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 federal court of appeals opinions announced between March 1, 2010 and September 17, 2010. 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 the list, it means that the editors did not identify any cases from the circuit for the specified time period that presented an issue of first impression.

FIRST CIRCUIT

Gastronomical Workers Union Local 610 v. Dorado Beach Hotel Corp., 617 F.3d 54 (1st Cir. 2010)

QUESTION: Whether "an employer [can] shield itself from [Employee Retirement Income Security Act (ERISA)] liability under [§] 302 simply by performing its obligations under a collective bargaining agreement[]" or whether, despite the contract, the employer must make additional contributions when a pension plan fails to meet minimum funding requirements. *Id*. at 58, 62.

ANALYSIS: The court stated that "pension contribution obligations are contractual in nature." *Id.* at 62. It further said, however, that "this tenet does not exist in a vacuum." *Id*. The court stated that "statutory mandates operate in tandem with contractually imposed duties[,]" and "[w]hen a plan fails to meet the statutorily imposed minimum funding requirement for a given plan year, the employer must satisfy the requirement by making further payments, regardless of the terms of the [collective bargaining agreement]." *Id*. The court reasoned that statutory obligations exist independently of private contracts, and allowing a collective bargaining agreement to supersede statutory mandates would allow parties to "elude ERISA's commands by the simple expedient of sharp bargaining . . . [thus] frustrat[ing] one of ERISA's primary goals: to ensure that covered pension plans provide employees promised retirement benefits." *Id*.

CONCLUSION: The 1st Circuit held that "an employer cannot shield itself from ERISA liability under [§] 302 simply by performing its obligations under a collective bargaining agreement." *Id*.

Global Naps, Inc. v. Verizon New Eng. Inc., 603 F.3d 71 (1st Cir. 2010)

QUESTION: Whether federal courts have jurisdiction over compulsory or permissive counterclaims pursuant to 28 U.S.C. § 1367. *Id.* at 76.

ANALYSIS: With respect to compulsory counterclaims, the court reasoned that Congress did not withdraw supplemental jurisdiction to hear the counterclaim so that it could be reserved for exclusive jurisdiction under a specific agency. *Id.* at 84. Next, in addressing permissive counterclaims, the court noted that § 1367 explicitly included permissive counterclaims and reasoned that all case law (prior to the 1990 enactment of the statute) that prevented permissive counterclaims should be disregarded. *Id.* at 86–87.

CONCLUSION: The 1st Circuit held "28 U.S.C. § 1367 . . . gives federal courts supplemental jurisdiction over both compulsory and at least some permissive counterclaims." *Id.* at 76.

***Riva v. Ficco,* 615 F.3d 35 (1st Cir. 2010)**

QUESTION: Whether "mental illness [can] equitably toll the one-year statute of limitations for the filing of a state prisoner's habeas petition contained in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) 28 U.S.C. § 2244(d)(1)[.]" *Id.* at 37

ANALYSIS: The court noted that the AEDPA applies a one-year statute of limitations to an application for a writ of habeas corpus and stated further that the AEDPA "expressly provides that the limitations period is tolled by a properly filed application for State post-conviction of other collateral review." *Id*. at 38–39. The court then referenced a recent Supreme Court decision determining "that the AEDPA limitations period is subject to equitable tolling in appropriate circumstances." *Id*. at 39. The court further noted that in order to establish a basis for equitable tolling, a petitioner must "demonstrate (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Id*. (internal quotation marks omitted). The court then reasoned that mental illness was one of those extraordinary circumstances, based on the court's own precedent involving mental illness and other federal statutes of limitation. *Id*. at 40.

CONCLUSION: The 1st Circuit held "that mental illness can constitute an extraordinary circumstance, which may prevent a habeas petitioner from understanding and acting upon his legal rights and thereby equitably toll the AEDPA limitations period." *Id*.

***San Juan Cable LLC v. Puerto Rico Tel. Co.*, 612 F.3d 25 (1st Cir. 2010)**

QUESTION: Whether a cable operator has "an implied private right of action to enforce [§] 541(b)(1) of the Cable Communications Policy Act of 1984 (Cable Act), 47 U.S.C. § 541(b)(1), against a rival who has violated that provision[.]" *Id.* at 27–28.

ANALYSIS: The court began its analysis with the baseline rule that a court should read a federal statute as written. *Id.* at 30. The court reasoned that since a private right of action to enforce § 541(b)(1) is absent from the Cable Act, Congress must have intended not to provide for one. *Id.* In support of this inference, the court emphasized that the private rights of action that Congress did expressly extend to cable operators exists to preserve and protect an individual cable operator's ability to provide its own cable service. *Id.* at 31. The court reasoned that

implying a private right of action for a cable operator against a rival would be "incongruous . . . with the inward-looking private rights of action expressly granted in the Cable Act." *Id.* Finally, the court reasoned that a private right of action for cable operators against their rivals would contradict the very premise of the Cable Act, which is to "ensure that would-be cable operators are not unfairly deprived of an opportunity to enter the marketplace . . . ." *Id.*

CONCLUSION: The 1st Circuit held that "the Cable Act does not carry with it an implied private right of action in favor of an incumbent cable operator against a would-be rival." *Id.* at 32.

SECOND CIRCUIT

Argueta v. Holder, 617 F.3d 109 (2d Cir. 2010)

QUESTION: Whether, when prior conviction cannot be used for evaluating moral character for purposes of Nicaraguan Adjustment and Central American Relief Act (NACARA) eligibility, it necessarily follows that those same prior convictions may not be used by the immigration judge when weighing discretionary factors. *Id.* at 113.

ANALYSIS: The court first stated that "[t]here is no statutory or regulatory provision that temporally restricts the discretionary factors [under consideration] in deciding whether to grant or deny cancellation of removal." *Id*. The court then pointed out that "under [Board of Immigration Appeals] precedent, the [immigration judge] regularly balances many positive and adverse factors in deciding how to exercise its discretion[,]" and that "[a]mong the factors deemed adverse to an alien [is] . . . the existence of a criminal record." *Id*. (internal quotation marks omitted). The court concluded that "prior criminal acts are not excluded from consideration because of their vintage[]" and that "prior convictions [are] considered as part of the overall balancing test . . . ." *Id*.

CONCLUSION: The 2nd Circuit held that it was within the discretion of the immigration judge to consider prior convictions, despite the fact that prior convictions cannot be used for evaluating moral character for purposes of NACARA eligibility. *Id*.

Dinler v. City of New York (In re City of New York), 607 F.3d 923 (2d Cir. 2010)

QUESTION: Whether the court "should issue a writ of mandamus to overturn an order of the United States District Court for the Southern District of New York . . . granting a motion to compel the production of

certain sensitive intelligence reports prepared by undercover officers of the New York City Police Department." *Id*. at 928.

ANALYSIS: The court reasoned that "a writ of mandamus is the only 'adequate means' for the City to seek review of the District Court's order and thereby prevent the irreparable harm that the City—and thus the public—would suffer from the disclosure of the Field Reports." *Id*. at 929. The court then noted that "because [it had] never before addressed the circumstances in which the law enforcement privilege must yield to a party's need for discovery, this petition presents 'novel and significant questions of law whose resolution will aid in the administration of justice.'" *Id*. Ultimately, the court reasoned that the City "has a 'clear and indisputable' right to the writ because the District Court indisputably 'abused its discretion' in making three distinct errors[,]" including: (1) "failing to apply a 'strong presumption against lifting the privilege'"; (2) "failing to require that plaintiffs show a 'compelling need' for the Field Reports"; and (3) making "a clearly erroneous assessment of the evidence when it found that plaintiffs' need for the Field Reports outweighed the public's interest in their secrecy." *Id*.

CONCLUSION: The 2nd Circuit held that the City had a "clear and indisputable" right to the writ of mandamus because the writ is (1) the only means of relief available to the City at this time; (2) is a matter novel and significant since it requires the court to clarify many aspects of the standard for reviewing claims of law enforcement privilege; and (3) there were clear errors committed by the District Court. *Id*.

***Katel Ltd. v. AT&T Corp.*, 607 F.3d 60 (2d Cir. 2010)**

QUESTION: Whether the International Telecommunications Regulations (ITRs), promulgated by the International Telecommunications Union, afford a private right of action. *Id*. at 67.

ANALYSIS: The court began by noting that the ITRs have treaty status, and treaties presumptively do not create private rights of action unless there is language to the contrary. *Id*. The court found that no wording in the ITRs creates this private right of action. *Id*. The court then addressed the argument that because the treaty binds the United States, a private right of action exists ipso facto. *Id*. The court decided that this assertion would hold true for sovereign entities but not for private corporations because they are not members of the International Telecommunications Union. *Id*. at 67–68. The court finally noted that "[w]hether a Member State has rights under the treaty, or is bound by it, says nothing about whether a private party in that Member State has a private right of action." *Id*. at 68.

CONCLUSION: The 2nd Circuit held that the ITRs did not create a private cause of action. *Id*.

***L-3 Commc'ns Corp. v. OSI Sys., Inc.*, 607 F.3d 24 (2d Cir. 2010)**

QUESTION: Whether a party that is granted costs for an appeal where judgment is affirmed in part, reversed in part, modified, or vacated is in the same position with regard to costs as a prevailing party on an appeal where judgment is entirely affirmed, dismissed, or reversed. *Id*. at 28.

ANALYSIS: The court began by discussing the latter group of situations, citing the provisions of Federal Rules of Appellate Procedure Rule 39(a)(1)–(3), which govern when it is "generally apparent which party should bear the costs . . . ." *Id*. The court then interpreted Rule 39(a)(4), which acknowledges the first category of outcomes, in which it may be more difficult to determine what party should bear the costs on appeal. *Id*. The court read the provision as "requiring the appellate court to make a determination about which party, if any, should bear costs before costs may be taxed[,]" but the appellate court need not delineate exactly which costs that party will bear. *Id*. at 29. The court noted that the fact that a court awards costs to a party under Rule 39(a)(4) would not reduce the party's ability to recover costs taxed in the district court, or in any way limit the party to only a partial recovery of its costs. *Id*.

CONCLUSION: The 2nd Circuit held that "[o]nce a party is designated by the appellate court without limitation as the party entitled to costs under subsection (a)(4), it is entitled to seek costs in the same manner as is a prevailing party under subsections (a)(1), (2), and (3) . . . ." *Id*.

***United States v. Menendez*, 600 F.3d 263 (2d Cir. 2010)**

QUESTION: Whether, pursuant to U.S. Sentencing Guidelines Manual § 2S1.1(a)(1), a district court may consider the underlying offense's base offense level when calculating the base offense level for the related offense of money laundering without reducing the ultimate offense level because of mitigating conduct. *Id.* at 266.

ANALYSIS: The court stated that the sentencing statute's express language "permits consideration of relevant conduct to determine only the defendant's *accountability* for the underlying offense." *Id*. at 268. The court reasoned that "relevant conduct . . . [therefore] is not considered in any way to affect the underlying offense *level*." *Id*. (internal quotation marks omitted). In addition, the court rejected the notion of "mitigating relevant conduct[,]" determining that the "[g]uidelines require the court to take into account uncharged conduct

that is '[r]elevant [c]onduct . . .' in order to *increase* the defendant's offense level." *Id*. The court further opined that adopting such an interpretation of relevant conduct "undermines the express purpose of [§] 2S1.1(a) to punish direct money launderers one to four levels greater than the Chapter Two offense level for the underlying offense." *Id*. (internal quotation marks omitted). Finally, the court reasoned, the third-party money laundering provision of the sentencing statute permits the court to consider mitigating conduct (e.g. the value of the laundered funds) in determining the offense level. *Id*. at 269. The court found that reducing the base offense level by applying that standard would "erroneously conflate the direct money laundering provision under § 2S1.1(a)(1) with the third-party money laundering provision under § 2S1.1(a)(2)." *Id*.

CONCLUSION: The 2nd Circuit held that the sentencing guidelines allow the court to "calculat[e] the base offense level for . . . conspiracy to launder money, by considering the [base offense level] involved in [a] conviction for . . . conspiracy to distribute heroin . . . without according any reduction in the offense level based on the lesser amount of funds actually laundered in the criminal scheme." *Id.*

***Nen Di Wu v. Holder*, 617 F.3d 97 (2d Cir. 2010)**

QUESTION: "[W]hether, or under what circumstances, a case should be dismissed pursuant to the fugitive disentitlement doctrine before the merits of the case are fully before the court." *Id.* at 100.

ANALYSIS: The court stated that "[a]t a minimum, a court must find that a party either is currently a fugitive from justice or was a fugitive from justice and that a nexus exists between the party's former fugitive status and the appeal." *Id*. The court noted that once it determines a party is a fugitive, the court must look to "the reasons for the doctrine and the equities of the case." *Id*. The court determined that when the record does not reflect "the extent to which [the defendant] is evading the law[]" or "how [the defendant's] fugitive status would prejudice the Government's case[,]" it could not use the merits of the case to "inform [its] discretion . . . ." *Id*. at 101–03.

CONCLUSION: The 2nd Circuit held that "in immigration cases, motions to dismiss pursuant to the fugitive disentitlement doctrine are correctly addressed only after briefing—and, where appropriate, argument—on the merits of the appeal." *Id.* at 103.

***Robinson Knife Mfg. Co. v. Comm'r of Internal Revenue*, 600 F.3d 121 (2d Cir. 2010)**

QUESTION: Whether taxpayers subject to 26 U.S.C. § 263A are allowed to deduct their intellectual property royalties? *Id.* at 129.

ANALYSIS: The court noted that the taxpayer presented three arguments as to why royalty payments need not be capitalized under § 263A: "(1) that the royalty payments are deductible as 'marketing, selling, advertising, [or] distribution costs,' . . . ; (2) that royalty payments which are not 'incurred in securing the contractual right to use a trademark, corporate plan, manufacturing procedure, special recipe, or other similar right associated with property produced,' . . . are always deductible; and (3) that the royalty payments were not 'properly allocable to property produced.'" *Id.* at 128–29. First, the court held that royalty payments cannot be deducted as marketing, selling, advertising, or distribution costs. *Id.* at 130. The court stated that "[i]f all trademark royalties were 'marketing, selling, advertising, [or] distribution costs,' then they would be deductible regardless of the terms of the contracts under which they were paid[]"; "[a]s a result, a lump-sum minimum royalty payment . . . would be immediately deductible." *Id.* The court reasoned that the rationale behind § 263A is "to make sure that trademark royalties are not deducted during a taxable year" preceding the year in which the corresponding trademarked items are sold; holding royalty payments immediately deductible would therefore produce "a mismatching of expenses and the related income and an unwarranted deferral of taxes." *Id.* Second, the court held that "royalty payments which are not incurred in securing the contractual right to use a trademark, corporate plan, manufacturing procedure, special recipe, or other similar right associated with property produced, are not deductible[]" because "it would be contrary to the purpose of § 263A to permit taxpayers to manufacture inventory and deduct royalties immediately, even if that inventory were not sold or otherwise disposed of until a later taxable year." *Id.* Finally, the court agreed that the royalties were not "properly allocable to property produced." *Id.* at 130–31. The court reasoned that it would be contrary to the purpose of § 263A to permit taxpayers to "manufacture inventory and deduct royalties immediately, even if that inventory were not sold or otherwise disposed of until a later taxable year." *Id*. at 130. The court noted "it is the costs, and not the contracts pursuant to which those costs are paid, that must be a but-for cause of the taxpayers production activities in order for the costs to be properly allocable to those activities and subject to the capitalization requirement." *Id*. at 131–32. The court further observed the record was clear that the royalties were sales-based, were calculated as a

percentage of the net sales, and were incurred only upon the sale of the items. *Id*. at 134.

CONCLUSION: The 2nd Circuit held "that taxpayers subject to 26 U.S.C. § 263A may [immediately] deduct royalty payments that are (1) calculated as a percentage of sales revenue from certain inventory, and (2) incurred only upon sale of such inventory." *Id*. at 134–35.

THIRD CIRCUIT

Elassad v. Independence Air, Inc., 604 F.3d 804 (3d Cir. 2010)

QUESTION: "[W]hether the [Federal Aviation Act (the Aviation Act)], the [Air Carrier Access Act (ACAA)], and their implementing regulations preempt state tort law with respect to accidents that occur when a passenger is disembarking a plane." *Id.* at 810.

ANALYSIS: The court noted that "it has traditionally been the province of state law to govern disputes in cases where a plaintiff alleges that he fell as a result of the defendant's negligence." *Id.* at 810–11. Therefore, the court determined that for there to be field preemption in the area, the court must "find that federal law 'leav[es] no room for state regulation' and that Congress had a 'clear and manifest' intent to supersede state law." *Id.* at 811. The court examined both acts, finding that there was no evidence that Congress intended to impose a duty in the area of "assistance provided to passengers during their disembarkation" in the Aviation Act. *Id.* at 814. The court further noted that the "ACAA regulations are intended to protect passengers from discrimination by air carriers; they are not intended to dictate a standard of care in a negligence action." *Id.* at 815.

CONCLUSION: The 3rd Circuit held that state negligence law should govern in actions against air carriers for injuries sustained by passengers during disembarkment because the Aviation Act and the ACAA do not preempt state law. *Id.* at 816.

United States v. Lee, 612 F.3d 170 (3d Cir. 2010)

QUESTION: Whether appellate courts should employ a plenary or plain error standard of review when evaluating a post-hoc claim that one criminal charge has tainted the jury's consideration of another. *Id.* at 178.

ANALYSIS: The court reasoned that issues of taint and insufficiency of the evidence stem from theories of the case; therefore, it looked to its standards of review under sufficiency of the evidence for guidance. *Id.* The court explained that it exercises plenary review on appeal when a

sufficiency challenge arises at trial, but it exercises plain error standard of review when such a challenge arises post-hoc. *Id.* Proceeding by analogy, the court reasoned that it should adopt the same distinction between the standards of review it exercises in evaluating a challenge based on taint. *Id.* at 179.

CONCLUSION: The 3rd Circuit adopted a plain error standard of review when a evaluating a post-hoc challenge based on taint. *Id.*

***Patel v. AG of the United States*, 599 F.3d 295 (3d Cir. 2010)**

QUESTION: Whether "the [Immigration and Nationality Act's (INA)] confidentiality provisions [are] inapplicable to applications for [Legal Immigration Family Equity (LIFE)] Act Family Unity benefits . . . ." *Id.* at 297.

ANALYSIS: The court first applied a "basic tenet of statutory construction" and analyzed the language of the LIFE Act's Section 1104(c)(5) and INA's § 245a(c)(5) in accordance with its ordinary meaning. *Id.* at 298 (internal quotation marks omitted). The court determined that "the plain language of [the LIFE Act] makes clear that the confidentiality provisions apply . . . only insofar as the filing is an application for adjustment of residency status." *Id.* As a result, the court was unable "to conclude that Congress intended to extend the protection of INA § 254A(c)(5) to any filing other than an application by an alien for adjustment of residency status." *Id.*

CONCLUSION: The 3rd Circuit held that the INA's confidentiality provisions apply only to applications to adjust the residency status of aliens. *Id.*

***Sullivan v. DB Invs., Inc.*, 613 F.3d 134 (3d Cir. 2010)**

QUESTION: "[W]hether variations among state antitrust statutes are so far-reaching that those differences overshadow [factual] commonalities when a class of indirect purchasers seeks [class] certification on a nationwide basis." *Id.* at 146.

ANALYSIS: To determine whether a class of indirect purchasers may possess a "common question of law" sufficient to qualify for the Federal Rules of Civil Procedure Rule 23(b)(3) certification, the court first surveyed the pertinent state antitrust statutes. *Id.* at 146–48. The court observed that some states afford standing to indirect purchasers to seek antitrust recovery, while other states provide standing for indirect purchasers only when the state joins the suit as parens patriae. *Id.* at 147. A third group of states denies standing to indirect purchasers outright. *Id.* The court concluded that this disparity made nationwide class certification both improper under Rule 23(b)(3) and violative of the

"Rules Enabling Act, which prohibits a court from interpreting procedural rules to create new substantive rights." *Id.* at 149.

CONCLUSION: The 3rd Circuit held that state antitrust statutes are so disparate that nationwide class certification of indirect purchasers is improper despite factual commonalities. *Id.* at 149–50.

FOURTH CIRCUIT

United States v. Alston, 611 F.3d 219 (4th Cir. 2010)

QUESTION: Whether, under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), a court may properly enhance a defendant's sentence based upon a prosecutor's proffer of facts to which defendant had never admitted. *Id.* at 220.

ANALYSIS: The court first noted that Supreme Court precedent in *Shepard v. United States*, 544 U.S. 13 (2005), and *Taylor v. United States*, 495 U.S. 575 (1990) "adher[ed] to the demanding requirement that any sentence under the ACCA rest on a showing that a prior conviction necessarily involved (and a prior plea necessarily admitted) facts equating to a predicate offense[.]" *Id.* at 225 (internal quotation marks omitted). The court reasoned that these limitations serve two vital interests: first, by limiting the items available to determine the nature of prior convictions, '"collateral trials' are avoided[]"; and second, limiting sentencing courts to a specified set of records mitigates concerns over potential Sixth Amendment violations. *Id.* The court noted that while the Sixth Amendment does not guarantee "a right to have a jury find the fact of a prior conviction," *Shepard* prevents sentencing courts from determining whether prior convictions may serve as the ACCA predicate offenses unless the facts are inherent in the conviction or confirmed by the defendant. *Id.* at 225–26.

CONCLUSION: The 4th Circuit held that the ACCA, 18 U.S.C. § 924(e), requires that the defendant admit elements of the qualifying offense before the court may properly enhance the defendant's sentence. *Id.* at 227.

United States v. Pettiford, 606 F.3d 156 (4th Cir. 2010)

QUESTION: Whether "a petitioner is entitled to [28 U.S.C.] § 2255 relief after successfully attacking some of his predicate sentences if those vacated convictions are not necessary for the armed career criminal designation." *Id*. at 162.

ANALYSIS: The court began by looking at the language of 28 U.S.C. § 2255(b) that provided when the court should grant habeas relief. *Id*. at 163. Under § 2255(b), a petitioner must show that his sentence was unlawful because "judgment was rendered without jurisdiction, or . . . the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack." *Id*. The court noted that a district court should grant the prisoner a remedy only after the prisoner has met this threshold inquiry. *Id*. Even when there has been vacatur of convictions, the prisoner may not have met the threshold inquiry. *Id*. at 164.

CONCLUSION: The 4th Circuit held that "[v]acatur alone does not entitle a petitioner to habeas relief." *Id*.

FIFTH CIRCUIT

United States v. Bautista-Montelongo, 618 F.3d 464 (5th Cir. 2010)

QUESTION: Whether the operator of a boat carrying a controlled substance is a "captain" or "pilot" as defined by 18 U.S.C. Appx. § 2D1.1(b)(2)(C) where the operator possessed no "special skill" as a captain-pilot. *Id.* at 466.

ANALYSIS: The court noted that the statute provides a two level increase for a defendant who imports or exports a controlled substance when "the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance." *Id.* (internal quotation marks omitted). The court stated that the three other circuits who had ruled on the issue had given the terms "captain" and "pilot" their everyday meaning. *Id*. at 466–67. The court adopted the holdings of its sister courts; it refused to "apply rigid requirements of professionalism to the captain-pilot enhancement, opting instead for a common sense approach." *Id.* at 467.

CONCLUSION: The 5th Circuit held that a special skill was not necessary for the captain-pilot enhancement. *Id*.

Lavie v. Ran, 607 F.3d 1017 (5th Cir. 2010)

QUESTION: Whether the court should recognize a foreign bankruptcy proceeding that is pending abroad "as a foreign main or nonmain proceeding," so as to afford the receiver a variety of protections of the Bankruptcy Code. *Id.* at 1019.

ANALYSIS: The court discussed the proper classification of a foreign main proceeding. *Id.* at 1022. First, the court established that the country in which the proceeding is pending has to be the debtor's center of main interest (COMI). *Id.* The court noted that, although the Bankruptcy Code does not explicitly define the term, it will presume the COMI to be "the debtor's registered office, or habitual residence in the case of an individual" unless there is evidence to the contrary. *Id*. at 1022. The court considered additional factors, similar to those involved in domicile determinations. *Id.* at 1023–24. Next, the court discussed what constitutes a foreign nonmain proceeding and posited that the sole requirement is an establishment in the foreign country. *Id.* at 1026. The court found that a debtor has an establishment if he has a place of operations in the foreign country and carried on nontransitory economic activity in the foreign country at the time that the creditor filed the petition for recognition. *Id.*

CONCLUSION: The 5th Circuit held that the bankruptcy proceeding was not a foreign main or nonmain proceeding, and so the bankruptcy receiver was not entitled to various protections. *Id*. at 1028.

Mission Primary Care Clinic, PLLC v. Dir., 370 Fed. App'x 536 (5th Cir. 2010)

QUESTION: Whether "payments made to a member of an LLC . . . constitute items sufficiently similar to salary or wages to allow use of [26 U.S.C. [§] 6331(e) to levy on them." *Id.* at 539.

ANALYSIS: The court first noted the absence of a definition of "salary or wages" within the continuing levy provision, and therefore turned to Treasury Regulation 26 C.F.R. § 301.6331-1(b)(1). *Id.* The court noted that this regulation includes compensation in the form of fees, bonuses, commissions, and "similar items" within the term "salary and wages" for the purposes of attaching a levy. *Id*. The court therefore declined to limit 26 U.S.C. § 6331(e) to payments branded as wages or salary and instead "focus[ed] on the 'critical characteristics' of the payments rather than on their label." *Id*. at 540 (citation omitted). The court went on to utilize "[its] own precedent interpreting provisions of the Tax Code for guidance in determining which characteristics of 'salary or wages' are relevant." *Id.* The court identified four factors relevant to characterizing payments: "(1) whether the services performed were more like those performed by an employee or a shareholder; (2) whether there was corporate authorization for the payment of salaries; (3) whether book entries showed periodic payments or lump sum payments; and (4) whether the payments bear a relationship to the earnings of the corporation." *Id*. In light of the four factors, the court

found the facts that the payments were periodic and "proportionate to [the member's] own work product, and not to an ownership share" indicated that the payment was "more akin to wages than to a pure distribution of profits." *Id*.

CONCLUSION: The 5th Circuit held that all of the "characteristics support the conclusion that the payments to [an LLC member] were 'salary or wages' within the meaning of [26 U.S.C. § 6331(e)]." *Id.*

***United States v. Rains*, 615 F.3d 589 (5th Cir. 2010)**

QUESTION: "[W]hether a conviction under [18 U.S.C.] § 924(c) counts as a felony drug offense for purposes of applying the enhancement under [21 U.S.C.] § 841(b)(1)(B)." *Id.* at 596.

ANALYSIS: The court noted the 4th Circuit had previously held "that § 924(c) could be the basis for an enhancement, at least when the record made clear that the conviction involved a drug trafficking crime rather than a crime of violence." *Id*. at 597. Furthermore, the court recognized its own precedent "that it is permissible to apply the enhancement even when the statute of conviction covers non-drug-related conduct so long as the record makes clear the actual violation involved drugs." *Id*. at 598. Additionally, the court noted that existing case law foreclosed the application of the rule of lenity. *Id*.

CONCLUSION: The 5th Circuit held "that § 924(c) can be the basis for an enhancement under § 841(b)(1) when the record makes clear that the conviction involved a drug trafficking crime rather than a crime of violence." *Id*.

SIXTH CIRCUIT

***United States v. Coccia*, 598 F.3d 293 (6th Cir. 2010)**

QUESTION: Whether requiring a defendant to provide a DNA sample under 42 U.S.C. § 14135a(d) (DNA Act) has an overriding punitive effect and violates the Constitution's prohibition on Ex Post Facto laws. *Id*. at 296, 298.

ANALYSIS: The court reasoned that blood tests "generally are considered minimally intrusive." *Id*. at 299. The court noted that the DNA Act did "not have a retribution component because it does not label the offender as more culpable than before, and is not geared toward making [the individual] understand and regret the severity of his crimes." *Id*. (internal quotation marks omitted). The court further reasoned that the "penalty in the DNA Act for non-compliance is punished as a separate

offense, diminishing potential *ex post facto* concerns because the purpose of the Clause is to protect against increased punishment for prior, not separate, offenses." *Id*.

CONCLUSION: The 6th Circuit held that the DNA Act was "not so punitive in effect as to override its regulatory purpose," and thus its application to the defendant did not violate the Ex Post Facto Clause. *Id*. at 298.

***United States v. Everett*, 601 F.3d 484 (6th Cir. 2010)**

QUESTION: Whether "an officer [may] conduct questioning during a traffic stop that (1) is unrelated to the underlying traffic violation, (2) is unsupported by independent reasonable suspicion, and (3) prolongs the stop by even a small amount?" *Id*. at 486.

ANALYSIS: The court noted that "[t]he ultimate touchstone of the Fourth Amendment . . . is reasonableness" and that Fourth Amendment jurisprudence has "consistently eschewed bright-line rules . . . ." *Id*. at 492. The court also observed that every other circuit to confront the issue had refused to impose a categorical "no-prolongation" rule. *Id*. The court reasoned that such a rule would provide little protection against police abuse because an officer might ask "unrelated questions to his heart's content, provided he does so during the supposedly dead time while he or another officer is completing a task related to the traffic violation." *Id*.

CONCLUSION: The 6th Circuit declined to impose "a categorical ban on suspicionless unrelated questioning that may minimally prolong a traffic stop." *Id*.

***Hamdi v. Napolitano*, 620 F.3d 615 (6th Cir. 2010)**

QUESTION: Whether petitioner's claim was barred by 8 U.S.C. § 1252(g), which precludes "federal courts from exercising subject-matter jurisdiction over any cause or claim . . . on behalf of any alien arising from [any action by the Department of Homeland Security] . . . ." *Id*. at 620.

ANALYSIS: The court observed that the proper interpretation of "on behalf of" was "a matter of first impression in [that] circuit (and apparently in all circuits)." *Id*. at 621. The court indicated it would "examine the statute for its plain meaning[,]" and that it would look to the "relevant legislative history" if the language was unclear. *Id*. The court noted that judicial precedents favored "narrow construction[s] of jurisdictional limits[,]" and that courts should not broadly interpret "jurisdiction-stripping provisions in the absence of explicit congressional intent." *Id*. at 622. Finally, the court reasoned that while petitioner's

claim could benefit his alien mother, petitioner was litigating his own constitutional rights. *Id*. at 623.

CONCLUSION: The 6th Circuit held that "a complaint brought by a U.S. citizen child who asserts his or her own distinct constitutional rights and separate injury does not fall fairly within [the] jurisdictional bar [of] § 1252(g)." *Id*.

***Smith v. Solis*, No. 08-4058, 2010 U.S. App. LEXIS 15457 (6th Cir. July 26, 2010)**

QUESTION: Whether a court has "jurisdiction to review an untimely request for a hearing" when the case arises under the Surface Transportation and Assistance Act (Transportation Act). *Id.* at *5.

ANALYSIS: The court noted that the 5th Circuit had addressed this issue and found that the Transportation Act's filing time restrictions are not jurisdictional. *Id.* at *5. The court also noted that both the respondent and an intervenor conceded that granting tolling to the petitioner would not prejudice them. *Id.* at *6. The court stated that "[i]n deciding whether equitable tolling is appropriate in a given case," it must look to five, non-comprehensive factors: "(1) lack of actual notice of filing requirement; (2) lack of constructive knowledge of filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the defendant; and (5) a plaintiff's reasonableness in remaining ignorant of the notice requirement." *Id.* at *7 (internal quotation marks omitted). The court held that "a complainant should not be punished for missing a filing deadline when he is affirmatively misled in a manner that causes that delay." *Id.* at *9.

CONCLUSION: The 6th Circuit held that the court has jurisdiction to hear the untimely request for a hearing for a case arising under the Transportation Act. *Id.* at *6.

***Terry v. Tyson Farms, Inc.*, 604 F.3d 272 (6th Cir. 2010)**

QUESTION: Whether "a plaintiff asserting unfair discriminatory practices or undue preference under §§ 202(a) and (b) of the [Packers and Stockyards Act (PSA)] must allege an adverse effect on competition in order to state a claim." *Id.* at 276.

ANALYSIS: The court noted that antitrust suits "require a party to allege an adverse effect on competition in order to sustain a cause of action," and that the PSA is primarily an antitrust statute. *Id.* at 277. The court further noted that all of the circuits that have addressed this issue have determined that "the purpose of the [PSA] is to protect competition and, therefore, only those practices that will likely affect competition adversely violate the Act." *Id.* Thus, the court decided that an adverse

effect on competition must be alleged. *Id.* The court declined to create a circuit split on this issue and reasoned that "the rationale employed by our sister circuits is well-reasoned and grounded on sound principles of statutory construction." *Id.* at 279.

CONCLUSION: The 6th Circuit held that "in order to succeed on a claim under [§§ 202(a) and (b) of the PSA], a plaintiff must show an adverse effect on competition." *Id.*

***Traverse Bay Area Intermediate Sch. Dist. v. Mich. Dep't of Educ.*, 615 F.3d 622 (6th Cir. 2010)**

QUESTION: Whether "local educational agencies . . . have statutory standing under 20 U.S.C. § 1415(i)(2)(A) to challenge a state agency's compliance with certain 'procedural safeguards' set forth in 20 U.S.C. § 1415(b)[,]" both of which are portions of the Individuals with Disabilities in Education Act (IDEA). *Id*. at 624.

ANALYSIS: The court noted that it first needed to "determine whether the IDEA creates an express right for a local educational agency to maintain a civil action against a state educational agency[,]" and if not, it then needed to "determine whether the IDEA creates an implied right of action." *Id*. at 627. The court reasoned that the "text of the IDEA does not contain language that expressly authorizes a local educational agency to bring an action against a state educational agency . . . ." *Id*. The court stated that congressional intent is dispositive for finding an implied right of action. *Id*. at 628. Because "Congress expressly provided a private right to sue in favor of any party aggrieved by a decision under 20 U.S.C. § 1415(b)" but "did not expressly provide a private right of action in favor of a[n] . . . educational agency[,]" the court reasoned that Congress did not intend to provide educational agencies with statutory standing. *Id*. at 629.

CONCLUSION: The 6th Circuit held that "the IDEA does not provide School Districts with an express or implied right to compel State Defendants' compliance with § 1415(b)'s procedural safeguards, absent an underlying claim that directly involves a disabled child's individual educational program." *Id.* at 624.

SEVENTH CIRCUIT

United States v. Barnes, 602 F.3d 790 (7th Cir. 2010)

QUESTION: Whether a trial court "may disregard a post-trial factual stipulation between the defendant and the government regarding the amount of drugs for sentencing purposes." *Id*. at 795.

ANALYSIS: The court noted that "a district court has the authority to reject a factual stipulation in a plea agreement." *Id*. The court observed that the sentencing guidelines, while granting parties the authority to provide stipulated facts to the district court, were silent on post-trial stipulations. *Id*. at 796. The court reasoned that unless it read that silence "to mean that post-trial stipulations of fact are also not authorized under the sentencing guidelines, [it could not] read the absence of an explicit grant of authority to disregard a post-trial stipulation as controlling in this situation either." *Id*.

CONCLUSION: The 7th Circuit held that "the absence of explicit instruction on how to deal with post-trial stipulations of fact to mean that [it] should treat post-trial stipulations as [it] would any other stipulation of fact, and grant the fact-finder the same authority to accept or reject the stipulation." *Id*.

United States v. Bell, 598 F.3d 366 (7th Cir. 2010)

QUESTION ONE: Whether the statute of limitations began to run when the defendant's child-support arrearage exceeded $10,000 or whether 18 U.S.C. § 228 is a continuing offense and is not completed until the offense expires. *Id*. at 368.

ANALYSIS: The court reasoned that to determine whether an offense is "continuing," the courts examine "whether the language of a criminal statute compels that conclusion or whether the nature of the crime is such that Congress must have intended it to be treated as a continuing one." *Id*. at 369. The court noted that the "language of the statute describes the offense continuing over a period of time either directly in terms of an accumulation of years of delinquency or indirectly in terms of an accumulation of money such that Congress [ ] imagined the criminalized conduct to last continuously . . . ." *Id*. (internal quotation marks omitted). The court further noted that "state courts routinely hold that state statutes criminalizing the willful failure to meet child-support obligations create continuing offenses." *Id*. Moreover, the court reasoned that penalties increase if the "deadbeat parent has failed to pay child support for more than two years, suggesting that it would be nonsensical if the punishment increased for the first two years (or when the arrearage

exceeded $10,000) but then fell to zero if the defendant successfully evaded the law for five years . . . ." *Id*.

CONCLUSION: The 7th Circuit held that 18 U.S.C. § 228 is a continuing offense and the statute of limitations did not toll until the offense expires. *Id*. at 368.

QUESTION TWO: Whether a court must give a jury instruction "that the government [must] prove that a defendant . . . understand[s] that he is violating a federal statute to be guilty under 18 U.S.C. § 228." *Id*. at 369–70.

ANALYSIS: The court analyzed the language of the statute, and specifically noted the "word 'willful' is a word of many meanings, and its definition is often influenced by its context." *Id*. at 370. The court noted that the legislative history does not suggest that the "defendant must know of the specific statute that he is violating—only that he knows of the legal duty (the duty to support the child) that he is violating." *Id*. The court further reasoned that the violation of a child-support order is "not apparently innocent conduct, and it is fitting that the defendant need not know of the specific federal law he is violating." *Id*.

CONCLUSION: The 7th Circuit held that the government need not prove that the defendant knew he was violating a federal statute. *Id.* at 371.

***United States v. LaFaive*, 618 F.3d 613 (7th Cir. 2010)**

QUESTION: Whether 18 U.S.C. § 1028A's "prohibition on using the identification of 'another person . . .'" criminalizes only the use of a living person's identity, or also the use of a deceased person's identity. *Id.* at 615, 617.

ANALYSIS: The court noted that it was critical to determine the meaning of "another person" in § 1028A(a)(1). *Id*. at 616. The court reasoned that, since the statute did not define "person," the court would assume that Congress "intended it to have its ordinary meaning." *Id.* The court observed that "the common usage of the word person includes both living and deceased individuals." *Id.* The court further noted that "there is nothing in § 1028A(a)(1) that would naturally limit the definition of person to just the living." *Id*. at 616–17.

CONCLUSION: The 7th Circuit held that the § 1028A prohibition on using the identification of "another person" criminalizes both the use of a living person's identity and a deceased person's identity. *Id*. at 617.

***Ojeda v. Goldberg*, 599 F.3d 712 (7th Cir. 2010)**

QUESTION: Whether "a fraudulently induced forbearance constitutes an extension or renewal of credit for purposes of [11 U.S.C.] § 523." *Id.* at 718.

ANALYSIS: The court looked to the definitions of "extension" and "renewal" to determine whether the fraudulently induced forbearance of which the plaintiff creditor complained was within the ambit of 11 U.S.C. § 523. *Id.* The court noted that Black's Law Dictionary defines "extension" as "'[t]he continuation of the same contract for a specified period,' or '[a] period of additional time to take an action, make a decision, accept an offer, or complete a task.'" *Id.* at 718–19. The court cited the definition of "renewal" as "'[t]he re-creation of a legal relationship or the replacement of an old contract with a new contract, as opposed to the mere extension of a previous relationship or contract." *Id.* The court found that a fraudulently induced forbearance was squarely within the definition of an extension or a renewal under the statute. *Id.*

CONCLUSION: The 7th Circuit held that "a fraudulently induced forbearance does constitute an extension or renewal." *Id.* at 718.

***Shlahtichman v. 1-800 Contacts, Inc.*, 615 F.3d 794 (7th Cir. 2010)**

QUESTION: Whether a computer-generated purchase confirmation email that includes the expiration date of the purchaser's credit card is a violation of the Fair and Accurate Credit Transactions Act (FACTA). *Id*. at 796.

ANALYSIS: The court first noted that FACTA covers only printed receipts and reasoned that the ordinary meaning of the word "print" means "recording it on paper." *Id*. at 799. The court then determined that the modifier "electronically" refers to "those receipts that are printed by machine, as opposed to those which are handwritten or created by taking an impression of the card using an imprinter." *Id*. The court further reasoned that "[FACTA] . . . applies to receipts that are printed and provided to the cardholder *at the point of sale or transaction*." *Id*. at 800 (internal quotation marks omitted).

CONCLUSION: The 7th Circuit held that "the language and context [of the provision] make plain that Congress was regulating only those receipts physically printed by the vendor at the point of sale or transaction; to apply the statute to receipts that are emailed to the consumer would broaden the statute's reach beyond the words that Congress actually used." *Id*. at 802.

***United States v. Thompson*, 599 F.3d 595 (7th Cir. 2010)**

QUESTION: Whether "holding a supervised-release revocation hearing by videoconference violates [Federal Rules of Criminal Procedure] Rule 32.1(b)(2)." *Id*. at 596.

ANALYSIS: The court reasoned that a defendant is entitled to "an opportunity to appear, present evidence, and question any adverse witness . . . and an opportunity to make a statement and present any information in mitigation." *Id*. at 598 (internal quotation marks omitted). The court noted that Rule 32.1(b)(2) provides that "before revoking a defendant's supervised release, the court must give the defendant 'an opportunity to appear' for purposes of presenting evidence, questioning witnesses, arguing in mitigation, and making a statement to the court." *Id.* at 599. The court then examined the traditional definitions of the word "appear," which "suggested that the 'appearance' required by this rule occurs only if the defendant comes into the physical—not virtual—presence of the judge." *Id.* Moreover, the court found that the "defendant's appearance in court is the means by which he effectuates the other rights conferred by the rule[,]" and "without [the] personal interaction between the judge and the defendant—which the videoconferencing cannot fully replicate—the force of the other rights guaranteed by Rule 32.1(b)(2) is diminished." *Id.* at 599–600. The court further determined that construing Rule 32.1(b)(2) to mandate the defendant's personal appearance before a judicial officer "comports with the traditional legal understanding of a person's 'appearance' before a court when his liberty is at stake in the proceeding . . . ." *Id.* at 600. Finally, the court reasoned that "the use of [videoconferencing] is the exception to the rule, not the default rule itself[]" because other rules of procedure permit such technology "only pursuant to a specifically enumerated exception and with the defendant's consent . . . ." *Id.* at 600–01.

CONCLUSION: The 7th Circuit held that "the 'opportunity to appear' in Rule 32.1(b)(2) . . . exclude[s] an 'appearance' by videoconference." *Id.* at 601.

***Young v. Verizon's Bell Atl. Cash Balance Plan*, 615 F.3d 808 (7th Cir. 2010)**

QUESTION ONE: At what time does a claim for equitable reformation under Employee Retirement Income Security Act (ERISA) § 502(a) accrue for the purposes of the statute of limitations. *Id*. at 817.

ANALYSIS: The court adopted the "general federal common law rule . . . that an ERISA claim accrues when the plaintiff knows or should know of conduct that interferes with the plaintiff's ERISA rights." *Id*.

Applying this rule to the facts at hand, the court found that while the defendant "discovered the drafting mistake in 1997, it did not then know that this mistake would give rise to a controversy requiring it to raise an equitable reformation claim." *Id*.

CONCLUSION: The 7th Circuit held that "[n]one of the parties' claims accrued before 2005 when [plaintiff] brought her federal court ERISA action, so these claims are timely under the applicable [statute of limitations period]." *Id*.

QUESTION TWO: "[W]hether § 502(a)(3) authorizes equitable reformation of an ERISA plan due to a scrivener's error . . . ." *Id*. at 818.

ANALYSIS: The court first examined similar case law "addressing the related problem of ambiguous plan language[,] [which] suggests that [equitable] relief may be appropriate." *Id*. The court then looked to holdings from the 3rd, 4th, 8th, and 9th Circuits, which "either concluded that ERISA authorizes such [equitable] relief or does not foreclose the possibility." *Id*. at 819.

CONCLUSION: The 7th Circuit held "that ERISA § 502(a)(3) authorizes equitable reformation of a plan that is shown, by clear and convincing evidence, to contain a scrivener's error that does not reflect participants' reasonable expectations of benefits," as it would "thwart this goal [of protecting employees] to enforce erroneous plan terms contrary to those expectations, even if doing so would increase employees' benefits." *Id.* The court underscored that the "appropriate equitable relief authorized by § 502(a)(3) allows a court to reform an ERISA plan to avoid such an unfair result." *Id.*

EIGHTH CIRCUIT

EEOC v. Kelly Servs., Inc., 598 F.3d 1022 (8th Cir. 2010)

QUESTION: Whether an employment agency violates Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(b), by failing to refer an individual for employment when the individual's bona fide religious belief conflicts with an employment requirement. *Id.* at 1030.

ANALYSIS: The court noted that the plain language of Title VII "states that an employment agency violates Title VII if it 'fail[s] or refuse[s] to refer for employment . . . any individual because of his . . . religion . . . .'" *Id*. The court then stated that a plaintiff must show "that the agency discriminated against her based on her [religion] in relation to referrals[]" to succeed on a Title VII claim against an employment agency. *Id.* (internal quotation marks omitted). The court reasoned that

there must be an actual, referable position for an employment agency's refusal to make a referral to constitute an adverse employment action. *Id*. The court noted that once a plaintiff establishes a prima facie discrimination case, it applies a burden-shifting scheme that "require[s] the employer to offer a legitimate, nondiscriminatory reason for the adverse employment action." *Id*. (citation and internal quotation marks omitted). The court then analyzed whether the employment agency's proffered nondiscriminatory reason for its adverse action was pretextual. *Id.* at 1031–32.

CONCLUSION: The 8th Circuit held that when an employment agency refuses to make a referral, but offers a legitimate, nondiscriminatory reason for its action, and this reason is not mere pretext, the agency has not violated Title VII. *Id.* at 1033.

***Jobe v. Medical Life Ins. Co.*, 598 F.3d 478 (8th Cir. 2010)**

QUESTION: Whether, in a health and welfare plan that is subject to the Employee Retirement Income Security Act (ERISA), "a summary plan description prevails over the formal policy where the summary grants to a plan administrator rights not present in the formal policy, yet also indicates that the policy prevails if the two documents conflict . . . ." *Id*. at 484.

ANALYSIS: The court reasoned that although it had previously held that "a summary plan description prevails over conflicting language in the policy," it is required to give the language of the two documents a "common and ordinary meaning." *Id.* at 485. The court determined it "must construe the documents as a reasonable person in the position of the [plan] participant, not the actual participant, would have understood the words." *Id.* The court noted that "summary plan description expressly states that no rights accrue by reason of the summary." *Id.* Therefore, the court found "the average plan participant would read that provision and conclude that the policy prevails if it conflicts with the summary, and that the summary could not, standing alone, grant [the administrator] the discretion it claims to have." *Id.*

CONCLUSION: The 8th Circuit held that the summary plan description does not "vest the administrator with discretion where the policy provides a mechanism for amendment and disclaims the power of the summary plan description to alter the plan." *Id*. at 484.

***Johnson v. Arden*, 614 F.3d 785 (8th Cir. 2010)**

QUESTION: Whether an internet service provider (ISP) is "immune from suit under the [Communications Decency Act (CDA)]." *Id.* at 790.

ANALYSIS: The court first looked to the language of the CDA, which states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider . . . ." *Id*. The court reasoned that this plain language "bar[s] plaintiffs from holding ISPs legally responsible for information that third parties created and developed." *Id*. at 791. The court determined that Congress only intended ISPs to bear responsibility for "speech that is properly attributable to them[]" and not for "information originating with a third-party user of the service." *Id*. (internal quotation marks omitted).

CONCLUSION: The 8th Circuit held that "the CDA provides ISPs . . . with federal immunity against state tort defamation actions that would make service providers liable for information originating with third-party users of the service . . . ." *Id*. at 792.

***United States v. Hull*, 606 F.3d 524 (8th Cir. 2010)**

QUESTION: Whether the scope of 18 U.S.C. § 2253(a)(3), "a criminal forfeiture statute," includes the full acreage of the property subject to forfeiture or "only a portion of the acreage should be forfeited." *Id.* at 527–28.

ANALYSIS: The court first noted that "[o]ur cases have concluded, with respect to other criminal forfeiture statutes . . . that the natural source for defining property subject to forfeiture is the instrument creating the defendant's interest in the property." *Id.* at 528 (internal quotation marks omitted). The court reasoned that "[g]iven this circuit precedent, and the absence of any material difference in language between these statutes and § 2253(a)(3) on the meaning of property, [there is] no basis to adopt a different approach." *Id.* The court further noted that "[o]nce it is established that the property subject to forfeiture consists of the entire acreage, nothing in the statute allows the court to order forfeiture of less than this property." *Id*.

CONCLUSION: The 8th Circuit held "that the statute . . . authorizes forfeiture of [the entire acreage of a defendant]'s real property." *Id.* at 529.

***United States v. Malloy*, 614 F.3d 852 (8th Cir. 2010)**

QUESTION: Whether a state conviction of extortion involving threats only against property qualifies as a crime of violence under U.S. Sentencing Guidelines Manual § 4B1.1(a). *Id.* at 857.

ANALYSIS: The court first noted that although "extortion is specifically listed as a crime of violence in [the federal code,]" it could not rely solely on this label. *Id*. The court then looked to an analogous

case in which the 1st Circuit noted that "nothing in the Guidelines, which specifically list extortion as a crime of violence, states or implies that extortion must involve threats to harm the person of another." *Id.* at 858. The court considered the 1st Circuit's reasoning that "restricting 'extortion' . . . to include only threats of physical harm would render the guideline redundant, as the Guidelines make '*any* crime that has as an element the threatened use of physical force against the person of another a crime of violence.'" *Id.* The 8th Circuit agreed with the 1st Circuit that there is "no reason to read [the Guidelines] so narrowly as to exclude extortion that threatened only property." *Id.* at 859.

CONCLUSION: The 8th Circuit held that conviction under a state extortion statute involving threats only against property is a crime of violence under the Sentencing Guidelines. *Id*.

***Public Water Supply Dist. No. 3 v. City of Lebanon*, 605 F.3d 511 (8th Cir. 2010)**

QUESTION: Whether the language "'[t]he service provided or made available' under [7 U.S.C.] § 1926(b) refers solely to the service for which a qualifying federal loan was obtained and which provides the collateral for the loan . . . or to all services that a rural district provides . . . ." *Id.* at 519.

ANALYSIS: The court stated that this issue is one of statutory interpretation and looked to the plain meaning of the statute's language. *Id.* at 519. The court then noted it does not "construe statutory phrases in isolation; [it] read[s] statutes as a whole," and it found that the "isolated use of the term 'service,' without explanation, provides little insight into the interpretive question . . ." presented by the case. *Id.* at 520. The court then looked to other sections within the same statute where the singular, rather than the plural, form of "service" was used, finding that "Congress used only the singular term 'service.'" *Id.*

CONCLUSION: The 8th Circuit held that the language "'the service provided or made available' to be limited to the financed service . . . ." *Id.* at 521.

***Sierra Club v. Otter Tail Power Co.*, 615 F.3d 1008 (8th Cir. 2010)**

QUESTION: Whether the Clean Air Act (CAA) "prohibit[s] only construction or modification of a facility without a [Prevention of Significant Deterioration (PSD)] permit and ['best available control technologies' (BACT)], or [whether it] impose[s] ongoing operational requirements." *Id*. at 1014.

ANALYSIS: The court first analyzed the language of the CAA, which states that "'[n]o major emitting facility . . . may be *constructed*'

without meeting the PSD requirements." *Id*. Additionally, the 8th Circuit noted that the provisions of the CAA establishing operational conditions for facilities "do so by employing plain and explicit language." *Id*. at 1015. Likewise, the court found that the citizen suit provision of the CAA is "limited to construction or modification, for it authorizes suit 'against any person who proposes to construct or constructs' a facility without a permit." *Id*. Thus, the court reasoned that "neither the statutory provision that creates the legal duty at issue here nor the provision for private enforcement gives any indication that the CAA imposes ongoing operational conditions under the PSD program." *Id*. The court finally considered and rejected arguments that certain regulations required ongoing PSD and BACT compliance. *Id*. at 1016–17. Ultimately, the court disagreed because "[t]he context of [such regulations] show[] that the command to apply BACT is not a freestanding requirement[]"; instead, "it is tied specifically to the construction process." *Id*.

CONCLUSION: The 8th Circuit held that the CAA and its related regulations apply only to construction and modification of a facility without a PSD permit or BACT, and do not apply to operations. *Id*. at 1018.

***United States v. Young*, 613 F.3d 735 (8th Cir. 2010)**

QUESTION: Whether "a defendant is entitled to an abandonment defense [to the crime of attempt] once an attempt has been completed." *Id.* at 744.

ANALYSIS: The court first noted that every circuit court to consider this issue held or implied that a defendant cannot abandon a completed attempt. *Id.* The court cited its own precedent, where it determined "the abandonment defense: (1) can apply to uncompleted attempt crimes, . . . and (2) has been rejected as a defense to completed crimes other than attempt . . . ." *Id.* at 746. The court therefore reasoned it "logically flow[ed]" that "when a defendant has completed the crime of attempt[]" by "ha[ving] the requisite intent and ha[ving] taken a substantial step towards the completion of the crime, he cannot successfully abandon the attempt because the crime itself has already been completed." *Id.*

CONCLUSION: The 8th Circuit held "the defense of abandonment is not warranted once a defendant completes the crime of attempt." *Id.*

NINTH CIRCUIT

Almaraz v. Holder, 608 F.3d 638 (9th Cir. 2010)

QUESTION: "[W]hether adoption of an international trade agreement amounts to changed country conditions that resurrect . . ." a motion filed by a party in an untimely manner. *Id.* at 639.

ANALYSIS: The court first noted that a defendant who requests that a late motion be excused or files a motion to reopen a petition for successive asylum under 8 U.S.C. § 1158(a)(2)(D) must demonstrate "changed country conditions." *Id.* at 640. To that end, the court recognized that "international trade agreements affect the lives of the citizens of signatory countries in numerous ways" and that such agreements "could potentially qualify as a material change in country conditions sufficient to grant a motion to reopen." *Id.* at 641.

CONCLUSION: The 9th Circuit recognized that international trade agreements may qualify as "a material change in country conditions sufficient to grant a motion to reopen" a petition for successive asylum under 8 U.S.C. § 1158(a)(2)(D), but only where the petitioner establishes that the international trade agreement led to changed circumstances. *Id.* at 641–42.

Anderson v. City of Hermosa Beach, 621 F.3d 1021 (9th Cir. 2010)

QUESTION: "[W]hether a municipal ban on tattoo parlors violates the First Amendment." *Id.* at 1055.

ANALYSIS: The court reasoned that for a municipality to justify a ban on tattoo parlors, it must show that the ban "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end . . ." as a "time, place, or manner restriction." *Id.* at 1063. The court noted that three criteria are requisite in determining the constitutionality of the ban, namely, whether the ban: "(1) is justified without reference to the content of the regulated speech; (2) is narrowly tailored to serve a significant governmental interest; and (3) leave[s] open ample alternative channels for communication of the information." *Id.* at 1064 (internal quotation marks omitted). The court held that a municipality cannot ban a tattoo parlor if the municipality does not provide sufficient evidence that its health and safety interests would benefit more from an all out ban rather than from placing certain restrictions on the operation of a tattoo parlor. *Id.* at 1064–68.

CONCLUSION: The 9th Circuit held that "tattooing is purely expressive activity fully protected by the First Amendment, and that a total ban on such activity is not a 'reasonable time, place, or manner' restriction." *Id.* at 1055.

***United States v. Batson*, 608 F.3d 630 (9th Cir. 2010)**

QUESTION: Whether "federal courts may order restitution as a condition of supervised release for offenses set forth in Title 26 of the United States Code (the Internal Revenue Code)." *Id.* at 631.

ANALYSIS: The court noted that under 18 U.S.C. § 3563(b)(2), courts have broad enough discretion to order restitution as a condition of probation. *Id.* at 631–32. The court then reasoned that 18 U.S.C. § 3583(d) allows courts to apply that discretion to supervised release. *Id.* at 632. In accordance with 18 U.S.C. § 3663A(a)(2), however, the court must limit restitution to offenses of conviction without elements of a "scheme, conspiracy, or pattern of criminal activity." *Id.*

CONCLUSION: The 9th Circuit held that federal courts have the authority to order restitution for offenses in Title 26 of the United States Code. *Id.* at 631.

***United States v. Brooks*, 610 F.3d 1186 (9th Cir. 2010)**

QUESTION: Whether a defendant's indictment under 18 U.S.C. §§ 1591(a) and 2423(a) is multiplicitous, or "charges a single offense in more than one count[,]" in violation of the Fifth Amendment's Double Jeopardy Clause. *Id.* at 1194.

ANALYSIS: The court first noted that "[t]he Fifth Amendment's prohibition on double jeopardy protects against being punished twice for a single criminal offense." *Id.* The court explained that "if the same act constitutes a violation of two different statutes, the test to determine whether punishment for both offenses may be imposed is 'whether each provision requires proof of a fact which the other does not.'" *Id.* The court further reasoned that "elements of the offenses are determinative, even if there is a substantial overlap in their proof." *Id.* (internal quotation marks omitted). The court therefore compared 18 U.S.C. § 1591(a) with 18 U.S.C. § 2423(a), and it noted that "§ 1591(a) plainly requires proof that defendant knew that the victim was under the age of eighteen years at the time of the crime [while] the government need not prove such knowledge for purposes of § 2423(a)." *Id.* at 1195. The court further observed that "§2423(a) requires proof that the defendant *intended* that the victim engage in prostitution, [but] such intent need not be proven for § 1591(a)." *Id.*

CONCLUSION: The 9th Circuit held that the elements of 18 U.S.C. §§ 1591(a) and 2423(a) each require proof of a fact that the other does not, and the multiplicity challenge therefore failed. *Id.*

***Cal. Dep't of Toxic Substances Control v. Hearthside Residential Corp.*, 613 F.3d 910 (9th Cir. 2010)**

QUESTION: **"[**W]hether 'owner and operator' status under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9607(a)(1), is determined at the time that cleanup costs are incurred or instead at the time that a recovery lawsuit seeking reimbursement is filed." *Id.* at 911.

ANALYSIS: The court reasoned that determining ownership at the time of cleanup comports with CERCLA's statute of limitations, which begins either "(1) at the completion of a 'removal' action, or (2) at the initiation of an on-site 'remedial' action." *Id.* at 914. The court noted that statutes of limitations seek to protect defendants, and therefore "it is reasonable to assume that Congress meant the statute of limitations to run against (and protect) the owner of the property at the time cleanup occurs." *Id.* Further, such a reading of "ownership" is in accord with two of CERCLA's overarching purposes: (1) "encourag[ing] responsible parties to remediate hazardous facilities without delay[,]" and (2) "encourag[ing] early settlement between potentially responsible parties and environmental regulators." *Id.* at 915.

CONCLUSION: The 9th Circuit held that "current ownership for purposes of liability under [CERCLA] . . . is measured from the time the recovery action accrues." *Id.* at 916.

***Carmona v. Carmona*, 603 F.3d 1041 (9th Cir. 2010)**

QUESTION: "[W]hether a plan participant's retirement cuts off a putative alternate payee's right to obtain an enforceable [Qualified Domestic Relations Order (QDRO)] with regard to the surviving spouse benefits of a [Qualified Joint and Survivor Annuity (QJSA)]." *Id.* at 1055.

ANALYSIS: The court first noted that "surviving spouse benefits under a QJSA vest at the time of the participant's retirement . . ." and a court may not modify the QJSA to reflect a new beneficiary after the date of retirement. *Id.* at 1055–56. The court also determined that the statutory scheme of the Employee Retirement Income Security Act (ERISA) "establishes the importance of the annuity start date" by establishing restrictions to modifying or opting out of QJSA benefits. *Id.* at 1057. The court also noted that the legislative history of the statute indicated that only recent enactments have specifically provided for a non-working spouse in consideration of the event where a participant predeceases a spouse. *Id.* at 1058. Finally, the court supported the vesting rule above because one of the principal goals of ERISA is "ensuring that plans be uniform in their interpretation and simple in their application"

and that allowing the spousal recipient to change after the vesting date will "make it difficult for trustees to administer plans . . . ." *Id* at 1059.

CONCLUSION: The 9th Circuit held that "the surviving spouse benefits irrevocably vest in the current spouse when the plan participant retires." *Id.*

***Carver v. Holder*, 606 F.3d 690 (9th Cir. 2010)**

QUESTION: Whether "an action for enforcement of an [Equal Employment Opportunity Commission (EEOC)] decision may be brought in the district court." *Id.* at 695.

ANALYSIS: The court first noted that "an employee who prevails on his [EEOC administrative] claim has two avenues into federal court"; the employee may bring an "enforcement action" or a "civil action" against the agency. *Id.* at 696. The court then noted that "[i]n an enforcement action, a prevailing employee may not challenge the . . . decision [of the EEOC's appellate arm] regarding either discrimination or what it found to be appropriate remedies." *Id*. The court stated that other circuits have held the "civil action must be de novo, putting at issue both the [EEOC appellate arm]'s liability determination . . . and its finding with regard to remedies." *Id*. The court reasoned "that the EEOC's response to [an employee]'s petition for enforcement is as much a part of the administrative disposition as is the remedial order itself" and held that "to the extent [an employee] characterizes his action as a suit for enforcement . . . his suit is limited to the enforcement of the EEOC's administrative disposition as a whole." *Id*. at 697. The court determined that an employee "must either accept the administrative disposition in its entirety or bring a de novo action in the district court." *Id.*

CONCLUSION: The 9th Circuit held that an employee may not bring an enforcement action of an EEOC decision in a district court. *Id.*

***United States v. Coronado*, 603 F.3d 706 (9th Cir. 2010)**

QUESTION: Whether the crime of "discharging a firearm with gross negligence" is a crime of violence under the residual clause of U.S. Sentencing Guidelines Manual § 4B1.2(a). *Id.* at 708.

ANALYSIS: The court noted that the standard in *Begay v. United States*, 533 U.S. 137 (2008), is appropriate in this case to determine if the crime fits within the residual clause of the U.S. Sentencing Guidelines Manual § 4B1.2. *Id.* at 710. Applying the standard, the court first noted that the dispositive issue is "whether a person convicted of negligent discharge of a firearm . . . necessarily engaged in conduct that was purposeful, violent, and aggressive" and that "[a]ll three criteria must be satisfied." *Id.* (internal quotation marks omitted). The court reasoned that

for an act to be purposeful, it requires a heightened mens rea or an intentional act, not necessarily satisfied by gross negligence. *Id.* at 710–11. Finally, the court noted that certain other crimes requiring a mens rea of negligence, gross negligence, or recklessness did not constitute purposeful crimes. *Id.* at 711–12.

CONCLUSION: The 9th Circuit held that a conviction of "discharging a firearm in a grossly negligent manner[] is not a 'crime of violence'" because it fails to satisfy the purposeful requirement of the Supreme Court's analysis in *Begay*. *Id.* at 712.

***Fernandes v. Holder*, 619 F.3d 1069 (9th Cir. 2010)**

QUESTION: Whether an immigration judge's (IJ) jurisdiction over a case is limited when the case is on remand from the Board of Immigration Appeals (BIA). *Id.* at 1074.

ANALYSIS: The court noted that "[a]n articulated purpose for the remand, without any express limit on scope, is not sufficient to limit the remand such that it forecloses consideration of other new claims or motions that the IJ deems appropriate or that are presented in accordance with relevant regulations." *Id*. The court reasoned that "[t]he BIA is free to impose a different rule, but in the absence of such a rule [the court] will construe a BIA remand to an IJ in the manner just described." *Id.*

CONCLUSION: The 9th Circuit held that an IJ's jurisdiction over a case is limited only "when the BIA expressly retains jurisdiction and qualifies or limits the scope of the remand to a specific purpose." *Id.*

***United States v. Forrester*, 616 F.3d 929 (9th Cir. 2010)**

QUESTION: Whether a defendant has the right to "collaterally attack the substance . . ." of a controlled drug scheduling order when "Congress has not explicitly foreclosed such review." *Id.* at 936.

ANALYSIS: The court explained that there are five schedules of controlled substances and the defendant was not allowed to give a defense that attacked the categorization of the drug he was convicted of possessing. *Id*. at 935. The court noted that prior cases allowing collateral attacks were "limited to *temporary* orders" because permanent scheduling orders are thoroughly examined by attorney generals and different rules govern their direct attack. *Id*. The court reasoned that certain schedules are not subject to direct attack because "the [Drug Enforcement Agency] itself is not a party in the case[,]" and would have "no opportunity to defend its scheduling order." *Id*. at 936 (internal quotation marks omitted). Finally, the court noted that "to allow all criminal defendants to collaterally attack a permanent scheduling order based on their view that a particular drug has been

mis-scheduled would potentially place a continuing, onerous burden on district courts to constantly re-litigate the same issue." *Id*.

CONCLUSION: The 9th Circuit held that "substantive collateral attacks on permanent scheduling orders are impermissible in criminal cases where defendants' sentences will be determined by those scheduling orders." *Id.* at 937.

***Kazarian v. U.S. Citizenship & Immigration Servs.*, 596 F.3d 1115 (9th Cir. 2010)**

QUESTION: Whether the Administrative Appeals Office (AAO) properly interpreted the "statutory and regulatory requirements for the 'extraordinary ability' visa" according to 8 C.F.R. § 204(h)(3). *Id.* at 1120.

ANALYSIS: The court noted that "scant" caselaw revealed that "regulations regarding this preference classification are extremely restrictive." *Id.* First, the court determined that the regulation's requirement, which calls for the visa applicant to show authorship of scholarly articles in the field of expertise giving him grounds for application, does not mandate that the applicant show the "research community's reaction to these articles." *Id.* at 1121. Second, the court determined that 8 C.F.R. § 204.5(h)(3)(iv) requires only evidence of judging academic work and it is not necessary to show specific facts such as whether the applicant is otherwise affiliated with the university for which he or she otherwise reviews such works. *Id.* at 1121–22. Third, the court determined that the AAO properly applied the standard required under 8 C.F.R. § 204.5(h)(3)(v) when it held that applicant's contributions were not major and thus did not meet the requirements of the regulation. *Id.* at 1122. Finally, the court agreed with the AAO's determination that the publishing of textbooks, lecturing at a college level, and presenting at conferences do not constitute "artistic exhibitions or showcases" required by 8 C.F.R. § 204.5(h)(3)(vii). *Id.*

CONCLUSION: The 9th Circuit held 8 C.F.R. § 204.5(h)(3) requires the applicant to provide three types of evidence when applying for extraordinary ability visa. *Id.*

***United States v. King*, 608 F.3d 1122 (9th Cir. 2010)**

QUESTION: Whether "a transferee court has jurisdiction to revoke supervised release for violations committed before transfer." *Id.* at 1126.

ANALYSIS: The court first referred to 18 U.S.C. § 3605, providing that "[a] court to which jurisdiction is transferred under this section is authorized to exercise all powers over the probationer or releasee that are permitted by this subchapter . . . which includes the power to revoke a

term of supervised release . . . if the court . . . finds by a preponderance of the evidence that the defendant violated a condition of supervised release[.]" *Id.* at 1126–27 (internal quotation marks omitted). The court noted that the text and structure of the statute authorizes a transferee court to revoke supervised release for violations committed before a transfer. *Id.* at 1126. Further, the court observed that other circuits considering the issue have decided that such courts have the necessary jurisdiction. *Id.* at 1127. Further, to hold that transferee courts do not have the jurisdiction requisite to revoke supervised release for violations committed before a transfer would lead to two adverse effects: first, the court "would create a 'twilight zone' of immunity for violations" that occurred but were not discovered before the defendant's transfer; second, such a finding would apply equally to transferee courts' authority "to *terminate* or *reduce the conditions of* supervised release." *Id.*

CONCLUSION: The 9th Circuit held that "a transferee court has jurisdiction under 18 U.S.C. § 3605 to revoke a term of supervised release for violations committed before the transfer of jurisdiction." *Id.* at 1128.

***United States v. Rosas*, 615 F.3d 1058 (9th Cir. 2010)**

QUESTION: "[W]hether a sentence enhancement pursuant to [18 U.S.C.] § 3147 may be applied to a defendant when the only offense committed while on release was a violation of [18 U.S.C.] § 3146, failure to appear." *Id*. at 1064.

ANALYSIS: The court first noted that the plain language of § 3147 "clearly and unambiguously mandates that the courts impose additional consecutive sentences on persons convicted of crimes they commit while released on bond." *Id*. (internal quotation marks omitted). The court found "nothing exceptional . . . vague or ambiguous[]" about the statute, and it noted other courts' holdings that § 3147 mandates a sentence enhancement for "the offense of failure to appear in violation of § 3146." *Id*. The court then considered and rejected the possibility that a sentence enhancement violates "the Fifth Amendment's Double Jeopardy Clause . . . by enhancing the sentence for the underlying conviction." *Id.* at 1065. The court reasoned that the "Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Id*. (internal quotation marks omitted). Likewise, the court concluded, denial of "a reduction for Acceptance of Responsibility on the basis of . . . failure to appear [does] not constitute double counting because [Acceptance of Responsibility] constitutes a sentencing benefit which a defendant may [or may not] be entitled to receive." *Id*. (internal quotation marks omitted).

CONCLUSION: The 9th Circuit held that "a defendant convicted of the offense of failure to appear may be subject to a sentence enhancement (on his underlying conviction) under § 3147, for committing an offense while on release." *Id*. at 1064.

***Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970 (9th Cir. 2010)**

QUESTION: Whether Rule 12(f) of the Federal Rules of Civil Procedure authorizes "a district court to strike a claim for damages on the ground that such damages are precluded as a matter of law." *Id*. at 971.

ANALYSIS: Examining the plain meaning of Rule 12(f), the court first considered "whether [a claim for damages precluded as a matter of law is]: (1) an insufficient defense; (2) redundant; (3) immaterial; (4) impertinent; or (5) scandalous." *Id*. at 973–74. Finding none of these attributes present, the court then advised against the use of Rule 12(f) as a mechanism "to have certain portions of [the] complaint dismissed or to obtain summary judgment . . . as to those portions of the suit—actions better suited for a Rule 12(b)(6) motion or a Rule 56 motion, not a Rule 12(f) motion." *Id.* at 974. The court suggested that reading Rule 12(f) "in a manner that allowed litigants to use it as a means to dismiss some or all of a pleading . . . would be creating redundancies within the Federal Rules of Civil Procedure, because Rule 12(b)(6) . . . already serves such a purpose." *Id*. Moreover, since "Rule 12(f) motions are reviewed for 'abuse of discretion' . . . [and] 12(b)(6) motions are reviewed *de novo*[,] . . . [a]pplying different standards of review, when the district court's underlying action is the same, does not make sense." *Id*.

CONCLUSION: The 9th Circuit held that Federal Rule of Civil Procedure 12(f) "does not authorize a district court to dismiss a claim for damages on the basis it is precluded as a matter of law." *Id*. at 976.

***Yin Hing Sum v. Holder*, 602 F.3d 1092 (9th Cir. 2010)**

QUESTION: Whether the terms "admission" [in 8 U.S.C. § 1101(a)(13)(A)] and "previously been admitted" [in 8 U.S.C. § 1182(h)] should be defined procedurally or substantively. *Id.* at 1096.

ANALYSIS: The court first noted that defining the terms substantively render part of the waiver provision of the Immigration and Nationality Act superfluous. *Id*. at 1093, 1097. The court then reasoned that "if Congress intended [the statute] to bar only alien[s] lawfully admitted for permanent residence, there would be no need to describe those non-citizens as also previously . . . admitted to the United States." *Id*. (internal quotation marks omitted). The court also observed that, when possible, statutes "should not be construed to render their provisions mere surplusage" or to lead to absurd results. *Id*.

CONCLUSION: The 9th Circuit held that the plain meaning of "admission" and "previously been admitted" referred to "a procedurally regular admission and not a substantively lawful admission." *Id*. at 1096.

TENTH CIRCUIT

United States v. Bergman, 599 F.3d 1142 (10th Cir. 2010)

QUESTION: Whether to "adopt a per se rule of ineffectiveness" or "to apply the standard for ineffective assistance of counsel established in *Strickland v. Washington* [466 U.S. 668 (1984)]" in cases "where a defendant's counsel has not been admitted to any bar . . . ." *Id.* at 1147.

ANALYSIS: The court first noted that it had previously "rejected a per se ineffectiveness rule and applied the *Strickland* standard in a case where a criminal defendant was represented by an attorney whose bar membership was unknowingly revoked before his trial." *Id.* The court distinguished the present case, however, as it involved "a criminal defendant . . . represented by a man claiming to have been successfully admitted to the bar, but who never attended law school or even graduated college." *Id.* The court noted that the 2nd Circuit had "adopted a per se rule of ineffectiveness under similar facts" because the right to counsel under the Sixth Amendment "meant, at the very least, representation by a licensed practitioner." *Id.* at 1147–48. The court agreed with the reasoning of the 2nd Circuit. *Id.* at 1148.

CONCLUSION: The 10th Circuit therefore "adopt[ed] a *narrow* per se rule of ineffectiveness where a defendant is, unbeknownst to him, represented by someone who has not been admitted to any bar based on his failure to ever meet the substantive requirements for the practice of law." *Id.*

ELEVENTH CIRCUIT

United States v. Alfaro-Moncada, 607 F.3d 720 (11th Cir. 2010)

QUESTION: "[W]hether a search without reasonable suspicion of a crew member's living quarters on a foreign cargo vessel that is entering this country is unreasonable for Fourth Amendment purposes." *Id.* at 727.

ANALYSIS: The court noted that 19 U.S.C. § 1581(a) provides that any "officer of the customs may at any time go on board of any vessel . . . at any place in the United States and search the vessel . . . and

every part thereof." *Id.* (internal quotation marks omitted). Additionally, the court acknowledged that the Supreme Court has recognized "the broad grant of authority that § 1581(a) confers on customs officers." *Id.* at 726–27. To "determine the reasonableness of a border search," the court weighed "its intrusion on [an] individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Id.* (internal quotation marks omitted). The court noted that "the Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior." *Id.* at 728. The court further reasoned that "[b]ecause of the United States' strong interest in national self-protection, [r]outine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant." *Id.* (internal quotation marks omitted). The court concluded that even though "[a] cabin is a crew member's home—and a home receives the greatest Fourth Amendment protection," a crew member's cabin, just like a fixed home, "cannot be used as a means to transport into this country contraband or weapons of mass destruction that threaten national security." *Id.* at 729–30.

CONCLUSION: The 11th Circuit held "that the suspicionless search of [a crew member's] cabin on . . . a foreign cargo ship, while it was docked [at the United States border], was not a violation of the Fourth Amendment." *Id.* at 732.

***United States v. Cunningham*, 607 F.3d 1264 (11th Cir. 2010)**

QUESTION: Whether 18 U.S.C. § 3583(e)(3) is constitutional, thus allowing a district court to "revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release upon a finding by a preponderance of the evidence that the defendant violated a condition of supervised release." *Id*. at 1266 (internal quotation marks omitted).

ANALYSIS: The court first established that in proceedings associated with a revocation of parole, the defendant is not entitled to the same panoply of rights that an ordinary criminal prosecution would grant. *Id*. at 1267. The court then noted "that the Sixth Amendment right to a jury trial is not applicable during revocation proceedings because revocation at supervised release is treated as part of the penalty for the initial offense." *Id.* (internal quotation marks omitted). The court next discussed whether the Fifth Amendment right to due process was violated, finding by the same token that the process due for revocation proceedings is not as sweeping as the due process protections in an original criminal action. *Id*.

CONCLUSION: The 11th Circuit held that the 18 U.S.C. § 3583(e)(3) is constitutional "because the violation of supervised release need only be proven by a preponderance of the evidence, and there is no right to a trial by jury in a supervised release revocation hearing." *Id*. at 1268.

***Edison v. Douberly*, 604 F.3d 1307 (11th Cir. 2010)**

QUESTION: Whether a private prison management corporation operating in a state prison is a public entity under the Americans with Disabilities Act (ADA). *Id.* at 1308.

ANALYSIS: The court noted that the statute defines "public entity to mean any department, agency, special purpose district, or other instrumentality of a [s]tate." *Id.* at 1309 (internal quotation marks omitted). The court reasoned that all of these entities have one defining characteristic: they are "either traditional governmental units or created by [government]." *Id.* The court noted key differences between traditional governmental units and entities that merely contract for service with traditional governmental units. *Id.* at 1310. The court cited other judicial authority holding private entities that contract with traditional government units exempt from liability under the ADA. *Id.*

CONCLUSION: The 11th Circuit held that a private corporation is not subject to claims under the ADA as a result of contracting with governmental units that are liable under the ADA. *Id.* at 1310.

***United States v. Frank*, 599 F.3d 1221 (11th Cir. 2010)**

QUESTION: Whether "paying a minor directly for sex constitutes a 'purchase[] . . . of a minor,' as that term is used in 18 U.S.C. § 2251A(b)(2)." *Id*. at 1234.

ANALYSIS: The court first noted that it "interpret[s] words that are not defined in a statute with their ordinary and plain meaning because [it] assume[s] that Congress uses words in a statute as they are commonly understood . . . ." *Id*. (internal quotation marks omitted). The court noted "[t]he phrase 'purchase a woman' . . . can be used synonymously with prostitution." *Id*. at 1235. The court further reasoned that "[i]n the context of child prostitution, the minor herself is turned into an object or commodity, by selling her body to be used by the defendant for a certain purpose." *Id*. Moreover, the court reasoned that "control is inextricably intertwined within the meaning of purchase[,] and that "[i]t is the purchase itself, the paying of money to obtain or acquire the minor's body, that is the means of control." *Id*. at 1236.

CONCLUSION: The 11th Circuit held "that the term 'purchase,' as used in § 2251A(b), covers situations where a defendant pays a minor directly for sex." *Id*.

***United States v. Garcia-Cordero*, 610 F.3d 613 (11th Cir. 2010)**

QUESTION: "[W]hether, as applied to a defendant smuggling aliens, the 'bring and present' requirement of 8 U.S.C. § 1324(a)(2)(B)(iii) violates the Fifth Amendment's privilege against self-incrimination." *Id.* at 615.

ANALYSIS: The court noted that the Supreme Court has held that the Fifth Amendment privilege "may not be invoked to resist compliance with a regulatory regime constructed to effect the State's public purposes unrelated to the enforcement of its criminal laws." *Id.* at 616. Additionally, the court reasoned that immigration law generally, as well as 8 U.S.C. § 1324 specifically, is properly classified as a regulatory scheme rather than a body of criminal law. *Id.* at 618. The court further observed that, significantly, the statute does not target illegal aliens; it imposes the "bring and present" requirement on all immigrants. *Id.*

CONCLUSION: The 11th Circuit held that the "bring and present" requirement of 8 U.S.C. § 1324(a)(2)(B)(iii) did not violate the privilege against self-incrimination. *Id.* at 615.

***LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185 (11th Cir. 2010)**

QUESTION: Whether "a federal cause of action pursuant to § 1692e of the [Fair Debt Collection Practices Act (FDCPA)] for threatening to take an action that cannot legally be taken is cognizable when premised upon failure to register as a consumer collection agency as required by state law, namely, Section 559.553 of the FCCPA [(Florida Consumer Collections Protections Act)]." *Id.* at 1189–90.

ANALYSIS: The court considered "the objectives of the FDPCA and the FCCPA, as well as the interplay between these state and federal statutes." *Id*. at 1190. The court found that the purpose behind each of the acts was parallel, both seeking to curb abusive debt collection practices. *Id.* The court then noted that the relevant provisions of both Acts were consistent, and thus the FDCPA did not preempt the FCCPA. *Id*. Moreover, the court highlighted that the FCCPA's explicit goal was "to provide the consumer with the most protection possible under either the state or federal statute[,]" supporting the permissibility of a federal remedy. *Id*. at 1192. Finally, the court observed that the "Florida legislature contemplated dual enforcement." *Id*.

CONCLUSION: The 11th Circuit held that "a violation of the FCCPA for failure to register may, in fact, support a federal cause of

action under § 1692e(5) of the FDCPA for threatening to take an action it could not legally take[]" so long as the conduct also contravenes the analogous portion of the FDCPA. *Id*.

***United States v. Wright*, 607 F.3d 708 (11th Cir. 2010)**

QUESTION: "[W]hether the imposition of a sentence after a defendant violates the terms of his community control results in the application of [U.S. Sentencing Guidelines Manual] § 4A1.2(k) ." *Id.* at 712.

ANALYSIS: The court first noted that "the comments to § 4A1.1 state that § 4A1.2(k) applies to revocation of probation, parole, or a similar form of release" and "[s]imilarly, application note 11 explains that § 4A1.2(k) covers revocations of probation and other conditional sentences." *Id*. (internal quotation marks omitted). The court reasoned that although "[t]his circuit has yet to interpret the term community control. . . . [t]he Sixth Circuit [found] that a community corrections sentence [was] sufficiently analogous to probation to warrant the application of § 4A1.2(k)(1)." *Id.* at 714 (internal quotation marks omitted). The court noted that "[p]robation allows the government to oversee an offender's rehabilitation while giving federal courts the authority to incarcerate the offender if he or she violates any of the stated conditions" and that "the primary purpose of probation is rehabilitation . . . ." *Id*. The court compared community control to probation, finding that both are "alternative, community-based methods to punish offenders in lieu of incarceration," "[b]oth are discretionary forms of release subject to revocation," and "[b]oth [programs] release the offender into the community subject to stated conditions and require extensive government supervision to ensure compliance." *Id.* at 714–15. The court reasoned that "[b]oth contain conditions specifically designed to rehabilitate the offender and promote respect for the law while simultaneously protecting the public." *Id.* at 715.

CONCLUSION: The 11th Circuit concluded, "that community control is sufficiently analogous to probation to warrant the application of U.S.S.G. § 4A1.2(k)." *Id.*

FEDERAL CIRCUIT

***In re Deutsche Bank Trust Co. Ams.*, 605 F.3d 1373 (Fed. Cir. 2010)**

QUESTION: "[W]hen an attorney's activities in prosecuting patents on behalf of a client raises [sic] an unacceptable risk of inadvertent disclosure." Id. at 1379.

ANALYSIS: The court first noted that "[t]he concern over inadvertent disclosure manifests itself in patent infringement cases when trial counsel also represent the same client in prosecuting patent applications . . . ." *Id*. The court proceeded to find that "[s]ome attorneys [are] involved in patent litigation" but play "no significant role in crafting the content of patent applications or advising clients" while "many [other] attorneys involved in litigation are substantially engaged with prosecution." *Id.* at 1379–80. The court reasoned that the former attorneys have a "remote" opportunity to "engage with the client in any competitive decisionmaking" and "a judge may find [these] attorney[s] [are] properly exempted from a prosecution bar"; however, for the latter attorneys, "competitive decisionmaking may be a regular part of their representation" and "such attorneys would not likely be properly exempted . . . ." *Id.* at 1380. The court concluded that for the "range of patent prosecution activities" in between these examples, a court must "examine all relevant facts surrounding counsel's actual preparation and prosecution activities, on a counsel-by-counsel basis" when "assessing the propriety of an exemption from a patent prosecution bar." *Id.*

CONCLUSION: The Federal Circuit held "that a party seeking imposition of a patent prosecution bar must show that the information designated to trigger the bar, the scope of activities prohibited by the bar, the duration of the bar, and the subject matter covered by the bar reasonably reflect the risk presented by the disclosure of proprietary competitive information." *Id.* at 1381.

***Encyclopaedia Britannica, Inc. v. Alpine Elecs. of Am., Inc.*, 609 F.3d 1345 (Fed. Cir. 2010)**

QUESTION: Whether 35 U.S.C. § 120 "requires an intermediate [foreign patent] application in a priority chain to 'contain a specific reference to the earlier filed application.'" *Id.* at 1349.

ANALYSIS: The court noted that § 120 had four requirements that a later-filed application must meet in order to be entitled to having "the same effect . . . as though filed on the date of the prior application." *Id.* (internal quotation marks omitted). To satisfy one of these requirements, the court noted "the application must be co-pending with the earlier application" or "an application can also claim the benefit of the filing

date of an earlier application through a chain of co-pending applications." *Id.* at 1350. The court observed that applications are co-pending if "filed before the patenting or abandonment of or termination proceedings on . . . an application similarly entitled to the benefit of the filing date of the first application." *Id.* (internal quotation marks omitted). The court concluded that the plain language of § 120 suggests that "similarly entitled" applications are "required to contain a specific reference to an earlier filed application." *Id.* at 1350–51.

CONCLUSION: The Federal Circuit held that every application in the chain of priority must refer to prior applications under 35 U.S.C. § 120. *Id.* at 1352.