# First Impressions

The following pages contain brief summaries, drafted by the members of the *Seton Hall Circuit Review*, of issues of first impression identified by a federal court of appeals opinion announced between January 31, 2007 and October 31, 2007. This collection is organized by circuit.

Each summary presents an issue of first impression, a brief analysis, and the court's conclusion. It is intended to give only the briefest synopsis of the first impression issue, not a comprehensive analysis. This compilation makes no claim to be exhaustive, but will hopefully serve the reader well as a reference starting point. If a circuit does not appear on this list, it means that the editors did not identify any cases from that circuit for the specified time period that presented an issue of First Impression.

## FIRST CIRCUIT

### *United States v. Gil-Carmona*, 497 F.3d 52 (1st Cir. 2007)

**QUESTION:** Whether the Maritime Drug Law Enforcement Act's "requirement that a 'vessel [be] subject to the jurisdiction of the United States' was an essential element of the crime to be determined by a jury, rather than by a judge, as mandated by Congress in section 70504(a)." *Id.* at 54.

**ANALYSIS:** The court stated that "[a] defendant's claim that his constitutional rights were violated by the removal of an element of the charged offense from the jury's consideration is ordinarily reviewed for harmless error." *Id.* at 55. Following this standard, the court examined "whether the record contains evidence that could rationally lead to a contrary finding with regard to the omitted element." *Id.*

**CONCLUSION:** The 1st Circuit concluded "that the jury would have found . . . [the defendant] guilty even if the question of jurisdiction . . . had been submitted to them, rendering any error in failing to do so harmless." *Id.*

### *E. Sav. Bank v. Lafata*, 483 F.3d 13 (1st Cir. 2007)

**QUESTION:** "[W]hether the Bankruptcy Code's protection of mortgage lenders against modification of claims secured by a principal residence" applied when the residence lay mostly "on a lot abutting the mortgaged property." *Id.* at 15.

**ANALYSIS:** The 1st Circuit noted that, "[i]n *Nobleman*, the Supreme Court held that [section] 1322(b)(2) barred modification of the entire claim—secured and unsecured portions—if the claim is secured by the debtor's principal residence." *Id.* at 18. Because the lender did not dispute the Bankruptcy Court's finding that the encroachment is not "the main part, the principal part, or even an important part of the . . . residence," the court next analyzed "whether even some nominal encroachment by a debtor's principal residence on a mortgaged property will trigger the anti-modification protections of [section] 1322(b)(2)." *Id.* at 19. The court first examined the language of the statute, noting that "[t]he key phrase in the statute is 'secured only by a security interest in real property that is the debtor's principal residence.'" *Id.*

The court recognized that the language of the statute was ambiguous as to whether this was satisfied "when a party actually resides

mostly on the adjacent property." *Id.* at 20. The court therefore examined the legislative history of section 1322(b)(2), which it had previously reviewed in *Lomas Mortgage, Inc. v. Louis*, and concluded that "the most that could be said of the legislative history was that Congress wanted to benefit the residential mortgage market as opposed to the entire real estate mortgage market." *Id.* The court next stated that "[t]his policy of preferring mortgage lenders to other lenders in bankruptcy does not necessarily extend to those cases where the lender has failed to exercise reasonable due diligence." *Id.* The court stated that under these circumstances, holding in favor of the creditor would create a "windfall" for the bank and "[g]iven its lack of due diligence, we see no reason why the result should be otherwise." *Id.* at 21.

**CONCLUSION**: The 1st Circuit held that "the anti-modification provisions of section 1322(b)(2) will not apply if the debtor's principal residence only encroaches on the mortgaged property." *Id.* at 21.

### *Wood v. Spencer*, 487 F.3d 1 (1st Cir. 2007)

**QUESTION:** Whether a petitioner's lack of due diligence disposed of a habeas petition regarding a state-created impediment inquiry. *Id.* at 6.

**ANALYSIS:** The court noted that the section in question, 28 U.S.C. § 2244(d)(1)(B), focused "on government conduct and does not contain an explicit diligence requirement," though such a requirement was included in a different section of the same statute. *Id.* But the court held that "all words and provisions of statutes are intended to have meaning and are to be given effect," and should be interpreted so as not to make a word or phrase therein superfluous." *Id.* at 7. To not impute a diligence requirement would ". . . fail[] to give meaning to the second clause of the statutory provision. That clause demands that a state-created impediment must, to animate the limitations-extending exception, 'prevent' a prisoner from filing for federal habeas relief." *Id.* The court considered the petitioner's available alternatives to be "of considerable relevance." *Id.* The 1st Circuit noted that "the person who has notice that information exists and ready access to it hardly can blame his inaction on the state's failure to deliver the information to him." *Id.*

**CONCLUSION:** "[O]n the facts of this case, the Commonwealth's conduct cannot fairly be said to have been the obstacle that prevented Wood from filing for federal habeas relief." *Id.* at 8.

***Torres-Negrn v. J & N Records, LLC*, 504 F.3d 151 (1st Cir. 2007)**

**QUESTION:** Whether a reconstruction of an original work from memory constituted a "copy" within the meaning of 17 U.S.C. § 408(b). *Id.* at 157.

**ANALYSIS:** The court determined "[t]he statutory definition of 'copy' provides little guidance." *Id.* The court further noted that in accordance with dictionary definitions, a reconstruction varies from a copy in that it is created without an original. *Id.*

**CONCLUSION:** The 1st Circuit concluded that without first-hand access to the original, a reconstruction did not constitute a "copy" sufficient to satisfy 17 U.S.C. § 408(b). *Id.* at 163.

***Mellen v. Trs. of Boston Univ.*, 504 F.3d 21 (1st Cir. 2007)**

**QUESTION:** "Whether [under the Family Medical Leave Act] holidays were to be counted against intermittent leave taken in an interval of a week or more." *Id.* at 25.

**ANALYSIS:** The court examined "the intersection of certain FMLA regulations, 29 C.F.R. § 825.200(f) and 29 C.F.R. § 825.205(a), pertaining to proper allocation of intermittent leave" and determined that the provisions "fit together naturally." *Id.* at 23, 25. Section 825.200(f) provided that "the fact that a holiday [occurred] within the week taken as FMLA leave ha[d] no effect" on the calculation of the "amount of leave used" by an employee. *Id.* at 25. Section 825.205(a) established that "only the 'amount of leave actually taken'" by an employee taking intermittent leave could "be counted against the twelve-week entitlement." *Id.* The court concluded that "[t]he 'amount of leave actually taken' to which section 825.205(a) refers is the 'amount of leave used' defined in section 825.200(f)." *Id.*

**CONCLUSION:** The court held that "if an employee's intermittent leave includes a full, holiday-containing week, section 825.200(f) provides that the 'amount of leave used' includes the holiday." *Id.*

***Mejia-Orellana v. Gonzales*, 502 F.3d 13 (1st Cir. 2007)**

**QUESTION:** Whether an alien that has "acquired his 'lawful permanent resident status' by fraud or misrepresentation" had been lawfully admitted and is therefore eligible for cancellation of removal. *Id.* at 14.

**ANALYSIS:** The 1st Circuit initially acknowledged that "[i]n order to be eligible for cancellation of removal under 8 U.S.C. § 1229b(a), an

alien must . . . have been 'lawfully admitted for permanent residence for not less than five years.'" *Id.* at 15–16. The court's next logical inquiry was whether admissions acquired through fraud and misrepresentation is included within the meaning of "lawfully admitted for permanent residence." *Id.* at 16. The court followed the BIA precedent, that when aliens "have acquired permanent resident status by fraud or misrepresentation, because they have not been lawfully admitted for permanent residence," they are denied 8 U.S.C. § 1229b (a) protection. *Id.*

**CONCLUSION:** The court held that because the alien acquired permanent resident status through fraud and misrepresentation, the alien was never 'lawfully admitted for permanent residence' and was ineligible for cancellation of removal under 8 U.S.C. § 1229b (a). *Id.* at 16–17.

***UPS Cap. Bus. Credit v. Gencarelli*, 501 F.3d 1 (1st Cir. 2007)**

**QUESTION:** Whether or not a commercial lender had a "right to receive a bargained-for prepayment penalty from a solvent debtor." *Id.* at 2.

**ANALYSIS:** The 1st Circuit held that section 502 of the Bankruptcy Code, rather than section 506(b), must be used to govern the allowance of claims. *Id.* at 5. As such, the Bankruptcy Code does not allow a solvent debtor to be relieved of prepayment obligations unless a section 502 exception applies. *Id.* at 8. The court noted that where a debtor is solvent, bankruptcy law holds that courts must enforce contractual provisions that are deemed valid under state law. *Id.* at 7.

**CONCLUSION:** The 1st Circuit examined policy and other circuit courts' precedents to allow "claims for prepayment penalties as unsecured claims, even if the penalties are deemed unreasonable, so long as they are valid under section 502." *Id.*

***United States v. Brown*, 500 F.3d 48 (1st Cir. 2007)**

**QUESTION:** "[W]hether, for purposes of 21 U.S.C. § 841(b)(1), 'attempt' offenses are considered 'felony drug offenses'" and, therefore, may count as predicate offenses on which to base a recidivist sentencing enhancement. *Id.* at 51.

**ANALYSIS:** The court noted that here, the statutory scheme contained "specific penalty provisions applicable to recidivist drug offenders," providing that persons "convicted under section 841(a)(1) 'after two or more prior convictions for a felony drug offense have

become final . . . shall be sentenced to a mandatory term of life imprisonment without release.'" *Id.* at 59. The court interpreted "felony drug offense" under its applicable statute, as "an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs." *Id.* The court noted that, per the relevant statute, the attempt criteria of felony and imprisonment were met. *Id.* The court found that "relate" in this context means "show or establish a logical or causal connection between." *Id.* at 60. The court interpreted this broad definition as a congressional mandate to "treat inchoate offenses with as much gravity as the substantive offenses that underlie them," and cited case law concluding that "possession with intent to distribute qualifies as a 'serious offense.'" *Id.*

**CONCLUSION:** The court held that, "[u]nder section 841(b)(1), the term 'felony drug offense' includes crimes [such as attempt crimes] that do not involve outright possession of narcotic drugs." *Id.*

***United States v. Weikert*, 504 F.3d 1 (1st Cir. 2007)**

**QUESTION:** Whether requiring an individual on supervised release to provide a blood sample, for purposes of creating a DNA profile and entering it into a centralized database, violated the Fourth Amendment's prohibition on unreasonable searches and seizures. *Id.* at 2–3.

**ANALYSIS:** The court noted that this case required a balancing of the government's interest in "monitoring and rehabilitating supervised releasees, solving crimes, and exonerating innocent individuals" and the defendant's privacy interest. *Id.* at 14. The court noted that supervised releasees have a "substantially diminished expectation of privacy." *Id.* at 11. Further, the court explained that the government has a compelling interest in maintaining a record of the identities of supervised releasees because they "are more likely to commit future criminal offenses than are average citizens." *Id.* at 13.

**CONCLUSION:** The court concluded that the government's interest in "monitoring and rehabilitating supervised releasees" outweighed the defendant's privacy interest, "given his status as a supervised releasee, the relatively minimal inconvenience occasioned by a blood draw, and the coding of genetic information that, by statute, may be used only for purposes of identification." *Id.* at 14.

## SECOND CIRCUIT

### *Vadas v. United States*, No. 06-2087-pr, 2007 U.S. App. LEXIS 10348 (2d Cir. May 3, 2007)

**QUESTION:** Whether the government's "filing and later withdrawal of an Amended Second-Offender Information" pursuant to 21 U.S.C. § 851, "rendered null and void the originally filed Second-Offender Information." *Id.* at 14.

**ANALYSIS:** The court initially explained that section 851 prohibits a court from imposing an enhanced sentence "unless the government files—before trial or the entry of a guilty plea—an information with the court specifying in writing the earlier convictions upon which the enhancement rests." *Id.* at 3. The court stated that the notice requirement of section 851 "reflects, essentially, two goals, first 'to allow the defendant to contest the accuracy of the information,' and second 'to allow defendant to have ample time to determine whether to enter a plea or go to trial and plan his trial strategy with full knowledge of the consequences of a potential guilty verdict.'" *Id.* at 17. The court reasoned that there was "no doubt that the filing of the [original] Second-Offender Information provided Vadas with notice that was adequate to allow him to accept (or to prepare to challenge) a sentence enhancement based on a previous conviction." *Id.* at 20.

**CONCLUSION:** The court concluded that "the purposes of section 851 were fulfilled through the original filing of the information, and . . . this filing remained effective" despite the withdrawal of the Amended Second-Offender Information. *Id.* at 21.

### *Weber v. United States*, 484 F.3d 154 (2d Cir. 2007)

**QUESTION:** Whether the 2nd Circuit should exercise its jurisdiction over a direct appeal from the Bankruptcy Court as authorized by section 1233 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), which confers jurisdiction on the courts of appeals in such circumstances, but grants them discretion to accept or decline the direct appeal. *Id.* at 157.

**ANALYSIS:** The court agreed with the purpose of section 1233 of the BAPCPA that "on appeals that raise controlling questions of law, concern matters of public importance, and arise under circumstances where a prompt, determinative ruling might avoid needless litigation."

*Id.* at 158. Accordingly, the court held that "the Court of Appeals would be most likely to exercise its discretion to "permit direct appeal where there [was] uncertainty in the bankruptcy courts," or where the court found it "patently obvious that the Bankruptcy Court's decision [was] either manifestly correct or incorrect." *Id.* at 161. However, the court also ruled that it would be "reluctant to accept cases for direct appeal" when a decision would benefit from percolation through the district court. *Id.*

**CONCLUSION:** The 2nd Circuit declined to exercise its discretion to hear the direct appeal in this case because there was no showing that evaluation of the Bankruptcy Court's decision at that time would have led to a more rapid resolution of the case, since the decision did not appear to be either manifestly correct or manifestly incorrect. *Id.*

***United States v. Triumph Capital Group, Inc.*, 487 F.3d 124 (2d Cir. 2007)**

**QUESTION:** "[W]hether there can be a Sixth Amendment violation when the only attorney-client communication prohibited was communication about the defendant's testimony." *Id.* at 132.

**ANALYSIS:** The court noted that "all of the federal circuit courts that have considered the issue have concluded that under *Perry* and *Geders* a district court may not order a defendant to refrain from discussing his ongoing testimony with counsel during an overnight recess, even if all other communication is allowed." *Id.* The court ruled "that an order banning the defendant from discussing his testimony with counsel during an overnight recess is unconstitutional because it has the effect of prohibiting a wide range of discussions that under *Geders* are constitutionally protected." *Id.* The court reasoned that "while the judge may instruct the lawyer not to coach his client, he may not forbid all 'consideration of the defendant's ongoing testimony' during a substantial recess." *Id.*

**CONCLUSION:** The court concluded that "a restriction on communication during a long recess can violate the Sixth Amendment even if the restriction bars discussion only of the defendant's testimony." *Id.* at 133.

***Belot v. Burge*, 490 F.3d 201 (2d Cir. 2007)**

**QUESTION:** Whether the court should apply a *de novo* or abuse of discretion standard of review when reviewing a district court's denial of equitable tolling as an exercise of its discretion as to a petition under the

Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *Id.* at 205.

**ANALYSIS:** The court noted "if a district court denies equitable tolling on the belief that the decision was compelled by law, that the governing legal standards would not permit equitable tolling in the circumstances—that aspect of the decision should be reviewed *de novo*. If the decision to deny tolling was premised on an incorrect or inaccurate view of what the law requires, the decision should not stand. Courts generally in such circumstances state that application of an incorrect standard of law is an 'abuse of discretion.'" *Id.* at 206.

**CONCLUSION:** The court reviewed "the discretionary ground for abuse of discretion" and found that "this decision was within the district court's reasonable discretionary parameters." *Id.* at 207.

### ***State Employees Bargaining Agent Coalition v. Rowland*, 494 F.3d 71 (2d Cir. 2007)**

**QUESTION:** Whether the legislative elimination of a job position precluded "a plaintiff's claim of an ongoing violation of federal law under [the] *Ex parte Young*" exception to Eleventh Amendment sovereign immunity. *Id.* at 98.

**ANALYSIS:** The court began by noting that under *Ex parte Young*, plaintiffs can sue state officials acting in their official capacities for "prospective, injunctive relief," as long as plaintiffs allege "'ongoing violation[s] of federal law.'" *Id.* at 95. Rejecting the appellants' contention that the elimination of the job positions in question had also eliminated the requisite ongoing violations, the court found that plaintiffs' properly claimed that the state's actions were both ongoing and "potentially curable by prospective relief." *Id.* at 96–97. First, the court explained that despite the elimination of the plaintiffs' job positions, the plaintiffs could still claim ongoing harm since they remained without jobs. *Id.* at 97. Second, the court found that relief such as reinstatement or the creation of new positions could properly address the alleged ongoing violations. *Id.*

**CONCLUSION:** The court held that the elimination of a job position allegedly "in violation of plaintiffs' rights [was] nevertheless 'ongoing' for the purposes of the *Ex parte Young* exception" to the Eleventh Amendment. *Id.* at 96.

***Davis v. Blige,* 505 F.3d 90 (2d Cir. 2007)**

**QUESTION:** "[W]hether one joint owner of a copyright can retroactively transfer his ownership by a written instrument, and thereby cut off the accrued rights of the other owner to sue for infringement." *Id.* at 97.

**ANALYSIS:** The 2nd Circuit distinguished this case from the cases relied upon by the district court "insofar as they involved retroactive licenses granted pursuant to negotiated settlements of accrued infringement claims." *Id.* at 101. The court explained the differences between settlements and licenses, stating that a "settlement agreement can only waive or extinguish claims held by a settling owner; it can have no effect on co-owners who are not parties to the settlement agreement. . . . Licenses and assignments, however, are prospective; they permit use by a non-owner who would not otherwise have a right to use the property." *Id.* at 102–103. The court found that permitting retroactive licenses or assignments would eliminate a co-owner's right to sue for infringement and would violate "the fundamental principle of contract law prohibiting the parties to a contract from binding nonparties." *Id.* at 103. Finally, the court listed "(1) the need for predictability and certainty and (2) discouragement of infringement" as two policy reasons against retroactive licenses or assignments. *Id.* at 105.

**CONCLUSION:** The court held that "such retroactive transfers violate basic principles of tort and contract law, and undermine the policies embodied by the Copyright Act." *Id.* at 97–98.

***Osario-Pedreros v. Keisler*, 503 F.3d 162 (2d Cir. 2007)**

**QUESTION:** Whether an agency abused its discretion by not granting a continuance "when a petitioner's I-130 petition has been denied by the District Director but an appeal of that decision is still pending in front of the BIA." *Id*. at 165.

**ANALYSIS:** The court determined "[t]he BIA clearly grounded its holding not only on the fact that the District Director had denied the I-130 petition, but also on its finding, fully supported by the record, that Osario-Pedreros had failed to provide *any* meaningful argument or evidence as to why the District Director's decision was erroneous." *Id*.

**CONCLUSION:** The 2nd Circuit held that "the agency's refusal to grant a continuance was not an abuse of discretion." *Id*. at 166.

***Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 500 F.3d 171 (2d Cir. 2007)**

**QUESTION:** Whether a contractual waiver of a jury trial was "effective against a claim that the contract containing the waiver was induced by fraud." *Id.* at 188.

**ANALYSIS:** The 2nd Circuit stated that if a party alleges an agreed-upon dispute resolution provision was procured by fraud, "the fairest course is to afford that litigant the protections he would have enjoyed had he never been fraudulently induced to forsake them by contract." *Id.* However, "a contractual waiver is enforceable if it is made knowingly, intentionally, and voluntarily." *Id.* If the party does not view the provision as a product of fraud, the court then found there is no reason to discard the agreed-upon manner of dispute resolution. *Id.*

**CONCLUSION:** The court joined the 10th Circuit in holding that "unless a party alleges that its agreement to waive its right to a jury trial was itself induced by fraud, the party's contractual waiver is enforceable vis-à-vis an allegation of fraudulent inducement relating to the contract as a whole." *Id.*

## THIRD CIRCUIT

***Vega v. United States*, 493 F.3d 310 (3d Cir. 2007)**

**QUESTION:** "[W]hether an erroneously released prisoner [was] entitled to credit for time spent at liberty." *Id.* at 313.

**ANALYSIS:** The court found no violation of due process and concluded that "credit for time spent at liberty is [not] among those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'" *Id.* at 317. The court identified three interests important to the determination of whether an released prisoner should be granted credit for the time he was at liberty: (1) "simple fairness toward the prisoner", (2) "limit[ing] the capricious exercise of governmental power", and (3) "society's interest in convicted criminals serving out their sentences." *Id.* at 318.

**CONCLUSION:** The court established a two-part test and held that an erroneously released prisoner is entitled to credit for time spent at liberty if "he can bring forth facts indicating that he was released despite having unserved time remaining" and if the government fails to prove either that "the imprisoning sovereign was not negligent, or vicariously negligent, or that the prisoner, in any way, affirmatively effectuated his release or prevented his re-apprehension." *Id.* at 323.

***Chen v. Att'y Gen.*, 491 F.3d 100 (3d Cir. 2007)**

**QUESTION:** "[W]hether a husband may qualify for asylum on the well-founded fear that his wife may be persecuted under a coercive population control policy." *Id.* at 103.

**ANALYSIS:** The court stated that "[t]he spouse of an asylee may obtain derivative asylum status under 8 U.S.C. § 1158(b)(3), but the provision for derivative asylum does not allow one spouse to stand in the shoes of the other and to independently obtain asylum based on a threat to the other spouse." *Id.* at 105. The court assessed the Board of Immigration Appeal's ("BIA") interpretation of the controlling statute concluding that the BIA "exercised its delegated gap-filling authority reasonably," and was not unreasonable "in holding . . . that the scope of the harm resulting from the enforcement of a population-control policy by forced abortion and involuntary sterilization extends to both spouses. *Id.* at 108.

**CONCLUSION:** The 3rd Circuit "established that a petitioner may qualify for asylum on the basis of a well-founded fear that his spouse may face forced abortion or sterilization." *Id.* at 109.

***Wachtel v. Health Net, Inc.*, 482 F.3d 225 (3d Cir. 2007)**

**QUESTION:** Whether the common-law "fiduciary exception" to the attorney-client privilege extended to all statutory fiduciaries, such as those created by ERISA. *Id.* at 230.

**ANALYSIS:** The court first surveyed the history of attorney-client privilege and the fiduciary exception in English and American law, finding that the primary policy justifications for the exception are the trustee's duty to furnish information to beneficiaries and the trustee's solicitation of legal advice as a representative of the beneficiaries as "real clients" rather than for personal purposes. *Id.* at 232. The court then noted two exceptions to the fiduciary exception, to "allow the attorney-client privilege to remain intact for an ERISA fiduciary when its interests diverge sufficiently from those of the beneficiaries . . . ." *Id.* at 233. The 3rd Circuit viewed four factors: corporate ownership of assets, structural conflict of interest from the profit motive, handling of multitudes of ERISA and non-ERISA plans with divergent interests, and payment of legal fees from funds of the corporation, to find that the insurance company was the real client. *Id.* at 234–36. Finally, the court surmised that Congress never intended for ERISA trustees to be subject to the same obligations that apply to common law trustees, so that the duty to disclose was limited to certain circumstances, such as the denial of medical services. *Id.* at 236–37.

**CONCLUSION:** The 3rd Circuit found that the district court erred in ordering privileged documents discoverable under the fiduciary exception. *Id.* at 238.

***Biskupski v. Att'y Gen.*, 503 F.3d 274 (3d Cir. 2007)**

**QUESTION:** What is the proper interpretation of "'actions taken' in section 321(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)." *Id.* at 279.

**ANALYSIS:** The 3rd Circuit interpreted 8 U.S.C. § 1324(a)(2), which provides that any person who knowingly or recklessly helps an alien who did not receive official authorization to enter the United States, shall be subject to a fine or imprisonment or both. *Id.* at 278. In 1996, Congress expanded IIRIRA to make "immigrant smuggling" under section 1324(a)(2) an "aggravated felony" and extended the required imprisonment term to at least five years. *Id.* Upon changing the requirement, Congress noted that "[t]he amendments made by this section shall apply to *actions taken* on or after the date of the enactment of this Act, regardless of when the conviction occurred." *Id.* The court looked to the Ninth Circuit's ruling in *Valderrama-Fonseca v. INS* and the Fifth Circuit's ruling in *Garrido-Morato v. Gonzales*, both of which held that "actions taken" includes "actions and decisions of the Attorney General acting through an immigration judge or the BIA [Board of Immigration]" taken against the defendant "*under* the statute." *Id.* at 282.

**CONCLUSION:** The court held that "actions taken" under IIRIRA section 321(c) means "orders or decisions of the IJ or BIA which apply the 'aggravated felony' definitions and thus determine the availability of discretionary hardship relief to such felons." *Id.* at 283. The court found that "[t]his definition of 'actions taken' makes sense considering that until a final agency order is issued by either an IJ or the BIA, an alien remains the subject of administrative adjudication 'and has . . . not established any right to the benefit he is seeking to obtain by his application.'" *Id.*

***Kolkevich v. Att'y Gen.*, 501 F.3d 323 (3d Cir. 2007)**

**QUESTION:** Whether a criminal alien had the right to challenge the "final order of removal entered against [the alien] by the Attorney General, notwithstanding the fact that the passage of the REAL ID Act of 2005 cuts off [the alien's] right to file a petition for habeas corpus relief." *Id.* at 324.

**ANALYSIS:** The court's analysis began with the Suspension Clause [art I., § 9, cl. 2] of the U.S. Constitution which provides that "the privilege of the writ of Habeas Corpus shall not be suspended." *Id.* at 332. The court noted, however, that "the Suspension Clause does not require Congress to guarantee aliens the right to petition for habeas . . . at all times and under all circumstances." *Id.* The court then referred to the Congressional History of the REAL ID Act of 2005 (RIDA) and stated that "Congress [did not intend] to risk running afoul of the Suspension Clause by suspending the writ of habeas corpus with respect to the small class of aliens who received final orders of removal more than thirty days prior to the enactment of RIDA." *Id.* at 335.

**CONCLUSION:** The court allowed a criminal alien thirty days after a RIDA enactment to challenge the final order of removal, which it believed was reasonable in light of the Congressional purpose in ensuring that criminal aliens received "the same type and amount of judicial review as other aliens." *Id.* at 337.

## FOURTH CIRCUIT

### *Etape v. Certoff*, 497 F.3d 379 (4th Cir. 2007)

**QUESTION:** Whether, pursuant to 8 U.S.C. § 1447(b), a naturalization applicant's timely filing of a petition for a hearing in a federal court, due to the failure of the United States Bureau of Citizenship and Immigration Services (CIS) to make a decision on the naturalization application within 120 days, vested the court with exclusive jurisdiction. *Id.* at 381.

**ANALYSIS:** The court first looked to the 9th Circuit, which held, "section 1447(b) does indeed vest exclusive jurisdiction in the district court, and so prevents the CIS from further action . . . after a petition has been filed." *Id.* at 382. The court then examined the statutory language and reasoned that because section 1447(b) "clearly prescribes consequences for the CIS's failure to act," and "a district court acquires jurisdiction and may either decide the matter itself or remand to the CIS with instructions," therefore Congress intended to "provide district courts with exclusive jurisdiction." *Id.* at 385. In addition, the court stated, "holding that section 1447(b) vests the district court with exclusive jurisdiction furthers the twin congressional goals of streamlining the process but retaining applicants' judicial rights." *Id.* at 386.

**CONCLUSION:** The court held that a district court has exclusive jurisdiction over petitions filed under section 1447(b), and the "holding

should apply retroactively *only* to section 1447(b) cases still open on direct review." *Id.* at 388.

***Discover Bank v. Vaden*, 489 F.3d 594 (4th Cir. 2007)**

**QUESTION:** "[W]hether Congress intended the [Federal Deposit Insurance Corporation, "FDIA"] to completely preempt state-law usury claims against state-chartered banks." *Id.* at 604.

**ANALYSIS:** The court stated that "National Bank Act ("NBA") . . . is to national banks as . . . FDIA is to state-chartered banks." *Id.* at 605. The court also noted that "the NBA completely preempts state-court usury claims against national banks." *Id.* Therefore, the court concluded, there is "no such thing as a state-law claim of usury against a national bank." *Id.*

**CONCLUSION:** Following sister-circuit precedent and the Supreme Court's findings, the 4th Circuit held that "Congress intended complete preemption of state-court usury claims under the FDIA." *Id.* at 606.

***Life Partners, Inc. v. Morrison*, 484 F.3d 284 (4th Cir. 2007)**

**QUESTION:** "[W]hether the Virginia Viatical Settlements Act, Va. Code Ann. § 38.2-6002, et seq., which regulates viatical settlements with insureds who are residents of Virginia, is saved from the dormant Commerce Clause of the U.S. Constitution by the McCarran-Ferguson Act, 15 U.S.C. §§ 1011–1012, as a state law that 'relates to' the regulation of the business of insurance or as a state law enacted 'for the purpose of regulating the business of insurance.'" *Id.* at 286.

**ANALYSIS:** The court explained that "the 'relate to' language in . . . the McCarran-Ferguson Act . . . is 'clearly expansive' and that a state law that has a 'connection with' or 'reference to' the regulation of the business of insurance is saved from the Commerce Clause's preemption." *Id.* at 297. The court stated that by "focusing on the business of insurance insofar as it involves the marketing, sale, execution, performance, and administration of insurance contracts, Congress gave States broad authority to regulate," and the court reasoned that "because the Virginia Viatical Settlements Act addresses these aspects of insurance contracts with Virginia residents, the Act 'relates to' the regulation of the business of insurance." *Id.* Additionally the court recognized that "[t]he broad category of laws enacted 'for the purpose of regulating the business of insurance' consists of laws that possess the end, intention, or aim of adjusting, managing, or controlling the business of insurance." *Id.* The court explained that "[j]ust as the Virginia statute

relates to the business of insurance, it also clearly 'manages' and 'controls' the relationship between the insurer and the insured and is 'aimed at protecting or regulating' that relationship, as it dictates in what manner an insured may alter fundamental aspects of her relationship with the insurer." *Id.*

**CONCLUSION:** The court concluded that "the Virginia Viatical Settlements Act relates to the regulation of the business of insurance; was enacted for the purpose of regulating the business of insurance; and indeed regulates directly and substantially the actual business of insurance," and "[t]hus the McCarran-Ferguson Act saves the Act from any dormant Commerce Clause challenge." *Id.* at 299.

***Doe v. Kidd*, 501 F.3d 348 (4th Cir. 2007)**

**QUESTION:** Whether 42 U.S.C. § 1983 provided an applicant with a remedy for alleged violations of the reasonable promptness of medical services provision under section 1396a(a)(8) of the Medicaid Act. *Id.* at 355.

**ANALYSIS:** The 4th Circuit first explained that while section 1983 "imposes liability on any person who, under the color of state law, deprives another person of 'any rights, privileges, or immunities secured by the Constitution and laws,'" some statutes bar private enforcement by section 1983. *Id.* The court proceeded to analyze the reasonable promptness provision of the Medicaid Act under the framework established by the Supreme Court in *Blessing v. Freestone* in order to determine "whether [the] statutory provision gives rise to an individual right" under section 1983. *Id.* at 355–56. First, the court found that the provision was designed to benefit all individuals eligible for Medicaid. *Id.* at 356. Second, the court determined that the provision was "not so 'vague and amorphous' that the judiciary [could not] competently enforce it." *Id.* On the contrary, the court explained that the Medicaid notification standard of "reasonable promptness" was clearly stated and defined by the relevant regulations and guidelines. *Id.* Third, the court pointed out that the provision clearly created an obligation that "plans 'must' provide for assistance that 'shall' be delivered with reasonable promptness." *Id.* Finally, the court noted that Congress neither explicitly nor impliedly foreclosed private enforcement under section 1983. *Id.*

**CONCLUSION:** Noting that other circuit courts had reached the same conclusion, the 4th Circuit held that an applicant "may proceed under section 1983 to address any failure by [a state agency] to comply with the reasonable promptness provision of the Medicaid Act." *Id.* at 357.

## FIFTH CIRCUIT

### *Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494 (5th Cir. 2007)

**QUESTION:** Whether "courts should hold standing exists when the parties repeatedly admit by implication the facts necessary to satisfy standing." *Id.* at 507.

**ANALYSIS:** The court found an implied-admission concept regarding standing to be "sufficiently analogous to the approach taken by Federal Rule of Civil Procedure 15(b)." *Id.* at 506. The court then stated the rule in part: "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." *Id.*

**CONCLUSION:** The 5th Circuit concluded that the unchallenged allegations in the plaintiff's complaint constituted a "noneconomic, intangible injury under our Establishment Clause jurisprudence." *Id.*

### *United States v. Ridgeway*, 489 F.3d 732 (5th Cir. 2007)

**QUESTION:** Whether the government, under the Victim and Witness Protection Act ("VWPA"), was authorized to file a lien against a debtor's property for a restitution order owed to a private company on the private company's behalf. *Id* at 734.

**ANALYSIS:** The court determined that the provisions in VWPA are directed at payments due while the instant case involved outstanding debts. Therefore, the outcome was "governed by the enforcement provisions found in 18 U.S.C. § 3663(h)." *Id.*

**CONCLUSION:** The court ultimately adopted the government's position, which interpreted section 3663 (h)(1)(A) as allowing the government "to utilize all methods of collection provided for in Title 18, Chapter 229, subchapter 12, one of . . . [which] creates a lien on the fined person's property . . . [that does not] expire for twenty years . . . [as long as] the underlying judgment is less than twenty-two years old." *Id.* at 736.

### *United States v. Brazell*, 489 F.3d 666 (5th Cir. 2007)

**QUESTION:** Whether violation of 18 U.S.C. § 228(a)(3) constituted a continuing offense such that a defendant could continue to commit it after being sentenced to probation for a drug offense. *Id.* at 668.

**ANALYSIS:** The court noted that other circuits have concluded that failure to pay child support is a continuing offense. *Id.* The court agreed with its sister circuits' interpretation and further qualified its reasoning with the Supreme Court's definition of a "continuing offense" as "a continuous, unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long a time it may occupy." *Id.*

**CONCLUSION:** The court held that while a defendant's continual willful failure to satisfy a child support debt constituted a continuing offense, there was insufficient evidence to conclude that the defendant in this case violated section 228 while under a criminal sentence. *Id.*

### *Preston v. Tenet Healthsystem Mem'l Med. Ctr.*, 485 F.3d 793 (5th Cir. 2007)

**QUESTION:** Whether the pre-Hurricane Katrina addresses of hospitalized patients satisfied the local controversy exception of the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d), which required a district court to "decline to exercise jurisdiction" in a class action lawsuit if, among other things, "greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed." *Id.* at 797.

**ANALYSIS:** The court explained that "[a] party's residence in a state alone does not establish domicile," because domicile requires not only residence in the state but also "an intent to remain in the state." *Id.* at 798. Therefore, the court found that "the medical records are not tantamount to sufficient proof of citizenship." *Id.* The court reasoned that "[d]espite the logistical challenges of offering reliable evidence at this preliminary jurisdictional stage, CAFA does not permit the courts to make a citizenship determination based on a record bare of any evidence showing class members' intent to be domiciled in Louisiana." *Id.* at 802.

**CONCLUSION:** The court concluded that "pre-Katrina addresses in the medical records fail to satisfy [the] burden" for meeting the two-thirds citizenship requirement of the local controversy exception of CAFA. *Id.*

### *Garrido-Morato v. Gonzales*, 485 F.3d 319 (5th Cir. 2007)

**QUESTION:** Whether the definition of the phrase "actions taken" in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") in sections 321(b) and (c) included "decisions of the Attorney General's representatives with regard to a particular alien" for

purposes of retroactively applying the new definition of aggravated felony found in 8 U.S.C. § 1101(a)(43)(N). *Id.* at 324.

**ANALYSIS:** The court stated that, while the term may be more inclusive, it at least includes "actions and decisions of the Attorney General acting through an immigration judge or the BIA." *Id.* The 5th Circuit noted, "[f]ive of six other circuit courts to consider this meaning in a variety of contexts agree with the government that 'actions taken' are decisions of the Attorney General's representatives with regard to a particular alien." *Id.*

**CONCLUSION:** The court held that the immigration judge's ruling denying Plaintiff her hardship relief was an 'action taken' that caused the expressly retroactive definition of aggravated felony to apply." *Id.*

### *United States v. Gonzalez*, 483 F.3d 390 (5th Cir. 2007)

**QUESTION:** Whether delegation of voir dire duties to a magistrate judge required personal, affirmative consent from the accused to be valid. *Id.* at 392.

**ANALYSIS:** The court reviewed Supreme Court precedent to find that delegation of jury selection responsibilities over a defendant's objection is not permitted and that voir dire, absent objection, is one of the duties that may be delegated. *Id.* The 5th Circuit then noted that the ambiguity as to what level of consent is required has resulted in a split in authority, with the 11th Circuit the only court to hold that the defendant's personal consent is mandatory. *Id.* at 393.

**CONCLUSION:** The court found that "the right to have an Article III judge conduct voir dire is one that may be waived though the consent of counsel." *Id.* at 394.

### *Lincoln Gen. Ins. Co. v. De La Luz Garcia*, 501 F.3d 436 (5th Cir. 2007)

**QUESTION:** Whether the MCS-90B endorsement (the "Endorsement for Motor Carrier Policies of Insurance for Public Liability under Section 18 of the Regulatory Reform Act of 1982") obligated an insurance company "to cover an accident occurring in Mexico." *Id.* at 438–39.

**ANALYSIS:** The court conducted a plain language reading of section 31138 of the Bus Regulatory Reform Act of 1982 and concluded that "although section 31138 recognizes that a commercial motor vehicle may be transporting passengers to 'a place outside the United States,' it requires minimum levels of financial responsibility only for the part of

the transportation that occurs 'in the United States.'" *Id.* at 441. "[T]he minimum levels of financial responsibility requirements apply to the transportation of passengers 'in the United States'; thus, the endorsement does not require an insurer to pay judgments recovered against the insured if the transportation of passengers by motor vehicle does not occur in the United States." *Id.* In the instant case, the court indicated that because "the motor vehicle was not subject to the minimum financial responsibility requirements in section 31138" while in Mexico, therefore "the endorsement does not cover the . . . accident." *Id.*

**CONCLUSION:** The court found that "the MCS-90B endorsement is not applicable and does not provide coverage for the . . . accident" which occurred in Mexico. *Id.* at 442.

***Mahogany v. Stalder*, No. 06-30699, 2007 U.S. App. LEXIS 22284 (5th Cir. Sept. 18, 2007)**

**QUESTION:** Whether a prisoner in state custody bringing a 42 U.S.C. § 1983 "claim for damages arising from his failure to receive a written statement of the evidence relied on" in a prison disciplinary hearing "would necessarily demonstrate the invalidity of the judgment in the disciplinary proceeding." *Id.* at 4.

**ANALYSIS:** The court noted that the Supreme Court has held "a prisoner cannot maintain a section 1983 action for monetary damages if 'establishing the basis for the damages claim necessarily demonstrates the invalidity of the conviction'" *Id.* at 3. The court stated that "[t]he Supreme Court has recognized an inmate's right to seek damages under section 1983 for the denial of procedural due process rights during prison disciplinary hearings, including the right to receive a written statement of the evidence relied on during those proceedings." *Id.* at 4. The court concluded that a judgment in favor of the plaintiff "would not necessarily imply the invalidity of the finding of guilt or sanction imposed." *Id.*

**CONCLUSION:** The 5th Circuit held that "a claim for damages based on a failure to receive a written statement of the evidence relied on in a prison disciplinary proceeding is cognizable under section 1983 . . . the district court should not have dismissed Mohagany's section 1983 claim in so far as Mahogany [sought] damages for the violation of his due process rights." *Id.* at 5.

***United States v. Araguz-Briones*, No. 06-40937, 2007 U.S. App. LEXIS 17481 (5th Cir. July 23, 2007)**

**QUESTION:** "Whether a court should hold the government to its obligations under a plea agreement after the court invalidates a defendant's obligation not to appeal his sentence." *Id.* at 3.

**ANALYSIS:** The 5th Circuit looked to the 2nd Circuit's ruling in *United States v. Stevens* for guidance in ruling on the government's available remedies where the defendant signed a plea agreement but breached it by filing an appeal. *Id.* at 9. The defendant agreed to sign an appeal waiver in return for the government's promise to move for a one-level downward departure in the sentencing guidelines. *Id.*

**CONCLUSION:** The court found that the government would be entitled to have a court either "(1) resentence [the defendant], with the government's moving for the one-level section 5K3.1 reduction as called for in the plea agreement, or (2) vacate the plea agreement in its entirety and allow the parties either to reach a new agreement or to go to trial." *Id.* at 10. The court also explained that the defendant "may not, however (unless the government consents), retain the benefits of the sentencing agreement while being relieved of its burdens." *Id.*

***United States v. Planck*, 493 F.3d 501 (5th Cir. 2007)**

**QUESTION:** Whether separate charges against a defendant for possession of individual devices that contained images and/or movies of child pornography violated the rule against multiplicitous prosecutions. *Id.* at 503.

**ANALYSIS:** The 5th Circuit looked to "precedent in analogous cases" to guide its analysis of the statute. *Id.* The court first examined 18 U.S.C. § 2252A(a)(5)(B), which proscribes "knowingly possess[ing] any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography . . . ." *Id.* The 11th Circuit, "[i]n deciding whether an indictment is multiplicitous, looked to whether separate and distinct prohibited acts, made punishable by law, have been committed." *Id.* at 503.

**CONCLUSION:** The court found that the *actus reus* of the crime at hand was the possession of child pornography, and that the government, for a single crime, only needed to prove that the defendant possessed the contraband at a single place and time to establish a single act of possession. *Id.* at 505. Thus, because the defendant possessed the child pornography through different transactions and in three separate places, he had committed three separate crimes; therefore the counts were not multiplicitous. *Id.*

## SIXTH CIRCUIT

### *Revis v. Meldrum*, 489 F.3d 273 (6th Cir. 2007)

**QUESTION:** Whether the judgment for summary eviction and physical seizure of a residence pursuant to a writ of execution without advance notice to a judgment debtor in a sexual-harassment lawsuit, provided constitutionally-adequate process. *Id.* at 281.

**ANALYSIS:** The 6th Circuit noted that the underlying sexual-harassment lawsuit established only the debtor's financial obligation. *Id.* Thus the court noted that "this materially distinguishes the judgment against [the debtor] from a judgment for possession upon which a writ of possession may issue." *Id.* Additionally, the court further remarked that several authorities "support the principle that an execution levied upon real estate does not result in the immediate eviction of the judgment debtor." *Id.* at 283. Furthermore, the 6th Circuit indicated that "while personal property may be levied upon through seizure, a writ of execution for real property is generally levied by formally noting on the writ a legal description of the property and giving notice to the owner and the public that the property is subject to sale." *Id.*

**CONCLUSION:** The 6th Circuit held that the underlying litigation and judgment for summary eviction of judgment debtor and physical seizure of his residence, pursuant to a writ of execution without advance notice, did not provide constitutionally adequate process. *Id.* at 281.

### *Littriello v. United States*, 484 F.3d 372 (6th Cir. 2007)

**QUESTION:** Whether the "Treasury Department's 'check-the-box' regulations, 26 C.F.R. § 301.7701-1 to 301.7701-3, promulgated in 1996 to simplify the classification of business entities for tax purposes," were valid. *Id.* at 374.

**ANALYSIS:** The court agreed with the district court that the "check-the-box" regulations were ambiguous "when applied to recently emerging hybrid business entities such as the LLCs involved in this case" and that the Treasury regulations "developed to fill in the statutory gaps when dealing with such entities are eminently reasonable." *Id.* at 378. Additionally, the court ruled that the 'check-the-box' regulations were "a valid exercise of the agency's authority . . . [and] that the plaintiff's failure to make an election under the 'check-the-box' provision dictate[d] that his companies be treated as disregarded entities

under those regulations, thereby preventing them from being taxed as corporations under the Internal Revenue Code." *Id.* Accordingly, the court held that Littriello was liable for the taxes due from those businesses, because they constitute sole proprietorships under section 7701, and he was the proprietor. *Id.*

**CONCLUSION:** The 6th Circuit held that the "check-the-box" Treasury regulations were reasonable and a valid exercise of the IRS's authority to fill statutory gaps as to emerging hybrid business entities under the statute defining business entities for tax treatment. *Id.*

***City of Cookeville v. Upper Cumberland Elec. Mbrshp. Corp.*, 484 F.3d 380 (6th Cir. 2007)**

**QUESTION:** Whether a defense asserting that federal law preempted plaintiff's proposed condemnation of defendant's facilities "because the condemnation frustrated the purposes of the Rural Electrification Act of 1936 ("REAct"), 7 U.S.C. §§ 901–950bb (as amended)," was considered a colorable defense for purposes of removal under 28 U.S.C. § 1442. *Id.* at 391.

**ANALYSIS:** The court began by noting that a colorable defense "need only be plausible; its ultimately validity is not to be determined at the time of the removal." *Id.* The court examined the defense and found that it "had previously found success in other circuits," and that, as a result of this success, "one would be hard pressed to say that the defense was not colorable." *Id.*

**CONCLUSION:** The court held that removal of the action "to the district court[,] even if assertion of a colorable defense were required," was proper. *Id.* at 392.

***United States v. Malone*, 503 F.3d 481 (6th Cir. 2007)**

**QUESTION:** Whether it was permissible "for a district court to consider as part of its sentencing calculus the sentence that a defendant likely would have received had he been prosecuted in state court." *Id.* at 485.

**ANALYSIS:** The 6th Circuit first observed the "3rd, 4th, 7th, 8th, and 10th circuits have uniformly found it improper for a district court to consider state court sentences for comparable crimes when fashioning a federal defendant's sentence." *Id.* The court then recognized that "considering state court sentences, a district court actually is re-injecting the locality disparity that the Sentencing Reform Act of 1984 ("SRA") was designed to guard against." *Id.* at 486. The court reasoned that to

allow such consideration "[n]ot only would . . . enhance, rather than diminish, disparities, it also would permit district courts to impose *upward* variances based on state sentencing practices." *Id.*

**CONCLUSION:** The court held that "it is impermissible for a district court to consider the defendant's likely state court sentence as a factor in determining his federal sentence." *Id.*

***Loren v. Blue Cross & Blue Shield*, 505 F.3d 598 (6th Cir. 2007)**

**QUESTION:** Whether "multiple [health care] coverage options [offered by an employer]" constituted "one plan pursuant to the Employee Retirement Income and Security Act ("ERISA"). *Id.* at 604.

**ANALYSIS:** The 6th Circuit first noted that the proposed regulations for the Health Insurance Portability and Accountability Act established a presumption that health benefits offered by an employer were part of a single ERISA health plan, and that the filing of a single plan document was strong evidence that the employer created just one plan. *Id.* at 605. The court of appeals explained that this presumption could be overcome, however, with a showing that an employer filed multiple plan documents with the intent to create separate plans. *Id.* The court relied on the 10th Circuit's analysis of the issue, considering each of the factors enunciated by the 10th Circuit. *Id.* First, the court noted that defendants had each filed only one plan document with a single ERISA identification number. *Id.* at 606. Second, the court pointed out that the defendants could not demonstrate that they had intended to "establish multiple plans." *Id*. Although the court did not explain whether the "plans shared the same administrator or trust" (another consideration articulated by the 10th Circuit), the 6th Circuit found that the other factors were sufficient to make a determination. *Id.*

**CONCLUSION:** After considering the factors articulated by the 10th Circuit, the 6th Circuit held that the defendants had "not overcome the presumption that the employee health benefits offered by an employer, [provided for and operated under a single plan document,] constitute[d] a single ERISA plan." *Id.*

***United States v. Carter*, 500 F.3d 486 (6th Cir. 2007)**

**QUESTION:** "Whether a [18 U.S.C.] § 3582 motion should be considered as a second or successive [18 U.S.C.] § 2255 motion." *Id.* at 489.

**ANALYSIS:** The court determined that 18 U.S.C. § 3582(c)(2) provides "a mechanism for the modification of a sentence" if the

Sentencing Commission changed the "relevant sentencing range after a defendant is sentenced." *Id.* at 488. The court applied the Supreme Court's reasoning in *Gonzalez v. Crosby*, which held that "a Rule 60(b) motion should be construed as a successive habeas petition when it attacks the substance of the defendant's motion," to a section 3582 motion, finding that both rules "could be used . . . to circumvent the screening requirements of section 2255 and attack the merits of [petitioners'] convictions and sentences." *Id.* at 488–89.

**CONCLUSION:** The 6th Circuit held that "when a motion titled as a section 3582 motion otherwise attacks the petitioner's underlying conviction or sentence, that is an attack on the merits of the case and should be construed as a section 2255 motion." *Id.* at 489.

***Mossaad v. Gonzales*, No. 06-3313, 2007 U.S. App. LEXIS 19094 (6th Cir. Aug. 8, 2007)**

**QUESTION:** Whether the "aggravated felony bar provisions of the Immigration Act of 1990 and MTINA [Miscellaneous and Technical Immigration and Naturalization Amendments of 1991]" applied retroactively to the defendant's 1989 conviction for armed robbery. *Id.* at 5.

**ANALYSIS:** The 6th Circuit utilized a two-pronged approach provided by the Supreme Court "for determining [whether] a statute should be applied retroactively." *Id.* Under the first prong, "a court must ascertain whether Congress has 'directed with the requisite clarity that the law be applied retrospectively.'" *Id.* The Sixth Circuit further noted that, "[i]f the court finds that Congress clearly intended for the law to be applied retroactively, the analysis ends and the law may be applied as Congress clearly intended." *Id.* Under the second prong, "[i]f . . . the court finds that Congress was not clear enough in its intention to apply the law retroactively, it must determine whether the law attaches new legal consequences." *Id.* The Sixth Circuit considered the present issue only under the first prong. *Id.* at 6. The court opined, "Congress more than adequately dictated that the aggravated felony bars contained in the Immigration Act of 1990 and MTINA should apply retroactively to all such convictions." *Id.*

**CONCLUSION:** "Given the clarity with which Congress has spoken with regard to the retroactive effect of the aggravated felony bar," the court denied the defendant's petition for review of the Board of Immigration Appeal's determination that his "conviction for armed robbery bar[red] his claims for asylum and withholding of removal" *Id.* at 10.

***Bridges v. Am. Elec. Power Co.*, 498 F.3d 442 (6th Cir. 2007)**

**QUESTION:** Whether an ERISA [Employee Retirement Income Security Act] plan beneficiary lacked statutory standing and became incapable of representing a class based upon divestiture from the ERISA plan. *Id.* at 444.

**ANALYSIS:** The court first distinguished statutory standing from standing under Article III of the U.S. Constitution. *Id.* at 444–45. The court then looked to the plain language of the ERISA statute and Supreme Court precedent to find that the statutory definition of "participant" includes employees or former employees with a colorable claim against the ERISA Plan. *Id.* at 445.

**CONCLUSION:** The 6th Circuit joined the 7th Circuit in holding that divestiture from an ERISA plan did not eliminate statutory standing, and remanded the case for consideration of the issue of whether a divested plan participant qualified as a class representative. *Id.*

***United States v. Amos*, 501 F.3d 524 (6th Cir. 2007)**

**QUESTION:** Whether a defendant's "prior conviction for possession of a sawed-off shotgun" could serve "as a predicate 'violent felony' for purposes of a sentencing enhancement under the Armed Career Criminal Act." *Id.* at 525.

**ANALYSIS:** The court began by noting that possession of a sawed-off shotgun was not a specifically named offense and did not involve the use of explosives and, as a result, "it would only qualify as a predicate offense if it is deemed to be 'conduct that presents a serious potential risk of physical injury to another.'" *Id.* at 526. The court opined that mere possession of a sawed-off shotgun was not in line with the more active crimes included in the statute. *Id.* The court also found that, "[a]lthough many instances of sawed-off shotgun possession create a greater risk of harm to others, . . . the same cannot be said for all instances of possession, such as where it is stored unloaded in an attic or the trunk of a car." *Id.* at 528–29.

**CONCLUSION:** The court held that "a prior conviction for possession of a sawed-off shotgun does not amount to a violent felony under section 924(e)." *Id.* at 530.

## SEVENTH CIRCUIT

### *United States v. Burt*, 495 F.3d 733 (7th Cir. 2007)

**QUESTION:** Whether excerpts from a chat log, "which the government had altered to replace the screen names with real names," qualified as hearsay, making its admission an abuse of discretion. *Id.* at 739.

**ANALYSIS:** The court remarked that "[i]t is today increasingly common to encounter the use of demonstrative aids throughout a trial. . . . Demonstrative aids take many forms; [including] duplicates, models, maps, sketches and diagrams, and computer-generated pedagogic aids." *Id.* at 740. The court explained that "[j]ust as a sketch or model of a crime scene can be used to help a witness to recount aspects of testimony and to make that testimony more accessible and understandable for the jury, so might affixing the names of real people in place of their aliases put the computer chat comments into a more useful context for the witnesses and the jury." *Id.*

**CONCLUSION:** The 7th Circuit found "no reason not to extend the logic of allowing models, maps, sketches, and diagrams to incorporate these particular chat excerpts as well." *Id.*

### *United States v. Ewing*, 494 F.3d 607 (7th Cir. 2007)

**QUESTION:** "Whether a conviction may be appealed following imposition of a provisional sentence under [18 U.S.C.] § 4244." *Id.* at 614.

**ANALYSIS:** The court found that the general rule established in *U.S. v. Nixon*, which restricts the filing of an appeal until the imposition of a final sentence, "[was] not intended to deny review to defendants who have not received a 'final' sentence but nonetheless are subjected to judicial control for a criminal conviction." *Id.* The court explained that "[w]ere [a defendant] denied appeal until [the imposition] of a final sentence, he might remain under commitment for the entire duration of the provisional sentence, with no opportunity to appeal his conviction." *Id.* at 615. Furthermore, the court found that the "imposition of discipline subjecting the defendant to the orders of the court makes a conviction final for the purposes of appeal." *Id.*

**CONCLUSION:** The court agreed with the Fifth Circuit's decision in *United States v. Abou-Kassem* and held that "a provisional sentence imposed pursuant to section 4244 is sufficiently final for appeal." *Id.*

***Moreno-Cebrero v. Gonzales*, 485 F.3d 395 (7th Cir. 2007)**

**QUESTION:** "[W]hether detention prior to conviction should count toward the term of imprisonment used to bar an alien from receiving relief under [former INA] section 212(c)." *Id.* at 398.

**ANALYSIS:** The court recognized that "[i]n calculating the term of imprisonment for section 212(c) waivers, courts of appeals have looked to the time of actual incarceration, rather than the nominal sentence ordered by a court." *Id.* at 398–99. The court ruled that the "pretrial detention had been related to [the defendant's] crime of conviction" because "[s]ection 3585(a) [which] governs the commencement of a 'sentence to a term of imprisonment'" states that "[t]ime spent in 'official detention prior to the date the sentence commences' is, according to the statute, part of that service." *Id.* at 399.

**CONCLUSION:** The court concluded that "[t]he only sensible result is to count that period as time that [the defendant] 'served for such felony' for purposes of section 212(c)." *Id.* at 400.

***United States v. Simmons*, 485 F.3d 951 (7th Cir. 2007)**

**QUESTION:** Whether "[U.S.S.G] § 2K2.1(a)(5) expired when [18 U.S.C.] § 921(a)(30) expired" and therefore precluded the use of section 2K2.1(a)(5) "to calculate [the defendant's] sentence." *Id.* at 953. Also, whether "under section 2K2.1(a)(5), . . . a Ruger Mini-14 firearm falls within the exception to section 921(a)(30) for weapons manufactured prior to September 13, 1994." *Id.* at 954.

**ANALYSIS:** The court agreed with the 2nd and 10th Circuits to rule that "the Sentencing Commission intended that courts determine for purposes of section 2K2.1(a)(5) whether the firearm used by the defendant qualified as a 'semiautomatic assault weapon' under section 921(a)(30) at the time of the crime." *Id.* Additionally, the court agreed with a majority of the circuit courts and "held that the exception to 18 U.S.C. § 921(a)(30) for weapons manufactured prior to September 13, 1994, applies to defendants charged with simple possession and not to sentence enhancements under the guidelines." *Id.*

**CONCLUSION:** The court held that "the district court properly used 2K2.1(a)(5) to calculate [the defendant's] sentence" and "that the district

court properly enhanced [the defendant's] sentence for selling the Ruger Mini-14." *Id.*

***Harzewski v. Guidant Corp.*, 489 F.3d 799 (7th Cir. 2007)**

**QUESTION:** Whether a former employee had a right "to obtain monetary relief under ERISA [Employee Retirement Income Security Act] for a breach of fiduciary duty by the fiduciary of a defined-contribution plan." *Id.* at 806.

**ANALYSIS:** The court began its analysis with an overview of cases which held "benefits that a former employee may seek are not limited to defined benefits." *Id.* The court noted that benefits in a defined-contribution plan were "the value of the retirement account when the employee retires, and a breach of fiduciary duty that diminishes that value gives rise to a claim for benefits." *Id.* at 807. Furthermore, the court recognized that "there is nothing in ERISA to suggest that a benefit must be a liquidated amount in order to be recoverable." *Id.*

**CONCLUSION:** Although the 7th Circuit held that former employees are entitled to monetary relief under an ERISA plan, the court remanded the case because the actual amount was undeterminable based on the relevant facts presented. *Id.*

***United States v. Veazey*, 491 F.3d 700 (7th Cir. 2007)**

**QUESTION:** Whether a sentencing guidelines cross-reference "relating to creating visual depictions of criminal sexual conduct with minors" applied "when the defendant's purpose to create a visual depiction was a secondary, rather than primary, purpose of the offense conduct." *Id.* at 705–706.

**ANALYSIS:** The court began by noting that "[n]owhere does the guideline require that producing a visual depiction be the *only* purpose of the defendant in committing the offense." *Id.* at 707. After reviewing the guideline and its accompanying notes, the court agreed with the 9th Circuit, finding that the cross-reference that enhanced sentences under section 2G1.3(c)(1) of the sentencing guidelines should "apply broadly and include 'all instances' where the defendant had a purpose to create a visual depiction." *Id.*

**CONCLUSION:** The court held that "the cross-reference applies when one of the defendant's purposes was to create a visual depiction of sexually explicit conduct, without regard to whether that purpose was the primary motivation for the defendant's conduct." *Id.*

***Certain Underwriters at Lloyd's London v. Argonaut Ins. Co., 500 F.3d 571 (7th Cir. 2007)***

**QUESTION:** "Whether, in interpreting an arbitration agreement that falls within the New York Convention ["the Convention"], but that contains no choice-of-law-provision," the court should apply a federal common law rule of decision or determine the appropriate governing state law via choice-of-law principles. *Id.* at 575.

**ANALYSIS:** The 7th Circuit stated that the Convention and its implementing federal legislation expressed "a clear federal interest in uniform rules by which agreements to arbitrate will be enforced." *Id.* at 579. Such a view was consistent with rulings by other federal courts of appeals. *Id.* The court indicated that in the absence of a choice-of-law provision, parties were bound, with no state-specific exceptions, to abide by the language of arbitration clauses. *Id.* at 581. Additionally, the court found that the conditions set forth in *Boyle v. United Technologies*, discussing when it was necessary to resort to federal rules, had all been met. *Id.* at 580.

**CONCLUSION:** Federal concern with regard to uniformity in the treatment of international arbitration agreements required that the court apply a federal common law rule as opposed to state law. *Id.* at 579.

***FreeEats.com, Inc. v. Indiana*, 502 F.3d 590 (7th Cir. 2007)**

**QUESTION:** Whether a fast-approaching election justified "refusing to abstain under the principles of *Younger* [*v. Harris*]." *Id.* at 598.

**ANALYSIS:** The court found guidance in the Supreme Court's decision in *Pennzoil v. Texaco, Inc.*, "in which the Court reiterated that 'a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary.'" *Id.* The court noted that "[a] party that exercises a state court's ordinary procedural processes to delay an action cannot then turn around and claim that because of that delay there is no state remedy available to meaningfully, timely, and adequately address its constitutional claim." *Id.* at 599. The court further recognized that "[i]f we were to conclude that waiting until weeks before an election to file a suit seeking injunctive and declaratory relief from a state statute that was enacted eighteen years earlier gives rise to 'extraordinary circumstances,' then it would give license to the federal courts to run roughshod over the state courts' rights to adjudicate properly filed actions involving constitutional challenges that relate in some way to that election. That result would not respect comity, and thus it would violate the core principles of *Younger*." *Id.* at 600.

**CONCLUSION:** The 7th Circuit held that the district court "erred in declining to abstain from exercising jurisdiction over this case pursuant to the *Younger* abstention doctrine." *Id.*

***Auto. Mechs. Local 701 Welfare & Pension Funds v. Vanguard Car Rental USA, Inc.*, 502 F.3d 740 (7th Cir. 2007)**

**QUESTION:** Whether, as part of its collective bargaining agreement ("CBA") with the union, the employer had to pay the increased contrition rate "during the status quo, post-contractual period." *Id.* at 748.

**ANALYSIS:** The court noted that "[f]ederal courts of appeals have the authority to provide relief when doing so would 'be just under the circumstances.' This includes the prerogative to decide motions for summary judgment as a matter of first impression . . . ." *Id.* at 747. Nonetheless, the court explained that '[i]n most instances . . . such a decision is best made by the district court; we would rarely find it appropriate to direct the entry of summary judgment' . . . 'rarely' does not mean 'never,' though." *Id.* Therefore, the 7th Circuit interpreted the collective bargaining agreement to conclude that, "as drafted, the 'status quo' period is not part of a renewed term.'" *Id.* at 749. The court found that "until there is a new CBA, the contribution rates must remain at the status quo level, which is the say at the level stipulated in the expired CBA." *Id.* at 750.

**CONCLUSION:** The 7th Circuit granted summary judgment, holding that "since there was no renewed term, the Board of Trustees had no authority to set new contribution rates and Vanguard had no obligation to pay them." *Id.*

***United States v. Warner*, 498 F.3d 666 (7th Cir. 2007)**

**QUESTION:** "Whether a state may be an 'enterprise' for purposes of a RICO [Racketeer Influenced and Corrupt Organizations Act] prosecution." *Id.* at 694.

**ANALYSIS:** The court first looked at *United States v. Turkette*, in which the Supreme Court stated that "[e]ven if one or more of the civil remedies might be inapplicable to a particular illegitimate enterprise, this fact would not serve to limit the enterprise concept." *Id.* The 7th Circuit reasoned that since *Turkette* held that "other public bodies, which similarly cannot be dissolved, may be [an] 'enterprise'" under RICO, so may a sovereign state. *Id.* Furthermore, the 7th Circuit agreed with its sister courts that public government entities could be "enterprises" under RICO, and endorsed the reasoning of *United States v. Thompson*: that it

"seem[ed] clear . . . that those who played the leading roles in the enactment of the RICO statute thoroughly understood organized crime's impact upon government entities." *Id.* at 695. The court explained that "the use of the state as the RICO enterprise in the indictment is analogous to the courts' treatment of the state as a market participant in a dormant commerce clause case" because in such cases a state is "a victim of the overall scheme" perpetrated by certain individuals. *Id.*

**CONCLUSION:** The 7th Circuit concluded that "[t]he district court did not err by allowing the state to be the RICO enterprise in this RICO conspiracy prosecution." *Id.*

## EIGHTH CIRCUIT

### *United States v. Gonzalez*, 495 F.3d 577 (8th Cir. 2007)

**QUESTION:** "What constitutes sufficient evidence to support a statute of limitations instruction in an escape case." *Id.* at 579.

**ANALYSIS:** The court related that "Congress has specifically indicated: 'no statute of limitations shall extend to any person fleeing from justice.'" *Id.* at 580. The court further noted that entering the United States "without arrest does not indicate . . . [an attempt] to surrender or . . . any intent to return to federal custody." *Id.* at 581.

**CONCLUSION:** The 8th Circuit held that the defendant "presented no evidence he terminated his escape" and thus there was no trigger to a statute of limitations. *Id.*

### *Goss Int'l Corp. v. Man Roland, Inc.*, 491 F.3d 355 (8th Cir. 2007)

**QUESTION:** Whether international comity should be afforded conservative or liberal deference for courts issuing an antisuit injunction. *Id.* at 359.

**ANALYSIS:** The court first recognized a circuit split regarding the level of deference afforded to international comity when courts consider issuing an antisuit injunction. *Id.* The court noted that the 1st, 2nd, 3rd, 6th, and D. C. Circuits have adopted the 'conservative approach' to issue antisuit injunctions sparingly in the rarest of cases, such as when "an action in a foreign jurisdiction would prevent United States jurisdiction or threaten a vital United States policy and [when] . . . domestic interests outweigh . . . international comity." *Id.* In contrast, the court related that the "5th and 9th Circuits follow the 'liberal approach' . . . [that permits]

an antisuit injunction when necessary to prevent duplicative and vexatious foreign litigation and . . . inconsistent judgments." *Id.* at 360.

**CONCLUSION:** Because the court held that international comity is a fundamental principle whose "importance in our globalized economy cannot be overstated," the court found that it deserved "conservative deference." *Id.* Furthermore, the court adopted the "conservative approach" so as not to "convey the message . . . that [it] . . . has so little confidence in the foreign court's ability to adjudicate a given dispute fairly and efficiently that is unwilling to even allow the possibility." *Id.*

### *United States v. Griffin*, 482 F.3d 1008 (8th Cir. 2007)

**QUESTION:** Whether "an expectation of receipt of child pornography through Kazaa file sharing" constituted "'a thing of value, but not for pecuniary gain' for sentence enhancement purposes under section 2G2.2(b)(2)(B)" of the Sentencing Guidelines. *Id.* at 1011.

**ANALYSIS:** The 8th Circuit noted that "'[d]istribution for the receipt, or expectation of receipt, of a thing of value but not for pecuniary gain' means any transaction, including bartering or other in-kind transaction, that is conducted for a thing of value, but not for profit." *Id.* The court further found that "in a case involving the bartering of child pornography, the 'thing of value' is the child pornographic material received in exchange for other child pornographic material." *Id.* Finally, the court noted that under previous versions of the guidelines, it had held "that the five-level distribution enhancement was warranted if the defendant engaged in trading or bartering of child pornography, or if the government demonstrated that the defendant expected to receive pornographic images in exchange for the images he distributed." *Id.* at 1012–13.

**CONCLUSION:** The court held that "section 2G2.2(b)(2)(B)'s five-level enhancement for the distribution of child pornography 'for the receipt, or the expectation of receipt, of a thing of value, but not for pecuniary gain' applied" to a defendant who downloaded and shared child pornography files "via an internet peer-topeer [sic] file-sharing network." *Id.* at 1013.

### *United States v. Stanko*, 491 F.3d 408 (8th Cir. 2007)

**QUESTION:** Whether a prior conviction under the Federal Meat Inspection Act ("FMIA") fell "within the 'business practices' exclusion of 18 U.S.C. § 921(a)(20)(A)." *Id.* at 911.

**ANALYSIS:** The court disagreed with the defendant's assertion that section 921(a)(20)(A) excludes "convictions for all business-related offenses from qualifying a defendant as a prohibited person under section 922(g)(1)," concluding instead that "the plain meaning of the statute indicates Congress's intent to limit the offenses that fall within the . . . exclusion to those pertinent to antitrust violations, unfair trade practices, restraints of trade, or offenses similar to them." *Id.* at 413–14. The court further concluded that "despite the fact that the FMIA statutory scheme necessarily involves regulating business and may have the effect of protecting consumers and competition from economic harm, . . . the primary purpose . . . is to protect public health from the effects of unwholesome meat." *Id.* at 417.

**CONCLUSION:** The 8th Circuit held that defendant's "FMIA convictions do not fall within [the] section 921(a)(20)(A) exclusion." *Id*. at 419.

### *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480 (8th Cir. 2007)

**QUESTION:** Whether the reassignment language under the ADA [Americans with Disabilities Act of 1990] required employers to automatically reassign disabled employees to a vacant position "without first competing with other applicants" in direct contradiction to the employer's non-discriminatory policy. *Id.* at 482.

**ANALYSIS:** The court looked to other circuits for guidance on this question and adopted the view espoused by the 7th Circuit. *Id.* at 483. The 7th Circuit held that reassignment under the ADA "does not require an employer to reassign a qualified disabled employee to a job for which there is a more qualified applicant, if the employer has a policy to hire the most qualified applicant." *Id.*

**CONCLUSION:** Accordingly, the court ruled that the ADA "does not require an employer to reassign a qualified disabled employee to a vacant position when such a reassignment would violate a legitimate nondiscriminatory policy of the employer to hire the most qualified candidate." *Id.*

## NINTH CIRCUIT

### *United States v. Valenzuela*, 495 F.3d 1127 (9th Cir. 2007)

**QUESTION**: How a district court should apply section 2K2.1(b)(5) of the Sentencing Guidelines, requiring a sentence enhancement for any

defendant that "used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent or reason to believe that it would be used or possessed in connection with another felony offense." *Id.* at 1131.

**ANALYSIS:** The court first used language from the Supreme Court and its own jurisprudence to define the terms "use" and "possession" for the purposes of section 2K2.1(b)(5). *Id.* To determine if a defendant's other offense constituted "another felony offense" under section 2K2.1(b)(5), the court looked to other circuits that employed the test outlined in *Blockburger v. United States*, which stated if the firearms offense and the other felony offense "each contain a element different from the other . . . the [firearms] offense may be used as 'another felony offense' to enhance a defendant's sentence." *Id.* 1132. Second, the court reasoned that if the "other felony offense" contained, as an element, the possession or sale of a firearm, that "other felony offense was a firearms possession or trafficking offense, and cannot be used to enhance a sentence under section 2K2.1(b)(5)." *Id.* at 1134. Third, the court stated that a "district court must decide if the defendant used or possessed the firearm in connection with the other felony offense," meaning the defendant either "actively employed" the firearm or it emboldened the "'defendant's felonious conduct.'" *Id.* Finally, the court found that "a district court may enhance a defendant's sentence under section 2K2.1(b)(5)" when all three elements are met. *Id.*

**CONCLUSION:** When determining whether to apply a sentence enhancement under section 2K2.1(b)(5) of the sentencing guidelines, "a district court should both determine under the *Blockburger* test whether the other felony offense . . . is a separate offense from the predicate felony offense [, and d]ecide if the defendant actively employed or possessed the firearm in a manner that emboldened . . . the other felony offense." *Id.* at 1136.

### *Tanner v. McDaniel*, 493 F.3d 1135 (9th Cir. 2007)

**QUESTION:** Whether the Supreme Court's decision in *Roe v. Flores-Ortega* created a new rule of constitutional law regarding the obligation of counsel to consult with the client concerning an appeal. *Id.* at 1141.

**ANALYSIS:** The court first declared that "courts should have recognized post-*Strickland* that a reasonably effective attorney would inform the client when he or she had a good reason to appeal." *Id.* at 1142. Next, the court asserted that ABA [American Bar Association]

standards had "put defense attorneys on notice that they should discuss any viable grounds for appeal with their clients." *Id.* Finally, the court determined that the *Flores-Ortega* decision merely applied the standards set forth in *Strickland*, concluding that "[e]ach time that a court delineates what 'reasonably effective assistance' requires of defense attorneys with respect to a particular aspect of client representation, it can hardly be thought to have created a new principle of constitutional law." *Id.* at 1144.

**CONCLUSION:** The court held that "*Flores-Ortega* broke no new ground in holding that reasonably effective performance requires a defense attorney to discuss an appeal with her client whenever there is a rational basis to think that her client should appeal" and that the decision in *Flores-Ortega* "did not produce 'a result so novel' [as to have] forge[d] a new rule. . . ." *Id.* at 1142.

***U.S. Mortg. Inc. v. Jenson*, 494 F.3d 833 (9th Cir. 2007)**

**QUESTION:** Whether the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") "allows or prohibits amendment of the complaint in a removed action." *Id.* at 842.

**ANALYSIS:** The court noted that "Congress included no express prohibition against amendment" following removal, and that "no court has held that SLUSA completely and categorically bars any amendment of the complaint following removal." *Id.* at 843. In addition, the court identified several district courts in the 9th Circuit which permitted plaintiffs to amend a removed complaint. *Id.* Further, the court found inequity in a policy which would require "dismiss[al] [of] otherwise valid and viable state law claims on the ground that plaintiff pled—perhaps inadvertently—a cause of action that may be construed as federal in nature." *Id.*

**CONCLUSION:** The court found that "[i]n light of the statutory silence on the issue in SLUSA, the existence of competing policy rationales, and the fact that the granting or denial of leave to amend is ordinarily a matter left to the discretion of the district court . . . SLUSA does not prohibit amendment of the complaint after removal." *Id.*

***Peru v. Sharpshooter Spectrum Venture LLC*, 493 F.3d 1058 (9th Cir. 2007)**

**QUESTION:** What is a "retail outlet" for the purposes of the Longshore and Harbor Workers' Compensation Act ("LHWCA"). *Id.* at 1063.

**ANALYSIS:** The court accepted the Benefit Review Board's ("BRB") "interpretation of the phrase 'retail outlet' to mean any place where items are sold directly to consumers" as reasonable. *Id.* at 1063–64. Having defined "retail outlet," the court then addressed "whether Peru was 'employed by' such an enterprise when she was injured." *Id.* at 1064. The court affirmed the BRB's conclusion "that Peru falls within the 'retail outlet' exclusion at 33 U.S.C. § 902(3)(B)" because a "substantial . . . part of . . . Peru's employment activities revolved around operation of a retail outlet" and there was insufficient evidence to show that either the employer's business or "Peru's employment activities had any substantial connection to traditional maritime activities. *Id.* at 1066. The court noted that section 902(3) expressly provided that individuals described in the retail exclusion were excluded from LHWCA coverage only if they were subject to coverage under a State workers' compensation law. *Id.* at 1067.

**CONCLUSION:** The court affirmed the BRB's "holding that Peru falls within the retail exclusion," but it remanded the case to the BRB "to determine in the first instance whether she [was] covered by Hawaii's state workers' compensation law." *Id.* at 1066–67.

### *Goel v. Gonzales*, 490 F.3d 735 (9th Cir. 2007)

**QUESTION:** Whether "polygraph examination results qualify as evidence that was 'not available' within 8 C.F.R. § 1003.2(c)(1), [the statute for reopening or reconsideration before the Board of Immigration Appeals ("BIA")] and thus may support a successful motion to reopen." *Id.* at 738.

**ANALYSIS:** The court stated that the key question was "whether the allegedly new information was unavailable at the time of the movant's hearing." *Id.* The court indicated that if the new information "was available or capable of being discovered at that time, it cannot provide a basis for reopening." *Id.* The court noted, "[w]e do not necessarily preclude the discretionary consideration of polygraph evidence by an IJ [immigration judge] or the BIA at earlier stages of a removal proceeding." *Id.* at 739.

**CONCLUSION:** Agreeing with the BIA, the 9th Circuit held that "polygraph evidence provides no adequate basis for reopening because it is not evidence that was previously unavailable within the meaning of the applicable regulation." *Id.* at 737.

***Sprint Telephony PCS, L.P. v. County of San Diego*, 490 F.3d 700 (9th Cir. 2007)**

**QUESTION:** Whether 47 U.S.C. § 253(a) regarding the removal of state and local legislative barriers to telecommunications service was applicable "to preempt an entire wireless facilities zoning ordinance," or whether "any challenge to a local zoning ordinance" could be lodged under section 332(c)(7). *Id.* at 710, 712.

**ANALYSIS:** The court found that section 253(a) "applies on its face to local ordinances that have the effect of prohibiting wireless service." The court then looked at legislative history of the Telecommunications Act of 1996 and determined that it "does not indicate that Congress intended a result contrary to the plain reading of the statute." *Id.* at 714. The court found there is "no indication . . . that Congress feared section 253(a)'s preemption language would endanger local zoning ordinances it intended to permit under section 332(c)(7)." *Id.* at 715.

**CONCLUSION:** Agreeing with the district court, the 9th Circuit held "that section 253(a) is a proper vehicle to challenge an entire wireless facilities zoning ordinance." *Id.* at 709.

***United States v. Strong*, 489 F.3d 1055 (9th Cir. 2007)**

**QUESTION:** "Whether mandatory commitment under [18 U.S.C.] § 4241(d) violates a defendant's fundamental liberty interest under the Due Process Clause." *Id.* at 1060.

**ANALYSIS:** The 9th Circuit adopted the Supreme Court's test regarding the constitutionality of committing a criminal defendant. *Id.* at 1061. The court highlighted "[t]he two factors articulated by the [Supreme] Court: (1) the duration of the defendant's commitment, and (2) the closeness of the fit between the commitment and the purpose for which such commitment is designed." *Id.* at 1061. The court held that the "duration of the commitment authorized under section 4241(d) is inherently limited," and that "commitment under section 4241(d) bears a 'reasonable relation' to the purpose for which it is designed: determining whether a criminal defendant is susceptible to timely restoration." *Id.* at 1061–62.

**CONCLUSION:** The court concluded that "section 4241(d) is consistent with defendants' due process rights." *Id.* at 1060.

***United States v. Gomez-Mendez*, 486 F.3d 599 (9th Cir. 2007)**

**QUESTION:** "[W]hether a defendant's prior California conviction for unlawful sexual intercourse with a minor qualifies as a 'crime of violence' under the federal Sentencing Guidelines." *Id.* at 600.

**ANALYSIS:** The court recognized that although the guidelines "fail to define a 'crime of violence' . . . [t]he Commission's commentary . . . defines a 'crime of violence' to mean [among other crimes] . . . statutory rape." *Id.* at 602. The court reasoned that because unlawful sexual intercourse with a minor is considered under "California's statutory rape law[,] . . . the district court did not err in concluding that . . . [the crime] qualified categorically as a 'crime of violence'." *Id.* at 603.

**CONCLUSION:** The court concluded that a "prior conviction for unlawful sexual intercourse [with a minor] . . . under Cal. Penal Code § 261.5(d) qualifie[d] as a 'crime of violence' under" the federal Sentencing Guidelines. *Id.* at 607.

***United States v. Hollis*, No. 05-30611, 2007 U.S. App. LEXIS 10796 (9th Cir. May 7, 2007)**

**QUESTION:** "[W]hether a conviction under [21 U.S.C. § 841(b)(1)(A)(iii)] requires the government to charge, and the jury to find, more than that [the] defendant distributed cocaine base." *Id.* at 1155.

**ANALYSIS:** The court noted that "[t]here can be no doubt that when Congress adopted the Anti-Drug Abuse Act of 1986, it meant to deal with what it saw as a crack epidemic sweeping the country." *Id.* at 1156. However, the court remarked "when [Congress] directed the most severe penalties at distribution of cocaine base, its terminology swept beyond crack." *Id.* The court recognized that "[w]hile all crack is cocaine base, not all cocaine base is crack." *Id.* Furthermore, although "cocaine and cocaine base are chemically identical . . . Congress clearly intended to make a distinction between powder cocaine and the more potent and addictive form of smokeable 'cocaine base' known as 'crack' or 'rock' cocaine." *Id.*

**CONCLUSION:** The court concluded that the statute requires "the indictment to charge and the jury to find 'crack' to trigger the enhanced penalties associated with cocaine base." *Id.*

***Paolini v. Albertson's Inc.*, 482 F.3d 1149 (9th Cir. 2007)**

**QUESTION:** Whether stock options constituted wages under Idaho Code sections 45–601(7) and 45–613. *Id.* at 1152.

**ANALYSIS:** Noting that the resolution of appellant's claim presented issues of first impression under Idaho law, the 9th Circuit certified the question to the Idaho Supreme Court. *Id.* The Idaho Supreme Court granted review of the question and held that "stock options do not constitute wages under Chapter 6 of Title 45 of the Idaho Code." *Id.*

**CONCLUSION:** Having determined that stock options did not constitute wages under sections 45-601(7) and 45-613 of the Idaho Code, the 9th Circuit affirmed "the district court's dismissal of Paolini's claim that he was terminated for pursuing a wage complaint, in violation of Idaho Code [section] 45-613." *Id.* at 1153.

***In re* Ahaza Sys., Inc., 482 F.3d 1118 (9th Cir. 2007)**

**QUESTION:** "[W]hat 'ordinary' in section 547(c)(2)(A) [of the Bankruptcy Code] means if the debt in question is a first-time transaction between the parties, and what 'debt' means when the original agreement between two parties is revised." *Id.* at 1125.

**ANALYSIS:** The 9th Circuit first noted that other circuit courts addressing the issue "most side with the view that a first-time transaction is not per se ineligible for protection from avoidance under section 547(c)(2)." *Id.* The court agreed with the weight of authority and affirmed the Bankruptcy Appellate Panel's finding that "'[i]t would be inconsistent with the purpose of the section for Stratos to be prevented from receiving the benefit of the ordinary course of business exception' for otherwise routine transactions simply because Stratos never previously entered into a transaction with Ahaza." *Id.*

Having determined that first-time debts are eligible for the exception, the court next analyzed the "criteria for deciding when a debt is incurred 'in the ordinary course of business,' albeit for the first time between the parties." *Id.* The court again examined how other circuits treated the issue and concluded that, "when we have no past debt between the parties with which to compare the challenged one, the instant debt should be compared to the debt agreements into which we would expect the debtor and creditor to enter as part of their ordinary business operations." *Id.* at 1126. The court further stated, "[o]nly if a party has never engaged in similar transactions would we consider more generally whether the debt is similar to what we would expect of similarly situated parties, where the debtor is not sliding into bankruptcy." *Id.* The court then rejected the trustee's argument that the term "ordinary" should always be assessed by "prevailing business standards" and concluded that "section 547(c)(2)(A) still reflects the

actual parties' practices insofar as that is possible and focuses on the issuance of debt itself." *Id.* The court next turned to the second component of the issue, specifically "[w]hen the payment agreement between two parties has been revised or restructured, what is the 'debt' to be considered under section 547(c)(2)(A)." *Id.* at 1126–27. The court surveyed other circuits' approaches to similar questions in other contexts and concluded that "[a] broad understanding of 'debt,' encompassing both the original and the revised agreement, is consistent with the Bankruptcy Code." *Id.* at 1127.

**CONCLUSION:** The court held that "to fulfill section 547(c)(2)(A), a first-time debt must be ordinary in relation to this debtor's and this creditor's past practices when dealing with other, similarly situated parties" and "both the pre-Agreement arrangement . . . and the Agreement itself are relevant to section 547(a)(2)(A)." *Id.* at 1126–27.

***Johnson v. Aljian*, 490 F.3d 778 (9th Cir. 2007)**

**QUESTION:** Whether an action could be brought under section 20A of the Exchange Act of 1934 when "the sole predicate violation . . . was not independently actionable because the claim has been dismissed as time-barred under its separate period of limitations." *Id.* at 780.

**ANALYSIS:** The court stated that "[c]laims under section 20A are derivative and therefore require an independent violation of the Exchange Act." *Id.* at 781. The court construed the term "violates" to mean that "a person has satisfied the essential elements of the proscribed act regardless of whether an action is commenced within the applicable statute of limitations." *Id.* at 781–82.

**CONCLUSION:** The 9th Circuit held that "to maintain a claim under section 20A, a plaintiff need not plead an actionable predicate violation." *Id.* at 785.

***Aholelei v. Dept. of Pub. Safety*, 488 F.3d 1144 (9th Cir. 2007)**

**QUESTION:** "[W]hether the filing of a third-party complaint, without more, waives a state's immunity." *Id.* at 1147.

**ANALYSIS:** The court rejected the "contention that the filing of a third-party complaint by the State defendants constituted an invocation of federal jurisdiction which was incompatible with an intent to preserve the defense of sovereign immunity." *Id.* at 1148. The court held that "State defendants, like other defendants, are allowed to assert legitimate alternative defenses." *Id.* at 1149. Therefore, the court noted that the

filing of a third-party complaint does not retract an immunity defense already pleaded. *Id.*

**CONCLUSION:** The court held that "the State defendants did not waive their sovereign immunity by filing the third-party complaint because they had timely asserted immunity prior to filing the third-party complaint and the third-party complaint was a defensive move which was not incompatible with an intent to preserve sovereign immunity." *Id.*

***Moreno-Morante v. Gonzales*, 490 F.3d 1172 (9th Cir. 2007)**

**QUESTION:** Whether "a United States citizen grandchild, in the lawful custody of non-citizen grandparents, [met] the statutory definition of 'qualifying relative' for the purpose of cancellation of removal." *Id.* at 1173.

**ANALYSIS:** The court noted that "'[c]hild,' for purposes of cancellation of removal, was defined by 8 U.S.C. § 1101(b)(1)." *Id.* at 1174. The court indicated that "the plain language at issue is unambiguous, and . . . [the] grandchildren do not satisfy its express terms." *Id.* at 1175. Alternatively, the court explained that "8 U.S.C. § 1229b(b)(1)(D) simply does not contemplate the cancellation of removal based on the hardship to be suffered by a 'de facto' child." *Id.* at 1176.

**CONCLUSION:** The court held that a "United States citizen grandchild, in the lawful custody of non-citizen grandparents," does "not meet the statutory definition of 'child' for purposes of cancellation of removal." *Id.* at 1173. The court further reasoned that "[n]either do they qualify by virtue of [a] de facto parent-child relationship . . . because Congress has specifically precluded such a functional approach to defining the term 'child' for cancellation of removal purposes." *Id.* at 1178.

***Sherman v. Harbin*, 486 F.3d 510 (9th Cir. 2007)**

**Editor's Note—**This case resolves "two issues of first impression in our bankruptcy jurisprudence." *Id.* at 513.

**QUESTION ONE:** Whether a bankruptcy court "considering the feasibility of a plan of reorganization under 11 U.S.C. § 1129(a)(11)" must have taken into account the "possible effect of a debtor's ongoing civil case with a potential creditor" when that civil case was pending on appeal. *Id.* at 514.

**ANALYSIS:** The 9th Circuit noted that a bankruptcy court "cannot adequately determine a plan's feasibility for purposes of section

1129(a)(11) without evaluating whether a potential future judgment may affect the debtor's ability to implement its plan." *Id.* at 518.

**CONCLUSION:** The court held that "because the bankruptcy court failed to consider the consequences of Sherman's potential success on appeal, it clearly erred in failing to discharge its obligations under section 1129(a)(11)." *Id.* at 519.

**QUESTION TWO:** Whether a bankruptcy court "may exercise its equitable powers to grant retroactive approval of a post-petition financing transaction pursuant to 11 U.S.C. § 364(c)(2)." *Id.* at 514.

**ANALYSIS:** The court began by noting that 11 U.S.C. §§ 364(c)(2) and 364(c)(3) state that "[c]hapter 11 debtors in possession are required to obtain the approval of the bankruptcy court when they wish to incur secured debt." *Id.* at 521. The court also recognized that this section has been interpreted to require a debtor to obtain the bankruptcy court's authorization *before* incurring secured debt. *Id.* The court found an exception to this rule, however, and stated that "where the debtor incurs debt without first obtaining court authorization, the bankruptcy court may exercise its equitable discretion to develop an appropriate remedy, provided, of course, that the chosen remedy is consistent with the provisions of the Bankruptcy Code." *Id.*

**CONCLUSION:** The court held that a bankruptcy court "may exercise its equitable powers to grant retroactive approval of a post-petition financing transaction pursuant to 11 U.S.C. § 364(c)(2)." *Id.* at 514.

### *United States v. Olmos-Esparza*, 484 F.3d 1111 (9th Cir. 2007)

**QUESTION:** Whether a district court could consider previous convictions when "calculating sentencing enhancements under section 2L1.2 of the 2003 Sentencing Guidelines." *Id.* at 1112.

**ANALYSIS:** The court began by examining the Sentencing Guidelines and found that "[n]either the text nor the application notes state that a conviction, as used in this section, must have occurred within a particular time period for the enhancement to apply." *Id.* at 1113. The court then rejected the defendant's argument that the application notes were ambiguous, "since one portion of the commentary expressly qualifies the temporal scope of prior convictions for aggravated felonies, but says nothing about age limitations as to other predicate convictions." *Id.* at 1114. In doing so, the court concluded that the maxim of statutory construction—"when some statutory provisions expressly mention a requirement, the omission of that requirement from other statutory

provisions implies that the drafter intended the inclusion of the requirement in some instances but not others"—did not apply. *Id.*

**CONCLUSION:** The court held that section 2L1.2 of the Sentencing Guidelines "on its face contained no temporal limitation on the prior conviction used to enhance sentences for illegal reentry." *Id.* at 1116.

***Ventress v. Japan Airlines*, 486 F.3d 1111 (9th Cir. 2007)**

**QUESTION:** What is the extent to which the Japan Friendship, Commerce, and Navigation Treaty ("FCN Treaty") preempted state employment law. *Id.* at 1115.

**ANALYSIS:** The court began its analysis by examining the FCN Treaty among others and noted that the "purpose of the Treaties was not to give foreign corporations greater rights than domestic companies, but instead to assure them the right to conduct business on an equal basis without suffering discrimination based on their alienage." *Id.* The court further noted that other circuits have "consistently held that foreign employers do not enjoy immunity from domestic employment laws that do not interfere with the employers' ability to hire their fellow citizens." *Id.* at 1116.

**CONCLUSION:** The court held that "article VIII(1), which confers on Japanese employers only the limited right to discriminate in favor of their fellow citizens for certain managerial and technical positions, does not preempt California's whistle blower protection laws." *Id.* at 1118.

***United Steel Workers, AFL-CIO-CLC v. NLRB*, 482 F.3d 1112 (9th Cir. 2007)**

**QUESTION:** Whether the National Labor Relations Board ("Board") abused its administrative discretion by agreeing to all aspects of an Administrative Law Judge's decision except the recommendation of a *Gissel* order to bargain as a remedy for unfair labor practices that interfered with a representational vote. *Id.* at 1115.

**ANALYSIS:** The court reviewed the Board's choice of remedy "for a clear abuse of discretion." *Id.* at 1116. The court found that a *Gissel* order functioned as an exceptional remedy appropriate only where the Board found that severe labor violations made the favored method of deciding collective bargaining status through an election infeasible. *Id.* at 1117. Because a *Gissel* order represented an exceptional remedy, the court rejected the union's attempt to draw a parallel between the appellate review of decisions not to issue a *Gissel* order with the probing review used when a *Gissel* order issued. *Id.*

**CONCLUSION:** The court held that "the Board's decision to order an unextraordinary remedy does not merit an extraordinary explanation." *Id.*

***Abebe v. Gonzales*, 493 F.3d 1092 (9th Cir. 2007)**

**QUESTION:** Whether a lawful permanent resident convicted of the sexual abuse of a minor, an aggravated felony, was entitled to "discretionary relief from removal under former section 212(c) of the Immigration and Nationality Act ("INA") . . . because the ground of deportability charged by the government" lacked a comparable ground of inadmissibility under INA § 212(a), 8 U.S.C. § 1182(a) and recent case law. *Id.* at 1094.

**ANALYSIS:** The court began by noting that the Board of Immigration Appeals ("BIA") had held that under section 212(c) of the INA, "relief is available only for aliens facing deportation on a ground with some tight connection to a ground of excludability that could have been waived under section 212(c) had the alien traveled abroad." *Id.* at 1099. The court added that "the BIA and the courts have regularly denied relief where the ground of deportability lacks a corresponding ground of excludability." *Id.* In a 2005 case, the court explained, the BIA ruled "that an alien who was deported for an aggravated felony 'sexual abuse of a minor' conviction was ineligible for section 212(c) relief on the basis of the comparable grounds rule" because "'the moral turpitude ground for exclusion addresses a . . . much broader category of offenses than the aggravated felony sexual abuse of a minor charge.'" *Id.* at 1100. In rejecting the petitioner's argument that such recent decisions by the BIA did not deserve deference, the court found that the decisions were consistent with statutory, agency, and judicial precedent. *Id.* at 1104.

**CONCLUSION:** The court held that the BIA's published cases and the 9th Circuit's decisions considering the issue "have consistently held section 212(c) relief to be unavailable to aliens deportable on grounds that lack comparable grounds for exclusion whether or not their conduct could also be characterized as involving moral turpitude." *Id.* at 1105.

***United States v. Ruiz-Chairez*, 493 F.3d 1089 (9th Cir. 2007)**

**QUESTION:** "Whether punishing illegal reentrants more severely than other felons with the same prior criminal records violates equal protection." *Id.* at 1091.

**ANALYSIS:** The 9th Circuit first noted that it had previously determined 8 U.S.C. § 1326, a statute which prohibits deported non-citizens from reentering the United States, to be "a legitimate exercise of

Congress' immigration power." *Id.* The court explained that under the applicable sentencing guidelines, minimum sentences for illegal reentry convictions were increased following removal for certain felony drug trafficking offenses or "crime[s] of violence." *Id.* The court noted that the Sentencing Guidelines could be "challenged on equal protection grounds," but pointed out that "the relevant test [was] whether the classification [was] 'rationally related to a legitimate government interest.'" *Id.*

**CONCLUSION:** The court held that the "enhancement level in [the Sentencing Guidelines] has a rational basis and serves [the] legitimate government interest" of discouraging non-citizens "who have committed drug-related and violent crimes" from illegally re-entering the United States. *Id.*

***United States v. Gamba*, 483 F.3d 942 (9th Cir. 2007)**

**QUESTION:** "[W]hether a district court judge may lawfully appoint a magistrate judge to preside over closing argument at a felony criminal trial if the defendant's counsel has, for trial tactic or legal strategy purposes, agreed to such appointment." *Id.* at 945.

**ANALYSIS:** The court considered "the degree to which a defendant himself must be involved in the decision to allow a magistrate judge to preside over closing argument." *Id.* at 947. The 9th Circuit recognized that "[n]umerous courts have held that defense counsel may waive constitutional rights of the accused as part of the trial strategy or tactics." *Id.* The court explained that "where defense counsel consents to proceed before a magistrate judge for tactical or strategic reasons, there is neither a constitutional nor a statutory impediment to delegating closing argument in criminal cases to magistrate judges." *Id.* at 950. Finally, the court noted, "[f]ew defendants have the training to permit them to appreciate the various legal concerns at issue when a magistrate judge is delegated authority to preside over closing argument." *Id.* at 949. The court indicated that "[b]ecause an attorney understands the importance of consistency in a trial proceeding, he is best equipped to make an immediate determination as to the risks or benefits of accepting a magistrate judge as a substitute for a district court judge." *Id.*

**CONCLUSION:** The 9th Circuit determined that "[w]here the decision is one of trial tactics or legal strategy, defense counsel may waive the defendant's right to have an Article III judge preside over closing argument without the defendant's personal, informed consent." *Id.* at 950.

***Collins v. D.R. Horton, Inc.*, 505 F.3d 874 (9th Cir. 2007)**

**QUESTION:** "[W]hether a judgment pending appeal should be given preclusive effect in an arbitration." *Id.* at 883.

**ANALYSIS:** The 9th Circuit noted that its precedents indicated "the benefits of giving a judgment preclusive effect pending appeal outweigh any risks of a later reversal of that judgment." *Id.* The court further recognized that the 6th, 7th, and 8th Circuits held that "where the prerequisites for collateral estoppel are satisfied, arbitrators must give preclusive effect to prior federal judgments." *Id.* at 880. The 9th Circuit agreed with those decisions.

**CONCLUSION:** The court concluded that "[a]rbitrators are not free to ignore the preclusive effect of prior judgments under the doctrines of res judicata and collateral estoppel, although they generally are entitled to determine in the first instance whether to give the prior judicial determination preclusive effect." *Id.*

***Sigma Micro Corp. v. Healthcentral.com*, 504 F.3d 775 (9th Cir. 2007)**

**QUESTION:** Whether Local Rule 9015-2(b), which upon the fulfillment of certain conditions automatically withdraws an action from the Bankruptcy Court to the district court, was valid. *Id.* at 781, 784.

**ANALYSIS:** The court found no ambiguity in Federal Rule of Bankruptcy Procedure 9029, which "grants district courts the power to adopt their own local rules," but subsequently limits this grant of power and "states a local bankruptcy rule must . . . be consistent with the Acts of Congress and Federal Rules of Bankruptcy Procedure." *Id.* at 784. The court found "Local Rule 9015-2(b) to be invalid as it establishes a procedure for withdrawing the district court's jurisdictional reference inconsistent with the Acts of Congress and Federal Rules of Bankruptcy Procedure." *Id.* The court cited two reasons for this finding: "First, Local Rule 9015-2(b) allows for the *bankruptcy court* to 'withdraw[]' the jurisdictional reference, whereas 28 U.S.C. § 157(d) [an "Act of Congress"] and Rule 5011(a) [a "Federal Rule of Bankruptcy Procedure"] make it explicit that only a district court may 'withdraw' the jurisdictional reference[,]" and "[s]econd, Local Rule 9015-2(b) permits a party to obtain a withdrawal of the reference upon a 'Motion for Certification', while 28 U.S.C. § 157(d) and Rule 5011(a) make it clear that a party may only obtain a withdrawal of the reference upon a 'Motion for Withdrawal.'" *Id.* at 785.

**CONCLUSION:** The court found no error in the bankruptcy court's decision "not to adhere to this invalid rule and . . . retain jurisdiction over the debtor's action for all pre-trial proceedings." *Id.*

***DirecTV, Inc. v. Huynh, 503 F.3d 847 (9th Cir. 2007)***

**QUESTION:** Whether the "use of unloopers constituted assembly and modification of piracy devices in violation of [47 U.S.C.] § 605(e)(4) [of the Federal Communications Act]." *Id.* at 853.

**ANALYSIS:** The court explained that an "unlooper" is a reprogramming device used to pirate satellite television by restoring functionality to an access card previously disabled by the satellites provider. *Id.* at 850. The court then construed the statute as a "two-tiered punishment rubric" designed to punish "upstream pirates" more severely than "end-users." *Id.* at 853. Thus, the court reasoned that "[b]ecause reprogramming access cards and inserting these modified access cards in DirecTV receivers is necessary to intercept signals in violation of subsection (a), treating these actions violations of subsection (e)(4) would collapse the distinction Congress established." *Id* at 854–55.

**CONCLUSION:** The 9th Circuit held "that section 605(e)(4) does not apply to individual end-users." *Id.* at 855.

***Indivos Corp. v. Excel Innovations, Inc.*, 502 F.3d 1086 (9th Cir. 2007)**

**QUESTION:** Whether the usual standard for granting a preliminary injunction under 11 U.S.C. § 105(a) applied to non-debtor proceedings. *Id.* at 1093.

**ANALYSIS:** The court reasoned that 11 U.S.C. § 105(a) "gives the bankruptcy courts power to stay actions that are not subject to the section 363(a) automatic stay but 'threaten the integrity of a bankrupt's estate.'" *Id.* The court concluded that Congress intended the "usual preliminary injunction standard" to apply to section 105(a) and that the automatic stay "did not apply to suits against non-debtors." *Id.* at 1094.

**CONCLUSION:** The 9th Circuit held "that when a debtor applies for a 11 U.S.C. § 105(a) preliminary injunction to stay a proceeding in which the debtor is not a party, the bankruptcy court must balance the debtor's likelihood of success in reorganization against the relative hardship of the parties, as well as consider the public interest if warranted." *Id.* at 1089.

***AFGE Local 1 v. Stone*, 502 F.3d 1027 (9th Cir. 2007)**

**QUESTION:** "[W]hether the CSRA [Civil Service Reform Act of 1978] precludes colorable constitutional claims sounding in equity where the plaintiff has no other remedy." *Id.* at 1034.

**ANALYSIS:** The court found that the Supreme Court had interpreted the CSRA so that it "cannot be reasonably read as satisfying the 'heightened showing' of congressional intent necessary to construe a federal statute completely 'to preclude judicial review of constitutional claims.'" *Id.* at 1036.

**CONCLUSION:** The court held that the CSRA "does not clearly state an intention on the part of Congress to preclude judicial review of constitutional claims." *Id.* at 1039. Pursuant to the holding, the court indicated that the plaintiffs-appellants were therefore "entitled to seek equitable relief based on the alleged violation of their First Amendment rights." *Id.*

***Ortega-Cervantes v. Gonzales*, 501 F.3d 1111 (9th Cir. 2007)**

**QUESTION:** Whether immigrants who were "conditionally paroled" under 8 U.S.C. § 1226(a) were necessarily "paroled into the United States" for purposes of adjustment of status to that of a lawful permanent resident under section 1255(a). *Id.* at 1112.

**ANALYSIS:** The court found that the regulation permitting "parole into the United States" only applied to "arriving aliens" or "inadmissible" aliens. *Id.* at 1116. Since the plaintiff was a "removable" alien "apprehended inside the United States after crossing the border illegally," the court indicated that the plaintiff "was conditionally paroled under the authority of section 1226(a) rather than paroled into the United States under the authority of section 1182(d)(5)(A)." *Id.*

**CONCLUSION:** The court held that conditional parolees under section 1226(a) were [not] 'paroled into the United States' within the meaning of section 1255(a) and [were] thus [in]eligible for adjustment of status under that section." *Id.*

***Camins v. Gonzales*, 500 F.3d 872 (9th Cir. 2007)**

**QUESTION:** Whether the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) abrogated the old section 101(a)(13) of the INA and the *Fleuti* doctrine. *Id.* at 878.

**ANALYSIS:** The court looked to other circuits for guidance on this question and adopted the view espoused by the BIA and the 3rd, 4th, and 5th Circuits. *Id.* The court recognized the reasoning from *In re Collado-Munoz*, where the "BIA concluded that IIRIRA . . . had changed the INA so that the *Fleuti* doctrine no longer applied." *Id.* The court adopted the holdings from its sister courts, that "[w]hen the BIA explicitly adopts in a published opinion a particular interpretation of an ambiguous provision

of the INA, we apply *Chevron* deference to its interpretation and adopt the agency's view 'so long as it is reasonable.'" *Id.* at 879.

**CONCLUSION:** Accordingly, the court ruled "in light of the deference owed the BIA, that IIRIRA section 301(a)(13) abrogated the *Fleuti* doctrine." *Id.* at 880.

### *Webb v. Smart Document Solutions, LLC*, 499 F.3d 1078 (9th Cir. 2007)

**QUESTION:** "[W]hether designated agents, such as personal attorneys, can count as the 'individual' [in the Department of Health and Human Services "DHHS" regulations implementing the Health Insurance Portability and Accountability Act of 1996 "HIPAA"] in order to obtain the reasonable, cost-based fee." *Id.* at 1084.

**ANALYSIS:** The court looked to the statutory language of the regulation holding that "DHHS defined 'individual' as 'the person who is the subject of the protected health information.'" *Id.* Thus, on its face, the court reasoned that the "regulations restrict the fee limitations to requests made by the *individual* and concretely define 'individual' in a way that excludes others acting on that individual's behalf." *Id.* Therefore, the court premised its holding on the canon of statutory construction which "creates a presumption that when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions." *Id.* In addition, the court considered the regulatory history and concluded that it "makes clear that DHHS did *not* intend for private attorneys to receive the reduced fees." *Id.* at 1085.

**CONCLUSION:** Based on the reasons espoused above, the court held that "the HIPAA regulations require the reduced rate only when the individual himself requests the records." *Id.* at 1080.

### *Singh v. Gonzales*, 499 F.3d 969 (9th Cir. 2007)

**QUESTION:** "[W]hether the REAL ID Act precludes habeas review of IAC claims that arise from an attorney's failure to file a timely petition for review of the BIA's [Board of Immigration Appeals] decision." *Id.* at 975.

**ANALYSIS:** The court began its analysis with a review of the statutory background of the REAL ID Act, finding that between 1961 and 1996, Congress attempted to limit the scope of habeas review available to aliens. *Id.* at 976. The 9th Circuit recognized, however, that despite Congress' efforts, the Supreme Court expanded judicial review for aliens in *INS v. St. Cyr*. *Id.* The court then noted that under section

106 of the REAL ID Act, Congress "expressly eliminated habeas review over all final orders of removal, but restored to the appellate courts jurisdiction over 'constitutional claims or questions of law.'" *Id.* at 977. Under the REAL ID Act's statutory language, the court held that both sections 1252(a)(5) and 1252(b)(9) permit judicial review for an order of removal. *Id.* at 978. Thus, based on a close review of the legislative history and statutory language, the court held that the REAL ID Act permitted habeas review of a final order of removal within the meaning of section 1252. *Id.* at 979–80.

**CONCLUSION:** The court held that the legislative history and statutory language of the REAL ID Act indicated that the statute arising from an attorney's failure to file a timely petition for review of the BIA's decision. *Id.* at 980.

### *Azizian v. Federated Dep't Stores, Inc.*, 499 F.3d 950 (9th Cir. 2007)

**QUESTION:** "[W]hether, or under what circumstances, appellate attorney's fees are 'costs on appeal' that a district court may require an appellant to secure in a bond ordered under . . . [Federal Rule of Civil Procedure, "FRCP"] 7." *Id.* at 953.

**ANALYSIS:** The court concluded "that a district court may require an appellant to secure appellate attorney's fees in a Rule 7 bond, but only if an applicable fee-shifting statute includes them in its definition of recoverable costs, and only if the appellee is eligible to recover such fees." *Id.* The court first noted that FRCP 7 derived from FRCP 73(c), which instructs that "the district court may 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.* at 954–55. The court then observed a circuit split in which the 3rd and D.C. circuits held that costs of appeal as per Rule 7 "are simply those that may be taxed against an unsuccessful litigant . . . and do not include attorney's fees that may be assessed on appeal," but the majority rule, adopted by the 2nd, 6th, and 11th circuits, found that the district court may order security for them if they were recoverable under a fee-shifting statute. *Id.* at 955. The court rejected arguments that Rule 39 defined costs for purposes of Rule 7. *Id.* at 958. Instead, the court held that "[t]he fee-shifting provision in Section 4 of the Clayton Act, 15 U.S.C. § 15, includes attorney's fees in its definition of costs recoverable by a prevailing plaintiff," because Rule 7 does not define "cost on appeal," does not use Rule 39 to define its costs, and the canons of statutory construction dictate that "each word of a statute should, if possible, be given effect." *Id.* at 953, 958. The court found, however, that because the provision in the instant case did not

"authorize taxing attorney's fees against a class member/objector challenging a settlement in an antitrust suit," the Clayton Act did not require security under Rule 7. *Id.* at 953.

**CONCLUSION:** "[A] district court may require an appellant to secure appellate attorney's fees in a Rule 7 bond, but only if an applicable fee-shifting statute includes them in its definition of recoverable costs, and only if the appellee is eligible to recover such fees." *Id.*

***Phillips v. E.I. Dupont De Nemours & Co.*, 497 F.3d 1005 (9th Cir. 2007)**

**QUESTION:** Whether the Supreme Court's decision in *American Pipe & Construction Company v. Utah* permitting "tolling for a plaintiff who files a separate action" pending certification of the class in a class action lawsuit. *Id.* at 1026.

**ANALYSIS:** The court reasoned that "[w]e should not allow a plaintiff to file an individual suit, which is in essence a signal that the plaintiff is opting out of a class, and then simultaneously give the same plaintiff class action benefits." *Id.* at 1026–27. The court explained that "[t]olling is not 'intended to be a tool to manipulate limitations periods for parties who, intending all along to pursue individual claims, assert reliance on the proposed class action just long enough to validate their otherwise time barred claims.'" *Id.* at 1027.

**CONCLUSION:** The court held that an "individual who filed a separate suit pending a decision on class certification loses the benefit of any statute of limitations tolling under *American Pipe*." *Id.* at 1027.

***Emmert Indus. Corp. v. Artisan Assocs.*, 497 F.3d 982 (9th Cir. 2007)**

**QUESTION:** Whether the Interstate Commerce Commission Termination Act ("ICCTA") limitations period codified at 49 U.S.C. § 14705(a), "applies solely to claims for charges owed under a filed tariff." *Id.* at 986.

**ANALYSIS:** The court noted that section 14705(a) mandated that "[a] carrier providing transportation or service . . . must begin a civil action to recover charges for transportation or service provided by the carrier within eighteen months after the claim accrues." *Id.* at 986–87. First, the court reasoned that "there is no tariff requirement on the face of the statute" and "[b]ecause the statute is complete and unambiguous . . . we will not read such a requirement into the statute." *Id.* at 987. Second, the court explained that "because the term 'charges' is not statutorily

defined, it should be interpreted according to its ordinary, everyday meaning," and "[t]he common meaning of 'charges' does not necessarily relate to debt owed pursuant to a tariff, but also includes a price, cost, expense, or debt owed under contractual obligation." *Id.* The court acknowledged that "to determine the meaning of section 14705(a) we must consider the particular language at issue in context of the overall statutory scheme," but reasoned that "because the word 'charges' as used in other sections of the ICCTA includes both tariff and non-tariff charges, the same meaning should apply to the word 'charges' in section 14705(a)." *Id.*

**CONCLUSION:** The court held that "nothing in the text or context of section 14705(a) indicate[d] that the eighteen-month limitations period is restricted to claims seeking charges under a filed tariff, or even to claims arising under federal law." *Id.* at 14.

### ***Lockett v. Catalina Channel Express, Inc.*, 496 F.3d 1061 (9th Cir. 2007)**

**QUESTION:** Whether a ferry operator's one-time refusal to allow a blind passenger to take a guide dog into ferry's lounge area, constituted a violation of the Americans with Disabilities Act ("ADA"). *Id.* at 1063–65.

**ANALYSIS:** The 9th Circuit reasoned that 28 C.F.R. § 36.208 provides that an individual can be denied an accommodation when the individual "poses a direct threat to the health or safety of others." *Id.* at 1065–66. Additionally, the court found that the passenger's request for passage in the lounge created a dilemma for the ferry operator because its prohibition on animals in the lounge was adopted in response to a passenger's assertion of an allergy to animal dander. *Id.* at 1065. Thus, the court noted that the ferry operator's employees had to decide immediately whether to potentially expose passengers in the lounge to dander or ask the disabled passenger to ride in the general passenger area. *Id.* Accordingly, the court concluded that the ferry operator faced a potential threat to the health and safety of others, and that 29 C.F.R. § 36.208 permitted the ferry operator to ask the disabled passenger to travel in the general passenger area while the operator investigated the matter. *Id.*

**CONCLUSION:** The 9th Circuit held that a ferry operator's one-time refusal to allow a blind passenger to take a guide dog into a ferry's lounge area did not violate the ADA, based on the fact that the lounge had been designated as an area free of animal dander per another passenger's request. *Id.* at 1067.

***United States v. Grigg*, 498 F.3d 1070 (9th Cir. 2007)**

**QUESTION:** Whether a police stop based upon allegations of involvement in a misdemeanor crime qualified as a reasonable search under the Fourth Amendment. *Id.* at 1075.

**ANALYSIS:** The court surveyed Fourth Amendment Supreme Court precedents, noting *United States v. Hensley* in particular. *Id.* at 1075–76. The court acknowledged the methodology of *Hensley*, but distinguished the underlying crime claimed as the basis for the stop in that case, noting that the 6th Circuit found *Hensley* inapplicable to misdemeanor crimes. *Id.* at 1075. After surveying numerous state court decisions as persuasive authority, the 9th Circuit rejected a bright line distinction between felonies and misdemeanors, favoring a test that "consider[ed] the nature of the misdemeanor offense in question, with particular attention to the potential for ongoing or repeated danger . . . and any risk of escalation . . . ." *Id.* at 1081.

**CONCLUSION:** The court reversed the conviction and remanded to the district court, finding the search unreasonable in light of the relatively harmless misdemeanor conduct being investigated and the failure of the police to utilize other, less intrusive investigation methods available. *Id.* at 1081–83.

## TENTH CIRCUIT

***Been v. O.K. Indus., Inc.*, 495 F.3d 1217 (10th Cir. 2007)**

**QUESTION:** "Whether section 202(a) of the Packers and Stockyards Act ("PSA"), 7 U.S.C. § 181 *et seq.*, requires a plaintiff to prove that an allegedly 'unfair practice' injures or is likely to injure competition." *Id.* at 1222.

**ANALYSIS:** The court initially interpreted the words of the statute "in light of the purposes Congress sought to serve." *Id.* at 1227. The court then followed the precedents of the 7th Circuit and the 11th Circuit, that held "'unfair[ness]' under section 202(a) require[d] evidence that the challenged practice will likely lead to a competitive injury [, and] . . . a claim brought under section 202(a) required some showing of a competitive injury or the likelihood [thereof]." *Id.* at 1228, 1229. The court reasoned that "[section 202](a) is a general prohibition on 'unfair, unjustly discriminatory, or deceptive practice[s]'" which provided "no further guidance on what type of act falls within its parameters." *Id.* at 1229. The court further reasoned that "[n]ot to require a showing of competitive injury or the likelihood thereof would make a federal case

out of every breach of contract," and concluded that "[n]othing in the PSA suggests Congress intended this result." *Id.*

**CONCLUSION:** The court held that section 202(a) of the PSA required a plaintiff "who claimed that a defendant was 'unfair' to show that such conduct results in or is likely to result in an injury to competition." *Id.* at 1238.

### *Hutton Contracting Co. v. City of Coffeyville*, 487 F.3d 772 (10th Cir. 2007)

**QUESTION:** Whether, under Kansas law, a party in breach of contract "may recover liquidated damages for the portion of a divisible delay not caused by its own breach." *Id.* at 783.

**ANALYSIS:** The court stated that "for some time . . . Kansas contract law has followed the parties' intentions rather than formalism . . . . [a]nd when there are gaps in the contract, Kansas courts will fill them with terms that are 'reasonable in the circumstances.'" *Id.* at 784. The court reasoned that "[a]pportionment of damages based on fault comports with modern notions of fairness . . . [a]nd such apportionment can encourage efficient behavior." *Id.* The court then reviewed several decisions throughout the past thirty years to find that "a strong majority" supports such a view. *Id.* at 785.

**CONCLUSION:** The court "believe[d] that Kansas would adopt the modern view and allow liquidated damages to be apportioned when faced with damages that are in fact divisible . . . . [a]nd affirm[ed] the district court's decision to apportion delay in awarding liquidated damages." *Id.* at 786.

### *Rupp v. United Sec. Bank*, 489 F.3d 1072 (10th Cir. 2007)

**QUESTION:** "[W]hether a 'director emeritus' is a 'director' within the meaning of 11 U.S.C. § 547(b) of the Bankruptcy Code." *Id.* at 1075.

**ANALYSIS:** The court noted that "[w]hen the term 'director' is used in reference to a corporation, as it is used in the statutory definition of 'insider,' the term plainly means a person who is a member of the governing board of the corporation and participates in corporate governance." *Id.* at 1077. Accordingly, the court turned to the meaning of "emeritus" as used by the parties in the case and defined "emeritus" as "holding after retirement (as from professional or academic office) an honorary title corresponding to that held last during active service." *Id.* at 1078.

**CONCLUSION:** The court found that the undisputed facts and legislative intent established "that [the debtor], a 'director emeritus,' was not a 'director' within the meaning of the definition" of 11 U.S.C. § 547(b) of the Bankruptcy Code. *Id.* at 1079.

***Co. Judicial Dep't v. Sweeney*, 492 F.3d 1189 (10th Cir. 2007)**

**QUESTION:** Whether "restitution ordered pursuant to juvenile delinquency proceedings is dischargeable under 11 U.S.C. § 1328(a)(3)," a statute preventing debtors from discharging restitution arising from convictions of crimes. *Id.* at 1190.

**ANALYSIS:** The 10th Circuit noted that it had previously found juvenile delinquency to be an "'an adjudication of status—not a criminal conviction.'" *Id.* at 1191. The court explained that "[t]his interpretation [was] consistent with the purposes of the federal Juvenile Justice and Delinquency Prevention Act," which included de-stigmatizing past criminal convictions and fostering rehabilitation. *Id.* The court emphasized that "an adjudication of juvenile delinquency is not equivalent to a conviction precisely because [the Juvenile Justice and Delinquency Prevention Act] punishes 'violation[s]' of the law that 'would have been . . . crime[s] if committed by an adult . . . with a classification of 'status' as opposed to 'criminal conviction.'" *Id.* While acknowledging that the statute created a "loophole" for juvenile delinquents defaulting on awards of restitution, the court declined to legislate from the bench to change the statute. *Id.* at 1192.

**CONCLUSION:** The court held that 11 U.S.C. § 1328(a)(3) "as written does not encompass juvenile-delinquency-related restitution," therefore allowing for the discharge of such debts. *Id.*

***United States v. Moran*, 503 F.3d 1135 (10th Cir. 2007)**

**QUESTION:** Whether police may stop a vehicle based on suspicion of a completed misdemeanor. *Id.* at 1141.

**ANALYSIS:** The 10th Circuit first looked to the Supreme Court's decision in *United States v. Hensley*, where the Court held that the Fourth Amendment permits police officers to conduct investigatory stops if they have a "reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony." *Id.* The Supreme Court did not indicate in *Hensley* whether the same rule applies to misdemeanors. *Id.* The court next noted that the 6th and 9th Circuits are split on the issue, and compared *Gaddis ex rel. Gaddis v. Redford Twp.*, which held that

"[p]olice may . . . make a stop when they have reasonable suspicion of a completed felony, though not of a mere completed misdemeanor," with *United States v. Grigg*, which held that "in reviewing the reasonableness of a stop to investigate a completed misdemeanor, a court must consider the nature of the misdemeanor offense in question, with particular attention to the potential for ongoing or repeated danger . . . and any risk of escalation." *Id.*

The court applied the balancing test from *Hensley* to determine the constitutionality of investigatory stops by balancing "the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion." *Id.* The court stated that "governmental interest in crime prevention and detection, necessarily implicated in a stop to investigate ongoing or imminent criminal conduct, may not be present when officers are investigating past criminal conduct," however, "a stop to investigate past criminal activity may . . . serve the governmental interest in solving crimes and bringing offenders to justice." *Id*. at 1142. This interest is particularly strong when the criminal activity involves a threat to public safety. *Id.* The court then considered whether, "balanced against the nature of the intrusion, the stop was reasonable." *Id.* at 1143. The 10th Circuit defined an investigatory stop as "brief" and "non-intrusive." *Id.* The court noted that each analysis must be fact-based to ensure that the investigatory stop met the brief and non-intrusive definitions. *Id.*

**CONCLUSION:** The court determined that "[b]alanced against the strong governmental interest in solving crime, the relatively limited intrusion on personal security occasioned by an investigatory stop was warranted and the officers' seizure of Mr. Moran was not unreasonable." *Id.*

### *United States v. Contreras*, 505 F.3d 1031 (10th Cir. 2007)

**QUESTION:** "[W]hether the Sentencing Guidelines enhancement for obstruction of justice, United States Sentencing Guidelines Manual § 3C1.1 (2002), applies when a defendant's obstructive conduct occurred during the prosecution of state charges preceding the federal indictment, but both federal and state charges were based on the same underlying conduct." *Id.* at 1034.

**ANALYSIS:** The 10th Circuit noted that seven other circuits had "considered whether the obstruction of a state investigation based on the same facts as the eventual federal conviction merits a section 3C1.1 enhancement," and that "of those circuits, six have held that obstruction

of the state proceeding does qualify for the enhancement; only one held that it did not." *Id.* at 1039.

**CONCLUSION:** The court followed the majority of circuits and found that obstruction of justice during a state proceeding still qualifies as obstruction under the enhanced sentencing guidelines. *Id.*

## ELEVENTH CIRCUIT

### *Albra v. Advan, Inc.*, 490 F.3d 826 (11th Cir. 2007)

**QUESTION:** [W]hether individual defendants may be personally liable for violating the ADA's [Americans with Disabilities Act] anti-retaliation provision when the 'act or practice' opposed by the plaintiff is made unlawful by the ADA provisions concerning employment" and whether there is "individual liability under" the Florida Omnibus AIDS Act ("FOAA"). *Id.* at 831–34.

**ANALYSIS:** The court held "that individuals are not amenable to private suit for violating the ADA's anti-retaliation provision, 42 U.S.C. § 12203, where the act or practice opposed by the plaintiff is made unlawful by the ADA provisions concerning employment, 42 U.S.C. §§ 12111–12117." *Id.* at 828. Additionally, the court held "that an individual may not be sued privately in his or her personal capacity for violating the FOAA's employment discrimination provisions." *Id.* at 835.

**CONCLUSION:** The 11th Circuit affirmed the district court's dismissal of Albra's complaint against the defendants, and denied the defendants' motion for [FRCP] Rule 38 sanctions. *Id.*

### *Jenkins v. Bellsouth Corp.*, 491 F.3d 1288 (11th Cir. 2007)

**QUESTION:** "[W]hether a district court has the authority to circumvent the ten-day deadline for obtaining interlocutory review of an order denying class certification by vacating and reentering that order, after the aggrieved parties filed and this [c]ourt dismissed an untimely petition for interlocutory appeal." *Id.* at 1289.

**ANALYSIS:** The 11th Circuit joined the 10th, 7th, and 5th Circuits in rejecting the plaintiffs' "attempts to circumvent the ten-day deadline of Rule 23(f)" through interlocutory review, noting that "what counts . . . is the original order denying or granting class certification, not a later order that maintains the status quo." *Id.* at 1291. The court's decision did not leave plaintiffs without relief; it simply prevented them from

"effectively defeat[ing] the function of the ten-day limit." *Id.* The court noted that the plaintiffs could later still "appeal the denial of a class certification following the entry of a final judgment" but were prevented from pursuing an interlocutory appeal. *Id.* at 1292.

**CONCLUSION:** Because the district court lacked the "authority to circumvent the ten-day deadline" provided in Rule 23(f) by vacating and reentering its earlier order, the petition was untimely. *Id.* The court dismissed the petition for lack of jurisdiction. *Id.*

### *United States v. Clemendor*, No. 06-15537, 2007 U.S. App. LEXIS 13799 (11th Cir. June 13, 2007)

**QUESTION:** Whether the penalty for an offense committed while on release under 18 U.S.C. § 3147, "and consequent assessment of section 2J1.7's 3-level increase to the offense level to enhance a sentence," was applicable "to the crime of failing to appear under section 3146." *Id.* at 10.

**ANALYSIS:** The court found that "[t]he statute unambiguously applies to defendants . . . who are convicted of an offense committed while on release." *Id.* at 12. Agreeing with the 4th Circuit, the 11th Circuit recognized that "failure to appear which violate[s] section 3146 . . . is clearly an offense committed while on release." *Id.* at 12.

**CONCLUSION:** The court concluded that "[b]ecause the plain and unambiguous language of section 3147 makes clear that the statute applies, without exception, to offenses committed while on release under Chapter 207 of Title 18, [a] violation of section 3146 comes within the ambit of section 3147. Moreover, application of the sentencing enhancement of section 3147 to a section 3146 offense d[id] not amount to double counting, nor d[id] it implicate principles of Double Jeopardy." *Id.* at 13.

### *Lobo v. Celebrity Cruises, Inc.*, 488 F.3d 891 (11th Cir. 2007)

**QUESTION:** Whether the Seaman's Wage Act, which grants seamen access to federal courts, "can be superseded by an agreement to arbitrate" falling under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention"). *Id.* at 894.

**ANALYSIS:** The court stated that "the Convention compels federal courts to direct qualifying disputes to arbitration." *Id.* at 895. Additionally, in *Scherk v. Alberto-Culver Co.*, the Supreme Court noted that the Convention persuasively illustrated the congressional policy favoring "uniform enforcement of arbitration agreements." *Id.* at 896.

The 11th Circuit therefore ruled that "to nullify the arbitration provision here would hinder the purpose of the Convention and subvert congressional intent." *Id.*

**CONCLUSION:** The 11th Circuit rejected the plaintiff's argument and affirmed the district court's dismissal in favor of arbitration. *Id.* at 896.

***Porter v. White*, 483 F.3d 1294 (11th Cir. 2007)**

**QUESTION:** Whether a falsely convicted individual seeking compensation for deprivation of liberty under section 1983 must have demonstrated that a law enforcement officer, who allegedly withheld exculpatory evidence from the prosecution, "acted with a level of culpability consisting of more than mere negligence." *Id.* at 1306.

**ANALYSIS:** The court noted that "[n]ot every action by a state actor that results in a loss of liberty under the Due Process Clause gives rise to liability under section 1983." *Id.* at 1307. Furthermore, the court recognized the Supreme Court's express statement that a state official's negligence or lack of due care could not trigger protection under the Due Process Clause. *Id.* at 1308.

**CONCLUSION:** The 11th Circuit held that a law enforcement official's negligence or inadvertence in withholding exculpatory material from prosecution, which in turn caused the defendant to be convicted at trial, could not provide a basis for liability under a section 1983 action seeking compensation for loss of liberty. *Id.*

***Delgado v. Att'y Gen.*, 487 F.3d 855 (11th Cir. 2007)**

**QUESTION:** "[W]hether a petitioner's spouse is eligible for derivative benefits under the withholding statute." *Id.* at 858.

**ANALYSIS:** The court found that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act" or "knows how to say something but chooses not to" then the omission or silence is assumed to be controlling. *Id.* at 862. "[A]lthough the asylum statute explicitly creates derivative rights for the spouse of a petitioner, the withholding statute contains no mention of derivative rights . . . Congress's silence thus dictates our holding . . . ." *Id.*

**CONCLUSION:** The court held that the petitioner's spouse was not entitled to derivative benefits under the withholding statute. *Id.*

***United States v. Mount Sinai Med. Ctr. of Fla., Inc.*, 486 F.3d 1248 (11th Cir. 2007)**

**QUESTION:** Whether student medical residents were eligible "to assert the 'student exemption' from Federal Insurance Contributions Act ("FICA") taxation found in 26 U.S.C. § 3121(b)(10)."

**ANALYSIS:** The court found that students who were both employed and attending classes at the same school, college, or university were not taxable to the employer under FICA. *Id.* at 1250. The court recognized that "the applicable regulations provide that an employee whose services are 'incident to and for the purpose of pursuing a course of study' has the status of a student" *Id.* at 1250. The court further found it improper to "rel[y] on legislative history without first determining whether the language was ambiguous." *Id.* at 1251. The court explained that "[b]y its plain terms, the student exemption does not limit the types of services that qualify for the exemption. Whether a medical resident is a 'student' and whether he is employed by a 'school, college, or university' are separate factual inquiries . . . ." *Id.* at 1252. Finally, the court indicated that "[i]f Congress had wanted to make medical residents ineligible for the student exemption, it could have easily crafted a specific exclusion . . . ." *Id.*

**CONCLUSION:** The court held that "medical residents enrolled in graduate medical education programs are [not] precluded, as a matter of law, from seeking to rely on the student exemption to FICA taxation . . . ." *Id.* at 1253.

***Centrex Corp. v. United States*, 486 F.3d 1369 (11th Cir. 2007)**

**QUESTION:** Whether "fee awards [could] be assessed based on claims of bad faith primary conduct." *Id.* at 1372.

**ANALYSIS:** The court held that "authorizing a court to shift fees based solely on bad faith conduct that forms the basis for the substantive claim for relief would undermine the American Rule by penalizing a party who raises good faith defenses to claims of liability for bad faith conduct." *Id.* The court noted that "a case in which a district court . . . award[s] attorney fees based solely on bad faith primary conduct . . . [did] not represent the prevailing view of the bad faith exception at common law . . . ." *Id.* at 1373. The court noted that "the Supreme Court approved an attorney fee award based not on conduct giving rise to the substantive claim but, rather, on the defendant's 'willful and persistent' bad faith treatment of that claim after it accrued[,]" and that "[o]ther Supreme Court cases, including more recent opinions, use language suggesting that abuse of the judicial process refers to abusive conduct

during litigation rather than bad faith primary conduct." *Id.* Thus, the court found that the congressional intent of the Equal Access to Justice Act should not be read to alter the common law fee-shifting rule. *Id.* at 1375.

**CONCLUSION:** The court held that "fee awards cannot be assessed based on claims of bad faith primary conduct." *Id.* at 1372.

### *Phoenix of Broward, Inc. v. McDonald's Corp.*, 489 F.3d 1156 (11th Cir. 2007)

**QUESTION:** Whether the *Conte Bros.* test was "the proper test for determining whether a party has prudential standing to bring a false advertising claim under section 43(a) of the Lanham Act, 15 U.S.C. §1125(a)." *Id.* at 1159.

**ANALYSIS:** The court found that the *Conte Bros.* test "'provides appropriate flexibility in application to address factually disparate scenarios that may arise in the future, while at the same time supplying a principled means for addressing standing under . . . section 43(a).'" *Id.* at 1164. The 11th Circuit also noted that "'two prominent commentaries have endorsed this standard" and that "under this standard, 'standing under the Lanham Act does not turn on the label placed on the relationship between the parties.'" *Id.*

**CONCLUSION:** The 11th Circuit held that "to determine whether a party has prudential standing to bring a false advertising claim under section 43(a) of the Lanham Act, a court should consider and weigh the . . . factors" set forth in the *Conte Bros*. case. *Id.* at 1163.

### *Buckner v. Fla. Habilitation Network, Inc.*, 489 F.3d 1151 (11th Cir. 2007)

**QUESTION:** Whether the court's level of deference to 29 C.F.R. §§ 552.3 and 552.109(a) should fall under *Chevron* or *Skidmore*. *Id.* at 1155.

**ANALYSIS:** The court recognized that "[t]he appropriateness of granting *Chevron* deference to the DOL [Department of Labor] regulation defining 'domestic service employment,' section 552.3" had not been a contentious issue. *Id.* The 11th Circuit noted that the Supreme Court recently recognized "that section 552.109(a) is entitled to *Chevron* deference and is enforceable." *Id.* The court of appeals further noted that the Supreme Court addressed the relevance of section 552.3 to conclude that although the regulation was valid, "section 552.109(a) is controlling on the issue of third party employment." *Id.*

**CONCLUSION:** The 11th Circuit held that section 552.109(a) was subject to *Chevron* deference, and although section 552.3 remained valid, section 552.109 controlled on the issue of third party employment. *Id.*

***United States v. Orisnord*, 483 F.3d 1169 (11th Cir. 2007)**

**QUESTION:** "Whether 'fleeing and eluding' . . . constitutes a 'crime of violence' for the purposes of [Sentencing Guidelines career-offender enhancement] § 4B1.2." Id. at 1182.

**ANALYSIS:** The court reasoned that "the language of the Guidelines makes clear that the 'potential risk' of injury, rather than actual violence or actual injury, is the touchstone of a 'crime of violence.'" *Id.* In addition, the court noted that "[t]he dangerous circumstances surrounding a person's attempt to flee from law enforcement coupled with the person's operation of a motor vehicle most assuredly presents a 'potential risk of physical injury' to others." *Id.*

**CONCLUSION:** The court determined "that felony fleeing and eluding . . . is a 'crime of violence' for purposes of the career-offender enhancement" under Sentencing Guideline § 4B1.2. *Id.* at 1183.

***Lowery v. Alabama Power Co.*, 483 F.3d 1184 (11th Cir. 2007)**

**QUESTION:** The court analyzed "[t]he proper interpretation of CAFA's [Class Action Fairness Act of 2005] mass action provisions" in determining whether a particular "action meets the requirements for federal diversity jurisdiction" under the statute. *Id.* at 1198.

**ANALYSIS:** Initially, the court examined the statutory language of CAFA and determined that the statute "incorporates into the mass action context a number of the requirements for a class action to qualify for CAFA diversity jurisdiction." *Id.* at 1201. The 11th Circuit determined that, under the provisions of CAFA, there are "at least four requirements for an action to be deemed a mass action." *Id.* at 1202. The court listed the requirements as: "(1) an amount in controversy requirement of an aggregate of $5,000,000 in claims; (2) a diversity requirement of minimal diversity; (3) a numerosity requirement that the action involve the monetary claims of 100 or more plaintiffs; and (4) a commonality requirement that the plaintiff's claims involve common questions of law or fact." *Id.* at 1202–03.

**CONCLUSION:** The court concluded that these requirements "serve as threshold requirements for a district court to have subject matter jurisdiction over the *action* as a whole." *Id.* at 1206.

***Usmani v. Att'y Gen.*, 483 F.3d 1147 (11th Cir. 2007)**

**QUESTION:** "[W]hether, in immigration proceedings, the Attorney General has discretion to deny a petition for adjustment of status under INA [Immigration and Nationality Act] § 245(i), 8 U.S.C. § 1255(i), once the petitioner is statutorily eligible for adjustment." *Id.* at 1148–49.

**ANALYSIS:** Examining the statutory language of the INA, the court determined "that the plain language of section 245(i) indicates Congressional intent that the IJ [immigration judge] have discretion" to adjust immigration status. *Id.* at 1151. The court reasoned that "Congress's omission in section 245(i) of the phrase 'in his discretion' does not establish that Congress intended adjustments under section 245(i) to be mandatory, and the BIA's [Board of Immigration Appeals] interpretation of section 245(i) as discretionary is a permissible, and logical, construction." Id.

**CONCLUSION:** The court held "that section 245(i) [of the INA] creates discretionary authority for the Attorney General to deny adjustment of status." *Id.*

***McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331 (11th Cir. 2007)**

**QUESTION:** Whether and to what extent a private military contractor could rely on derivative sovereign immunity stemming from the *Feres* doctrine. *Id.* at 1341.

**ANALYSIS:** The court explained three rationales for barring sovereign immunity. *Id.* at 1342. The court recognized first that the nature of the relationship between the government and military personnel "means . . . that the government's liability to soldiers for service-related accidents must be governed by a uniform rule." *Id.* The court next noted that "the uniform rule . . . must be one of no liability." *Id.* Further, the court explained that "service-related tort claims are often 'the types of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness.'" *Id.* The court then reasoned, "[s]tatus as a common law agent is *not* a sufficient condition for derivative sovereign immunity." *Id.* at 1344. Finally, the court declined to extend partial immunity on the ground that "an immunity built on *Feres* would only prevent *soldiers*—and would not prevent civilians—from bringing suit against private military contractors making or executing sensitive military judgments." *Id.* at 1353.

**CONCLUSION:** The court held that derivative *Feres* immunity did not exist in the instant case, because three of the four recognized *Feres*

rationales did not apply to private contractors. *Id.* at 1354. The court noted that "while protecting sensitive military judgments could conceivably ground an immunity" the *Feres* doctrine was "an inappropriate vehicle because it would single out soldiers and would not protect sensitive military judgments in suits brought by" civilians. *Id.* at 1354.

### *Evans v. Boyd Rest. Group, LLC*, No. 06-15246, 2007 U.S. App. LEXIS 21995 (11th Cir. Sept. 12, 2007)

**QUESTION:** "Whether an individual can assign her pre-judgment rights under Title VII." *Id.* at 11.

**ANALYSIS:** The court indicated that "[t]he novelty of this issue is what law governs its resolution," but "because a cause of action for discrimination in violation of Title VII is not assignable under either Georgia or federal law, we need not decide which law applies." *Id.* The court noted that both "Georgia and federal law provide the same rule regarding the assignment of claims for personal injuries." *Id.* at 11–12. The court further recognized that "[t]he remedial scope of Title VII . . . makes it more similar to a personal injury tort action than an action to enforce contractual or property rights." *Id.* at 12.

**CONCLUSION:** The 11th Circuit concluded that "because actions arising under Title VII are not assignable, the district court did not err in declaring the assignment void." *Id.* at 13.

### *United States v. Mazarky*, 499 F.3d 1246 (11th Cir. 2007)

**QUESTION:** "[W]hether the term of imprisonment to be subtracted is that which was imposed upon a single revocation, or the aggregate of all prison terms imposed upon multiple revocations" in the interpretation of 18 U.S.C. § 3583(h), which "limits the maximum term of supervised release upon revocation." *Id.* at 1249.

**ANALYSIS:** The 11th Circuit noted that this issue had been addressed "in the relevant legislative history and in the 7th, 8th, and 2nd Circuits." *Id.* The court recognized that the congressional explanation of an earlier bill described the phrase "any term of imprisonment" as the "aggregate of all prison terms served in prior revocations." *Id.* The court examined relevant case law from other circuit courts that indicated "subsection (h) was intended to provide credit for the aggregate of prison terms served on prior revocations toward the maximum amount of supervised release permitted by statute." *Id.* at 1250.

**CONCLUSION:** The 11th Circuit held that "under subsection (h) [of 18 U.S.C. § 3583] the maximum allowable supervised release following multiple revocations must be reduced by the aggregate length of any terms of imprisonment that have been imposed upon revocation." *Id.*

***Cesar v. Att'y Gen.*, No. 06-15140, 2007 U.S. App. LEXIS 17267 (11th Cir. July 20, 2007)**

**QUESTION:** Whether an immigration court was limited to applying only those materials outlined in *Taylor v. United States* and *Shepard v. United States* when determining if a particular crime of violence was a crime of domestic violence under 8 U.S.C. § 1227(a)(2)(E)(i). *Id.* at 1.

**ANALYSIS:** The 11th Circuit analyzed the Supreme Court's decisions in *Taylor v. United States* and *Shepard v. United States*, in which the Supreme Court established that when determining the nature of a conviction, a court may look at only statutory elements, charging documents, jury instructions, written plea agreement, plea colloquy transcript, and any explicit factual findings of the trial court to which the defendant assented or otherwise adopted. *Id.* at 3. The court then examined the circuit split on the issue, as evidenced by the 7th Circuit's decision in *Flores v. Ashcroft* and the 9th Circuit's decision in *Tokatly v. Ashcroft*. *Id.* at 4.

**CONCLUSION:** The 11th Circuit concluded that it did not need to reach a decision on the question of statutory interpretation, but also noted that if the court was limited to *Taylor*/*Shepard* limitations or materials, the outcome would remain unchanged. *Id.* at 4–5.

***United States v. Haun*, 494 F.3d 1006, (11th Cir. 2007)**

**QUESTION:** "Whether the Government must prove specific intent in order to obtain a conviction under 14 U.S.C. § 88(c)." *Id.* at 1008.

**ANALYSIS:** The court emphasized that its statutory interpretation should focus on "the language of the statutes that Congress enacts" because it "provides 'the most reliable evidence of . . . intent.'" *Id.* at 1009. The court explained that "[c]riminal statutes, although they are to be strictly construed, 'are not to be construed so strictly as to defeat the obvious intention of Congress. . . . The rule of common sense must be applied to the construction of criminal statutes, the same as others.'" *Id.* at 1009–10. Examining the language of the House Committee Report discussing the bill that was later codified, the court concluded that the purpose of the statute was "to penalize those who cause the Coast Guard to become involved when no help is needed, regardless of whether the

individual who precipitated the drama in the open seas knew with certainty that the Coast Guard would needlessly answer the distress call." *Id.* at 1010. Based on this interpretation the court concluded that "the use of the word 'willfully' in the statute does not mean that the Government must prove specific intent in order to obtain a conviction." *Id.*

**CONCLUSION:** The court held that [14 U.S.C. § 88(c)] "defines a general intent crime." *Id.*

### *Millennium Partners, L.P. v. Colmar Storage, LLC*, 494 F.3d 1293 (11th Cir. 2007)

**QUESTION:** Whether Rule 407 of the Federal Rules of Evidence barred evidence of repairs made by persons other than the defendant. *Id.* at 1302.

**ANALYSIS:** The court explained that "Rule 407 does not apply to a remedial measure that was taken without the voluntary participation of the defendant." *Id.* The court then adopted the viewpoint of seven othr circuits that agreed such evidence was not barred. *Id.* at 1303.

**CONCLUSION:** Joining seven other circuit courts of appeals, the 11th Circuit held that Rule 407 of the Federal Rules of Evidence did not bar evidence of repairs made by persons other than the defendant. *Id.*

### *Jones v. United Space Alliance, L.L.C.*, 494 F.3d 1306 (11th Cir. 2007)

**QUESTION:** Whether Florida courts interpret *Christiansburg Garment Co. v. EEOC* ("*Christiansburg*"), to limit the application of Florida's offer-of-judgment statute, Fla. Stat. Ann. § 768.79, in cases under Florida Civil Rights Act of 1992 [FCRA], in a suit to recover attorneys' fees. *Id.* at 1309.

**ANALYSIS:** While the Eleventh Circuit initially recognized two issues of first impression, it concluded that Florida case law "limit[ed] the application of section 768.79 in state civil rights cases, [and therefore, the court] need not reach the merits of a Rule 68 preemption issue." *Id.* The court noted that "[t]his circuit has found section 768.79 to be substantive law for Erie purposes." *Id.* As a result, the court analyzed "Florida law to determine whether section 768.79 should be applied" in the instant case. *Id.* at 1310. The court opined that "[b]ecause the FCRA is modeled on Title VII [of the Civil Rights Act of 1964], Florida courts apply Title VII case law when they interpret the FCRA." *Id.* Moreover, the court recognized, "[u]nder federal law, prevailing defendants cannot recover attorneys' fees in Title VII cases unless the claim was 'frivolous, unreasonable, or without foundation.'" *Id.* The court further indicated

that Florida had "expressly adopted the *Christiansburg* standard for cases under the FCRA." *Id.*

**CONCLUSION:** The court determined "that Florida's FCRA prevents the recovery of attorneys' fees under section 768.79 by the appellant." *Id.* at 1311.

## FEDERAL CIRCUIT

### *Blue & Gold, Fleet, L.P. v. United States*, 492 F.3d 1308 (Fed. Cir. 2007)

**QUESTION:** "[W]hether the [government]'s procurement decision was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.'" *Id.* at 1312.

**ANALYSIS:** The court found "that a party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims." *Id.* at 1313.

**CONCLUSION:** The court concluded that "the Court of Federal Claims properly [held] that Blue & Gold had failed to object in a timely fashion to the terms of the prospectus" and had waived its right to subsequently challenge the award of the government contract to another contractor. *Id.* at 1313, 1316. The court held that "[t]here was no error in holding for the defendants on Blue & Gold's challenge pursuant to the Service Contract Act" and affirmed the decision of the Court of Federal Claims. *Id.* at 1316–17.

### *Electrolux Holdings, Inc. v. United States*, 491 F.3d 1327 (Fed. Cir. 2007)

**QUESTION:** Whether the special exception to filing a corporate tax refund claim under 26 U.S.C. § 6511(d)(2)(A) that was available when "the overpayment . . . was 'attributable to . . . a carryback' of net capital loss," was also applicable to a carry forward loss. *Id.* at 1330.

**ANALYSIS:** The court determined that while the relevant statutory language—"'attributable to . . . a capital loss carryback' . . . —is not defined . . . in the [Internal Revenue] Code and [does not have] special technical meaning under tax laws . . . ." the court noted that other courts "in various tax cases have construed the phrase according to its plain

meaning which is understood to be 'due to, caused by or generated by." *Id.* at 1330–31.

**CONCLUSION:** The court held that when a plain meaning interpretation was applied to the section 6511(d)(2)(A) context, the special limitations exception was available for subsequent years only if overpayment was "due to, caused by, or generated by" a carryback of the long-term capital loss of the tax refund year at issue. *Id.* at 1333.

## DISTRICT OF COLUMBIA CIRCUIT

### *Holland v. Williams Mountain Coal Co.*, 496 F.3d 670 (D.C. Cir. 2007)

**QUESTION:** Whether a district court abused its discretion when it awarded attorney's fees to victorious defendants in a case involving the Coal Industry Retiree Health Benefit Act of 1992 ("Coal Act"), 26 U.S.C. § 9701 *et seq.*, while holding that the plaintiffs had acted in bad faith. *Id.* at 672–73.

**ANALYSIS:** The court first addressed a legal theory at odds with prevailing law, articulating that "the fact that another jurisdiction has rejected a legal theory does not render it so devoid of merit as to make reliance on it an exercise in bad faith." *Id.* at 674. The court then declared, "the problem with [the district court's] analysis is that it assume[ed] the narrow . . . definitions of successors in interest." *Id.* The court reasoned, "the very factual thread the district court discounted . . . might well have made the defendants successors in interest . . . under the broader, substantial continuity of operations test." *Id.* Finally, the court noted that "given how often [the substantial continuity] test has been applied to analogous statutes in both this and other circuits, we [could ] not say that it was an act of bad faith for the [plaintiffs] to urge its application to the Coal Act." *Id.* at 676. The court concluded "that it was reasonable for the [plaintiff]s to regard [the defendants] as successors in interest" and that "their decision not to sue [a potential defendant] cannot be taken as an indicator of bad faith." *Id.*

**CONCLUSION:** The court explained that "[t[his was not a case the plaintiffs 'lost because [they] vainly pressed a position flatly at odds with the controlling case law,' but rather one they 'lost because an unsettled question' as to which they had a reasonable position 'was resolved unfavorably," and thus, "[the district] court erred in finding the suit so meritless as to have been brought in bad faith requir[ing this court] to reverse the award as an abuse of discretion." *Id.* 677.

***Cambridge Holdings Group, Inc. v. Fed. Ins. Co.*, 489 F.3d 1356 (D.C. Cir. 2007)**

**QUESTION:** "[W]hether a defendant that has never been served is a 'party' for purposes of [Federal Rules of Civil Procedure] 54(b)." *Id.* at 1360.

**ANALYSIS:** The court noted that eight circuits '"treat[ed] an improperly served defendant as never [having been] before the district court for purposes of Rule 54(b)" and "[n]one [have] adopted a contrary interpretation." *Id.* The court reasoned that this position was the most logical interpretation of Rule 54(b) because "[t]he rule was enacted to codify 'the historic rule in the federal courts' prohibiting 'piecemeal disposition of litigation' by preventing an appeal in a case where litigation before the district court is ongoing." *Id.* Therefore, the court explained that "when a district court dismisses a suit as to all served defendants and only one unserved defendant remains, there is . . . no reason to anticipate proceedings before the district court." *Id.* at 1361.

**CONCLUSION:** The D.C. Circuit adopted the view of its sister circuits to hold that an unserved defendant is not a "party" under Federal Rule of Civil Procedure 54(b). *Id.*

***Morrow v. Microsoft Corp*, 499 F.3d 1332 (Fed. Cir. 2007)**

**QUESTION:** Whether "bankruptcy or trust law relationships affect the standing analysis in a patent infringement case." *Id.* at 1336.

**ANALYSIS:** The court stated that "[a] patent is a bundle of rights which may be retained in whole or in part, divided and assigned." *Id.* at 1341. The court explained that although the trusts gained rights to the patent in question through the bankruptcy proceeding, the suit was filed pursuant to and governed by the patent laws. *Id.* at 1336. The court noted that patent statutes "govern the creation and protection of patent rights, how rights can be transferred, and the parties entitled to assert those rights." *Id.*

**CONCLUSION:** The 11th Circuit held that "the patent statutes have long been recognized as the law that governs who has the right to bring suit for patent infringement, even when patent rights have been transferred as a result of bankruptcy or proceedings in equity." *Id.* at 1337.