorney fees in terms of 'prevailing market rates for the kind and quality of the services furnished,'" and further explained that the EAJA " . . . states in relevant part that attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in 'the cost of living' justifies a higher fee." *Id.* (internal citations omitted). The court additionally noted that "[t]hese two factors—market rates, and the cost of living—strike us as being inherently local in nature. We thus believe that using the market rate and the cost of living actually experienced by an EAJA applicant's attorney is most consistent with EAJA's plain language." *Id.* The court noted that "[t]he local CPI approach also better fulfills the purposes underpinning EAJA. Congress passed EAJA to (1) ensure adequate representation for those needing to vindicate their rights against the government and (2) minimize the cost of this redress to taxpayers." *Id.* Lastly, the court reasoned that the "local CPI approach reduces taxpayer exposure by preventing windfalls to attorneys whose costs of living lie below the national average." *Id.* at 1249–50.

CONCLUSION: The Federal Circuit held that "the Veterans Court did not err in ruling that the local CPI approach represented the correct method of calculating the adjustment in [the] attorney's hourly rate." *Id.* at 1249.

***Secure Axcess, LLC v. PNC Bank Nat'l Ass'n*, 848 F.3d 1370 (Fed. Cir. 2017)**

QUESTION: Whether eligibility for a Covered Business Method (CBM) patent is determined by its litigation history in addition to whatever method it claims is patentable at the time the idea is filed. *Id.* at 1373.

ANALYSIS: The court first determined what it means for a CBM patent to "claim" something. *Id.* at 1377. The court noted that under section 18(d)(1) of the America Invents Act, a CBM patent is defined as "a patent that claims a method or corresponding apparatus for performing data processing or other operations used in the practice, administration, or management of a financial product or service." *Id.* at 1377. The court determined that based on this language, the business practice must have an element of financial activity to be considered for a CBM patent. *Id.* at 1382. The court reasoned that the choice to litigate does not necessarily show that a patent is a CBM patent nor does it help to further understand the invention being claimed. *Id.* at 1381.

CONCLUSION: The Federal Circuit held that the patent's litigation history has no bearing on whether it is "used in the practice of a financial product or service," and therefore is irrelevant to whether it is a CBM patent. *Id.* at 1382.

***Aylus Networks, Inc. v. Apple Inc.*, 856 F.3d 1353 (Fed. Cir. 2017)**

QUESTION: "Whether statements made by a patent owner during an [inter parties review (IPR)] proceeding can be relied on to support a finding of prosecution disclaimer during claim construction." *Id.* at 1359.

ANALYSIS: The court noted that prosecutorial disclaimer has been applied to both pre-issuance and post-issuance proceedings before the Patent and Trademark Office (PTO). *Id.* at 1360. The court also recognized that the United States Supreme Court has held that an IPR proceeding involves reexamination of a patent because the PTO takes a second look at an earlier grant of a patent. *Id.* at 1361. The court recognized that many district courts have "addressed this issue and have . . . concluded that statements made by a patent owner during an IPR proceeding can be considered for prosecution disclaimer." *Id.* The court reasoned that any representations made in any filings during an IPR are subject to prosecution disclaimer because the public is allowed to rely on any of the statements in both sets of documents. *Id.* at 1362.

CONCLUSION: The Federal Circuit held that any statements made by the patent owner during IPR proceedings can be used to support a finding of prosecution disclaimer. *Id.* at 1361.

***Wyandot Nation v. United States*, 858 F.3d 1392 (Fed. Cir. 2017)**

QUESTION: Whether the threshold determination that an entity "is a federally recognized Indian tribe is within the primary jurisdiction of [the Department of the] Interior (Interior)." *Id.* at 1400.

ANALYSIS: The court noted that the doctrine of primary jurisdiction provides that an agency should make a determination of an issue in the first instance, rather than a court, to promote uniformity of decisions and where the issue falls within the "special knowledge" of the agency. *Id.* (internal quotation marks omitted). The court reasoned that, "[i]t is clear that 'desirable uniformity' would be obtained by [permitting Interior to determine whether the entity is a federally recognized Indian tribe] and that Interior has 'expert and specialized knowledge' of the issue involved." *Id.* The court further reasoned that the other courts to consider this question have held "that whether a particular entity is an Indian tribe is to be first resolved by Interior." *Id.*

CONCLUSION: The Federal Circuit held that tribal recognition falls within the primary jurisdiction of the Department of the Interior. *Id.* at 1402.

***In re OptumInsight, Inc.*, No. 2017-116, 2017 U.S. App. LEXIS 13483 (Fed. Cir. July 20, 2017)**

QUESTION: "Whether a predecessor company's attorney-client privilege waiver can extend to post-merger communication." *Id.* at *6.

ANALYSIS: The court noted that under Federal Rule of Evidence 502, intentional waivers of disclosed communications can also render undisclosed communications waived if they are related to the same subject matter. *Id.* at *7. The court reasoned that because the authority to both waive and assert privilege passes to a successor company's management, the successor may be bound by its predecessor's waiver. *Id.* at *8. The court also noted that scope of waiver is typically evaluated on a case-by-case basis for fairness. *Id.* at *9.

CONCLUSION: The Federal Circuit held that a predecessor company's waiver can extend through a merger and render post-merger communication waived if it "concern[s] the same subject matter" as the earlier waived communication and should be fairly considered together. *Id.* at *7–9.