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 2, 2011 and August 31, 2011. 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 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.

Preferred citation for the summaries below: *First Impressions*, 8 SETON HALL CIR. REV. [n] (2011).

FIRST CIRCUIT

Dickow. v. United States, 654 F.3d 144 (1st Cir. 2011)

QUESTION: Whether the Internal Revenue Service (IRS) erred in concluding "that [26 U.S.C.] § 6511(b)(2)(A) and its implementing regulations bar the requested refund because [petitioner] was not entitled to a second extension of the filing deadline that determined the estate's eligibility for the refund." *Id.* at 146.

ANALYSIS: The court noted that "the question turns on interpretation of 26 U.S.C. § 6081, governing extensions of time, and the regulations promulgated by the IRS within its authority under the Internal Revenue Code." *Id.* The court then applied the *Chevron* doctrine, and looked to whether Congress specifically addressed the issue at hand in plain statutory text, and if not, whether any ambiguous statutory text has been reasonably interpreted by the agency. *Id.* at 149. The court noted that it could not disturb an "IRS rule unless it was arbitrary and capricious in substance, or manifestly contrary to the statute." *Id.* Examining 26 U.S.C. § 6081, the court found that it allows for extensions of a period of six months, but it does not state whether more than one extension can be granted. *Id.* at 150. For clarification, the court then looked at the IRS regulations, which provide two categories of estate tax extensions. *Id.* The first is an automatic six month extensions upon the timely filing of Form 4678; the second is a six month extensions for good cause by filing a Form 4678 with a detailed explanation of why the taxpayer requires an extension. *Id.* The court found that these regulations reasonably prevent indefinite extensions. *Id.* The court also found that the IRS promulgated the regulations pursuant to explicit Congressional authorization and pursuant to notice and comment procedures, a sign that deference should be granted. *Id.* The court noted that there was some ambiguity in the rule, but when viewed as a whole, the rules are clear, especially when the IRS's own interpretation is entitled to deference. *Id.* at 151.

CONCLUSION: The court found that the "IRS did not have the authority to grant . . . a second six-month extension," and therefore, "the refund claim must be dismissed for lack of jurisdiction." *Id.*

Hernández-Miranda v. Empresas Díaz Massó, Inc., 651 F.3d 167 (1st Cir. 2011)

QUESTION: Whether the "current" calendar year, which determines the damages cap under 42 U.S.C. § 1981a(b)(3) in a Title VII employment discrimination action, refers to "the calendar year(s) in

which the discrimination occurred or the calendar year in which the damage award is made." *Id.* at 169.

ANALYSIS: The court noted that the 4th, 5th, and 7th Circuits concluded, based on the plain language of the statute, that the "current" calendar year is the year in which the discrimination occurred. *Id.* at 171. The court also observed that the Supreme Court, considering other statutes, has ruled that the "current" calendar year was the year of discrimination. *Id.* The court found § 1981a(b)(3), however, to be ambiguous. *Id.* at 171–72. The court then looked to the larger statutory scheme of 42 U.S.C. § 1981a(b)(3) and concluded that Congress intended to protect "small employers at the time of the discrimination, and not those who by happenstance or design became smaller employers between the time of discrimination and the time of the verdict." *Id.* at 173. The court further reasoned that construction of the statute to mean the year of discrimination would best serve "Title VII's purpose of encouraging resolution of disputes before litigation commences." *Id.* The court also found support for this interpretation in judicial constructions of another Title VII provision, which employs the phrase "current" calendar year as well. *Id.* at 174.

CONCLUSION: The 1st Circuit held that the "current" calendar year under 42 U.S.C. § 1981a(b)(3) refers to the calendar year in which the discrimination occurred. *Id.* at 170.

***Ramos-Cruz v. Centro Medico Del Turabo*, 642 F.3d 17 (1st Cir. 2011)**

QUESTION: Whether a hospital violates the "appropriate pre-transfer treatment" provision of the Emergency Medical Treatment and Active Labor Act ("EMTALA") if that "hospital does not deliver the feasible specific treatment that is best." *Id.* at 19.

ANALYSIS: The court, in affirming the district court's holding, relied on 10th Circuit precedent regarding appropriate pre-transfer treatment, which held that "a hospital runs afoul of this provision only where it violates an existing hospital procedure or requirement." *Id.* (internal quotation marks omitted). The court noted that its jurisprudence interpreted similar provisions of EMTALA in the same way, where "inappropriate" means only a refusal to follow regular procedures, not faulty treatment in one instance. *Id.* The court also stated that a contrary rule "would create a federal malpractice cause of action," which would be "entirely inconsistent with [its] jurisprudence and Congressional intent . . . ." *Id.*

CONCLUSION: The 1st Circuit held that a hospital does not violate the appropriate pre-transfer provision of EMTALA if that hospital does not deliver the best feasible treatment. *Id.*

***Ramos-Martinez v. United States*, 638 F.3d 315 (1st Cir. 2011)**

QUESTION: Whether "the limitations period for the filing of a federal prisoner's habeas petition under 28 U.S.C. § 2255(f) [is] subject to equitable tolling." *Id.* at 318.

ANALYSIS: The court noted that the factors articulated in *Holland v. Florida*, 130 S.Ct. 2549, 2560–62 (2010), are appropriate in this case to determine whether the limitations period contained in § 2255(f) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) is subject to equitable tolling. *Id.* at 321. First, the court found that § 2255(f) is non-jurisdictional and stated that "[w]hen found in federal statutes, non-jurisdictional limitations periods ordinarily are subject to a rebuttable presumption that equitable tolling is available." *Id.* Next, the court stated that § 2255(f) does not contain unusually emphatic language that might rebut the presumption of equitable tolling. *Id.* at 322. Finally, the court reasoned that "allowing equitable tolling in appropriate circumstances would not undercut the AEDPA's core principles." *Id.*

CONCLUSION: The 1st Circuit held "that section 2255(f)'s one-year limitations period is subject to equitable tolling in appropriate instances." *Id.*

***Roman-Oliveras v. Puerto Rico Elec. Power Auth.*, 655 F.3d 43 (1st Cir. 2011)**

QUESTION: Whether Title I of the Americans with Disabilities Act (ADA) provides for liability against individuals who are not employers. *Id.* at 45.

ANALYSIS: The court first recognized that, while neither the 1st Circuit nor the Supreme Court has explicitly rejected individual liability under Title I, numerous circuit courts have taken that position. *Id.* at 50–51. The court reiterated the compelling assertion that the ADA should not support personal capacity claims because the 1st Circuit has held that Title VII, an analogous statute, also does not support personal capacity claims. *Id.* at 51. The court favorably quoted from previous 1st Circuit precedent in which they adopted the 9th Circuit's observation that "[i]f Congress decided to protect small entities with limited resources from [Title VII] liability, it is inconceivable that Congress intended to allow civil liability to run against individual employees." *Id.* Lastly, the court mentioned that the 1991 amendments to Title VII's remedial scheme, applicable to the ADA as well, failed to state the amount of damages, if any, that would be payable by individuals. *Id.* The court interpreted Congressional silence on an individual damage provision to mean that Congress did not contemplate including individual liability under the terms of Title VII or Title I of the ADA. *Id.* at 52.

CONCLUSION: The 1st Circuit held that Title I of the ADA imposes liability on employers only, and not on individual co-workers. *Id.*

SECOND CIRCUIT

Abrahams v. MTA Long Island Bus, 644 F.3d 110 (2d Cir. 2011)

QUESTION ONE: Whether a "private right of action exists to enforce 49 C.F.R. § 37.137(c), the [Department of Transportation's] ongoing public participation regulation," promulgated pursuant to § 12143 of the Americans with Disabilities Act (ADA). *Id.* at 115–16.

ANALYSIS: The court first noted that the Supreme Court has determined that "private rights of action to enforce federal law must be created by Congress and the statute in question must evidence congressional intent to create a private right of action." *Id.* at 117 (internal quotation marks omitted). Additionally, where Congress creates a private right of action in a statute, that right does not automatically extend to the statute's implementing regulations. *Id.* at 117–18. The court noted that a private right of action exists only where the right originates in the underlying statute and only to the regulations necessary to apply the statute's mandates. *Id.* at 118. Observing that the ADA broadly bars discrimination, the court concluded that Congress intended to create a private right of action. *Id.* However, because the ongoing public participation regulation goes beyond the ADA's statutory mandate, the court found that no private right of action existed to enforce that regulation. *Id.* at 119–20.

CONCLUSION: The 2nd Circuit held that no private right of action exists to enforce 49 C.F.R. § 37.137(c) because the provision goes beyond merely applying the ADA's public participation mandate. *Id.*

QUESTION TWO: Whether the ADA obligates a public entity providing paratransit services to make reasonable modifications to its "additional services." *Id.* at 120.

ANALYSIS: The court observed that the Attorney General has the authority to issue regulations implementing the provisions of Part A of Title II of the ADA, and that the Secretary of Transportation has the authority to issue regulations implementing the paratransit and "additional services" provisions in Part B of Title II of the ADA. *Id.* Although the Attorney General has required public entities to make reasonable modifications that are necessary to avoid discrimination on the basis of disability, the court observed that the Secretary of Transportation has not promulgated a regulation requiring public entities to make reasonable modifications to their "additional services" to avoid discriminating against disabled individuals. *Id.* The court explained

that the Attorney General's regulation did not apply to any matter "within the scope of authority of the Secretary of Transportation," and therefore, the reasonable modification requirement does not cover "additional services" of public entities providing paratransit services. *Id.* at 121.

CONCLUSION: The 2nd Circuit held that the ADA does not obligate a public entity providing paratransit services to make reasonable modifications to its "additional services." *Id.* at 120–21.

***City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114 (2d Cir. 2011)**

QUESTION: Whether "a defendant who repeatedly moves to dismiss for lack of personal jurisdiction, but then withdraws from the litigation after those motions are denied, is permitted to attack an ensuing default judgment on the grounds that it is void for lack of personal jurisdiction." *Id.* at 118.

ANALYSIS: The court first noted that "personal jurisdiction, unlike subject-matter jurisdiction, can . . . be purposely waived or inadvertently forfeited." *Id.* at 133. The court then noted that whether waiver or forfeiture of the personal jurisdiction defense had occurred would be determined by taking into account "all of the relevant circumstances." *Id.* The court then analyzed the relevant circumstances, emphasizing that the defendant had willfully withdrawn from the litigation despite being warned that a default judgment would result. *Id.* at 135. Finally, the court opined that it saw "no reason to require the district court to raise sua sponte the defense of lack of personal jurisdiction on behalf of parties who have elect[ed] not to pursue those defenses for [themselves]." *Id.* (internal quotation marks omitted).

CONCLUSION: The 2nd Circuit held "that a defendant forfeits its jurisdictional defense if it appears before a district court to press that defense but then willfully withdraws from litigation and defaults, even after being warned of the consequences of doing so." *Id.*

***Delgado v. Quarantillo*, 643 F.3d 52 (2d Cir. 2011)**

QUESTION: Whether 8 U.S.C. § 1252(a)(5) bars a district court from adjudicating indirect challenges to an order of removal. *Id.* at 53.

ANALYSIS: The court first noted that 8 U.S.C. § 1252(a)(5), establishing a petition for review to the court of appeals as the sole means for judicial review of an order of removal, clearly precludes district courts from entertaining direct challenges to removal orders. *Id.* at 55. The court then found the plaintiff's mandamus action, seeking adjudication on the merits of an I-212 waiver application, was an indirect

challenge to a removal order. *Id.* Although not directly affecting the removal order, the court stated that, because a grant of an I-212 waiver would render the removal order invalid, the petitioner's mandamus suit is precluded. *Id.* The court found it irrelevant whether the challenged order was reinstated by Immigration and Customs Enforcement or the United States Citizenship and Immigration Services. *Id.* at 55–56. Finally, the court observed federal question jurisdiction cannot exist under the Administrative Procedure Act where "statutes preclude judicial review." *Id.* at 56.

CONCLUSION: The 2nd Circuit held that a district court lacks subject matter jurisdiction over an indirect challenge to an order of removal. *Id.* at 53.

***Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V.*, 651 F.3d 329 (2d Cir. 2011)**

QUESTION: Whether "11 U.S.C. [(Title 11)] § 546(e), which shields settlement payments from avoidance actions in bankruptcy, extends to an issuer's payments to redeem its commercial paper prior to maturity." *Id.* at 330 (internal quotation marks omitted).

ANALYSIS: The court first reasoned that the defendant gave no evidence why its payments should fall outside the definition of "settlement payment" as mandated under § 741(8) of Title 11. *Id.* at 335. The court next determined the defendant's "redemption payments fall within the plain language of § 741(8) and are protected from avoidance under § 546(e)." *Id.* The court noted that the meaning of § 741(8) could be gathered through the principles of statutory construction, reasoning that "the phrase 'commonly used in the securities industry' thus is properly read as modifying only the term 'any other similar payment.'" *Id.* at 335–336. The court explained that the phrase was "not a limitation on the definition of settlement payment, but rather . . . a catchall phrase intended to underscore the breadth of the § 546(e) exemption." *Id.* (internal quotation marks omitted). The court further explained that "nothing in the text of § 741(8) or in any other provision of the Bankruptcy Code supports a purchase or sale requirement." *Id.* at 336. Finally, the court found that "concluding that the safe harbor protects payments made to redeem tradeable debt securities does not contradict case law permitting avoidance of payments made on ordinary loans." *Id.* at 337. The court further stated that "[i]nterpreting the term 'settlement payment' in the context of the securities industry will exclude from the safe harbor payments made on ordinary loans." *Id.*

CONCLUSION: The 2nd Circuit held that because there is no such requirement needed to exclude from the safe harbor repayment of

ordinary loans, there is no purchase or sale requirement imposed on § 741(8) of Title 11. *Id.* at 338.

***M.F. v. State of N. Y. Exec. Dep't Div. of Parole*, 640 F.3d 491 (2d Cir. 2011)**

QUESTION: Whether "the [Interstate Compact for Adult Offender Supervision ("the Compact")] or its authorizing statute creates a private right of action." *Id.* at 494.

ANALYSIS: The court stated that "[f]ederal statutes can create causes of action expressly or impliedly," and that since "neither the Compact nor the federal statute that authorizes it contains an express private right of action, [it] must determine whether such a right is implicit in them." *Id.* at 495. The court focused its analysis on congressional intent to create a private right of action by looking to the text and structure of the statute. *Id.* The court found that "the Compact's text and structure make it clear that it is solely an agreement between states, and not a source of private rights of action for the offenders whose interstate movement it governs." The court went on to consider the four factors of *Cort v. Ash*, 422 U.S. 66 (1975), "in order to illuminate [its] analysis of congressional intent." *Id.* at 495–96. The court found that all four factors "militate against finding an implied private right of action in this case." *Id.* at 496. Finally, the court reasoned that the federal statute that authorizes the Compact, "does nothing more than authorize states (1) to enter into agreements and compacts with each other for purposes of crime prevention, and (2) to establish agencies to oversee those interstate agreements and compacts." *Id.* at 496–97. Thus, the court found no Congressional intent in the authorizing statute to create a private right of action. *Id.* at 497.

CONCLUSION: The 2nd Circuit held "that the Compact and its authorizing statute create neither an express nor an implied federal private right of action." *Id.*

***MLSMK Inv. Co. v. JP Morgan Chase & Co.*, 651 F.3d 268 (2d Cir. 2011)**

QUESTION: Whether section 107 of the Private Securities Litigation Reform Act ("PSLRA"), which provides that "no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation" of the Racketeer Influenced and Corrupt Organizations Act (RICO), bars "all civil RICO claims predicated upon securities fraud," or if there is an exception for claims where no private right of action under securities law exists. *Id.* at 273–74.

ANALYSIS: The court noted that "[t]he district court judges in [the 2nd Circuit] that have addressed [this question] are divided." *Id.* at 273. The court stated that "the plain language of [section 107 of the PSLRA] does not require that the same plaintiff who sues under RICO must be the one who can sue under securities law" and "does not indicate that Congress intended that it be applied in [such a] limited manner." *Id.* at 277–78 (internal quotation marks omitted). The court explained that "Congress intended that the section would eliminate securities fraud as a predicate offense in a civil RICO action," and not merely remove actionable claims under securities law. *Id.* (internal quotation marks omitted). The court reasoned that if there was an exception for non-actionable securities fraud claims, "a plaintiff could too easily manipulate a complaint to skirt [section 107 of the PSLRA's] limitations." *Id.* at 275. Finally, the court noted that its holding was in agreement with similar decisions of the 3rd, 5th, 9th, and 10th Circuits since "those cases, like the plaintiff here, without recourse to a private cause of action under the securities laws, . . . concluded that the plaintiffs' RICO claims were barred by the [PSLRA]." *Id.* at 280.

CONCLUSION: The 2nd Circuit held "that section 107 of the PSLRA bars civil RICO claims alleging predicate acts of securities fraud, even where a plaintiff cannot itself pursue a securities fraud action against the defendant." *Id.* at 277.

NML Capital, Ltd. v. Banco Cent. De La Republica Arg., 652 F.3d 172 (2d Cir. 2011)

QUESTION ONE: Whether "the exercise of sovereign immunity for 'property . . . of a foreign central bank or monetary authority held for its own account' pursuant to 28 U.S.C. § 1611(b)(1) depend[s] on whether the central bank or monetary authority is entitled to a presumption of independence . . . ." *Id.* at 175 (internal citations omitted).

ANALYSIS: The court explained that "unless the property of a foreign state, as defined in § 1603(a), is subject to one of the exceptions set forth in [the Foreign Sovereign Immunities Act (FSIA)] § 1610, it is immune from attachment, arrest, and execution pursuant to FSIA § 1609." *Id.* at 186–87. The court further explained that under 28 U.S.C. § 1611(b)(i) "the property of a foreign state shall be immune from attachment and from execution, if . . . the property is that of a foreign central bank or monetary authority held for its own account." *Id.* at 187. The court reasoned that "the plain language of the statute suggests that Congress recognized that the property of a central bank, immune under § 1611, might *also* be the property of that central bank's parent state." *Id.* at 188. Further, the court noted that if congress intended to limit the

statute to independent central banks, the statute would have been constructed differently. *Id.* "Therefore, the statute seems to anticipate the possibility that property held by the central bank may also be property of the sovereign state." *Id.* at 188–89. To bolster this reasoning, the court noted that "if execution could be levied on such funds without an explicit waiver, deposit of foreign funds in the United States might be discouraged," thus complicating foreign relations. *Id.* at 189. The court adds that "it makes no sense to assume that Congress would enact a statute designed to prevent significant foreign relations problems which failed to immunize a significant portion of the central bank reserves in the United States." *Id.* at 191. The court further reasoned that "there is no indication in the text, history, or structure of the FSIA that Congress intended to make the immunity of a central bank's property contingent on the independence of the central bank. The statute makes no reference to the independence or autonomy of a central bank or monetary authority. Moreover, the history of the FSIA and of the independence of central banks suggests that Congress understood the property of a foreign central bank to be deserving of immunity regardless of that bank's independence." *Id.* at 190.

CONCLUSION: The 2nd Circuit held "that the plain language, history, and structure of § 1611(b)(1) immunizes property of a foreign central bank or monetary authority held for its own account without regard to whether the bank or authority is independent from its parent state." *Id.* at 187–88.

QUESTION TWO: What "the proper meaning of the phrase 'property . . . of a foreign central bank or monetary authority held for its own account' [is under] § 1611(b)(1)." *Id.* at 175 (internal citations omitted).

ANALYSIS: The court first established that "property is 'held for its own account' if that property is used for 'traditional central banking activities.'" *Id.* at 191 (internal citations omitted). The court stated that "this appears to be the test adopted by Congress in the FSIA." *Id.* The rationale came from House Report 31, stating: "Funds held for the bank's or authority's 'own account' . . . [include] funds used or held in connection with central banking activities, as distinguished from funds used solely to finance the commercial transactions of other entities or of foreign states". *Id.* The court further offered that "funds are considered to be 'held for a central bank's own account' if they are used to perform functions that are normally understood to be the functions of a nation's central bank, and are not utilized in commercial activities." *Id.* The court supposed that an alternate definition of central bank property "held for its own account" could be drawn from the common law of bank

deposits. *Id.* at 191–92. Here, the court stated, property of a central bank is "held for its own account" if it is in an account in the central bank's name because under "fundamental banking law principles, a positive balance in a bank account reflects a debt from the bank to the depositor and no one else." *Id.* at 192 (internal quotation marks omitted). The court determined that a modified test—"which combines the 'plain language' of the statute and 'central bank activities' tests as conjunctive requirements—accords with the text and purpose of §1611(b)(1) . . . ." *Id*. at 194. The court adopted this test for purposes of determining whether central bank property is "held for its own account." *Id.*

CONCLUSION: The 2nd Circuit held that "where funds are held in an account in the name of a central bank or monetary authority, the funds are presumed to be immune from attachment under § 1611(b)(1)." *Id.*

***United States v. Gravel*, 645 F.3d 549 (2d Cir. 2011)**

QUESTION: Whether any weapon which "is designed to shoot . . . automatically more than one shot," under 26 U.S.C. § 5845(b) includes a weapon that was originally designed to shoot automatically but was re-designed to shoot semi-automatically. *Id.* at 551 (alteration in original).

ANALYSIS: After determining that the word "designed" was not defined in the statute, the court examined *Webster's Third International Dictionary* and *Black's Law Dictionary*. *Id.* The court noted that "design" was defined as "to form plan or scheme of, conceive and arrange in mind, originate mentally, plan out, [or] contrive" and found "design" under the statute to mean what was contemplated when the weapon was originally conceived and devised. *Id.* (internal quotation marks omitted).

CONCLUSION: The 2nd Circuit held that 26 U.S.C. § 5845(b) includes a weapon that was originally designed to shoot automatically but was redesigned to shoot semi-automatically. *Id.* at 551–52.

***United States v. Qurashi*, 634 F.3d 699 (2d Cir. 2011)**

QUESTION: Whether, under the Mandatory Victims Restitution Act ("MVRA"), "a criminal restitution order may include prejudgment interest." *Id.* at 702.

ANALYSIS: The court first noted that the primary goal of the MVRA is to make victims of crime whole by fully compensating them for their losses and returning them to their original state of well-being. *Id.* at 703. The court reasoned that "if sentencing courts are required to compensate victims for the full amount of each victim's losses, there is no reason to exclude losses that result from the deprivation of the victim's ability to put its money to productive use." *Id.* (internal

quotation marks omitted). In addition, the court noted that the MVRA's primary goal of "compensating victims for their losses is advanced by allowing prejudgment interest." *Id.*

CONCLUSION: The 2nd Circuit held that "the MVRA allows a sentencing court to award prejudgment interest in a criminal restitution order to ensure compensation in the full amount of each victim's losses." *Id.* at 704 (internal quotation marks omitted).

***United States v. Simels*, 654 F.3d 161 (2d Cir. 2011)**

QUESTION: Whether unlawfully obtained wiretap evidence may be used by the prosecution for impeachment in a criminal case. *Id.* at 169.

ANALYSIS: The court first noted that "all of the circuits that have considered the issue have held that unlawfully obtained wiretap evidence may be used by the prosecution for impeachment in a criminal case." *Id.* These circuits have extended the rationale used in *Walder v. United States*, 347 U.S. 62 (1954), a case in which the Supreme Court used evidence obtained in violation of the Fourth Amendment for impeachment purposes in violation of Title III. *Id*. The court reasoned that if evidence obtained in violation of the Constitution was admissible, evidence in violation of a statute could be used for impeachment purposes. *Id.* at 170. The court added that "Congress had this background in mind when the statute was passed, and that, in the absence of an express statement, it did not intend to draw the line of exclusion in a different place." *Id.*

CONCLUSION: The 2nd Circuit held that evidence that was obtained unlawfully under Title III may be used by the prosecution for impeachment in a criminal case. *Id.*

THIRD CIRCUIT

***Helen Mining Co. v. Dir. OWCP*, 650 F.3d 248 (3d Cir. 2011)**

QUESTION: Whether a prior denial of benefits under the Black Lung Benefit Act for a medical disability due to pneumoconiosis triggers the three-year statute of limitations as to bar any subsequent claims of eligibility. *Id.* at 251.

ANALYSIS: The court first noted that the phrase "medical determination of total disability due to pneumoconiosis" was not defined by the statute or the regulation. *Id.* The court reasoned that the "remedial nature of the statute requires a liberal construction of the Black Lung entitlement program to ensure widespread benefits to miners." *Id.* at 252 (internal quotation marks omitted). The court further explained

that because pneumoconiosis was a latent and progressive disease, the statute should be read "in an expansive manner to ensure that any miner who has been afflicted with the disease, including its progressive form, is given every opportunity to prove he is entitled to benefits." *Id.* at 253. Finally, the court opined that an expansive reading of the statute of limitations provision would be "consistent with, both, a legislative intent to favor miners and the regulatory provision that allows subsequent claims." *Id.*

CONCLUSION: The court held that "a medical determination of total disability due to pneumoconiosis predating a prior and final denial of benefits is deemed a misdiagnosis, and thus, cannot trigger the statute of limitations for filing a subsequent claim." *Id.* at 251.

***In re Marcal Paper Mills, Inc.*, 650 F.3d 311 (3d Cir. 2011)**

QUESTION: "[W]hether under the Employee Retirement Income Security Act (ERISA), as amended by the Multiemployer Pension Plan Amendments Act (MPPAA), the portion of withdrawal liability that is attributable to the post-petition time period constitutes an administrative expense entitled to priority under the Bankruptcy Code." *Id.* at 312.

ANALYSIS: The court first established that, in bankruptcy proceedings, administrative expenses are entitled to priority over general unsecured creditors' claims. *Id.* at 313. The court then explained that administrative expenses "must arise from a [post-petition] transaction with the debtor-in-possession, . . . must be beneficial to the debtor-in-possession in the operation of the business[,] . . . and must also be actual and necessary" to the bankrupt company's continued operation. *Id.* at 314–15. The court observed that a bankrupt company's pension benefits are part of the consideration it gives its employees for performing such necessary, post-petition work. *Id.* at 315. The court also observed that Congress enacted the MPPAA to preserve this liability even after the company withdraws from a multiemployer plan. *Id.* at 316.

CONCLUSION: The 3rd Circuit held that withdrawal liability arising from post-petition work is an administrative expense entitled to priority. *Id.* at 314.

***J.S. v. Blue Mt. Sch. Dist.*, 650 F.3d 915 (3d. Cir. 2011)**

QUESTION: Whether a School District violated a student's First Amendment right to free speech when it disciplined the student for creating, on a weekend on her home computer, a MySpace profile making fun of her high school principal. *Id.* at 920.

ANALYSIS: The court first noted that "[t]he Supreme Court established a basic framework for assessing student free speech claims in

Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969)." *Id.* at 926. The court then stated that it would "assume, without deciding, that *Tinker* applies to [the plaintiff's] speech in this case." *Id.* The Supreme Court in *Tinker* held that school officials are justified in prohibiting speech if they can demonstrate "facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities." *Id.* at 928. In reviewing the record, the court noted that the speech "was so outrageous that no one could have taken it seriously." *Id.* at 930. The court then noted that the student "did not even intend for the speech to reach the school." *Id.* Further, the court noted that the speech, which "contained adult language and sexually explicit content" making fun of a school official, did not identify the school official by name, school, or location and was not accessible at school. *Id.* at 929. The court then compared the court's record to the record in *Tinker* and determined that "[t]he facts simply do not support the conclusion that the School District could have reasonably forecasted a substantial disruption of or material interference with the school as a result of [the plaintiff's speech]." *Id.* at 931.

CONCLUSION: The 3rd Circuit held that "the School District violated [the student's] First Amendment free speech rights when it suspended her for [the off-campus speech]." *Id.*

***Sarango v. Att'y Gen. of the United States*, 651 F.3d 380 (3d Cir. 2011)**

QUESTION: Whether an immigration judge has jurisdiction to consider a "request for consent to reapply for admission" to the United States after deportation under 8 U.S.C. § 1182(a)(9)(C)(ii). *Id.* at 381.

ANALYSIS: As and initial mater, the court found that the plain language of 8 U.S.C. § 1182(a)(9)(C)(ii) unambiguously limits the power to review requests for consent to reapply for admission to the Secretary of Homeland Security. *Id.* at 385–86. The court noted that Congress enacted 8 U.S.C. § 1182(a)(9)(C)(ii) to replace a provision which previously gave the Attorney General the authority to consider requests for consent. *Id.* at 385. The court concluded that Congress intended to divest the Attorney General, as well as the Board of Immigration appeals and the immigration courts which operate under the Attorney General, of the authority to consider requests for consent to reapply. *Id.* Finally, the court noted that the Board of Immigration Appeals has previously recognized that Congress can limit the jurisdiction of immigration agencies. *Id.* at 386.

CONCLUSION: The 3rd Circuit held that an immigration judge lacks jurisdiction to adjudicate requests for consent to reapply under 8 U.S.C. § 1182(a)(9)(C)(ii). *Id.* at 387.

FOURTH CIRCUIT

Matson v. Alarcon, 651 F.3d 404 (4th Cir. 2011)

QUESTION: What is the meaning of the word "earned" under 11 U.S.C. § 507(a)(4) of the Bankruptcy Code in the context of an employee's entitlement to severance pay? *Id.* at 408.

ANALYSIS: After concluding that the statute does not define the word "earned," the court cited two alternative definitions of the term in *Webster's Third New International Dictionary*: to "receive as equitable return for work done or services rendered," or "to come to be duly worthy or entitled." *Id.* at 408. Although the first definition may be more common, the court noted, the second definition is more appropriate here as it reflects the purpose of severance pay to compensate the employee "for certain losses attributable to the dismissal." *Id.* at 408–09. Further, because it is termination, and not work or services that "triggers" severance pay, the court found the first definition to be inadequate. *Id.* at 409.

CONCLUSION: The 4th Circuit held that the word "earned" interpreted under 11 U.S.C. § 507(a)(4) means "to become entitled." *Id.* at 409.

FIFTH CIRCUIT

Black v. Pan Am. Labs., L.L.C., 646 F.3d 254 (5th Cir. 2011)

QUESTION: Whether, pursuant to 42 U.S.C. § 1981a(b), Title VII's compensatory and punitive damages cap applies on a "per claim" or a "per party" basis. *Id.* at 264.

ANALYSIS: The court first stated that while "[t]his issue is one of first impression in the Fifth Circuit[,]" several other circuits have addressed it. *Id.* The court then cited to the 6th Circuit, which "held that the plain language of the statute dictated applying the cap on a 'per party' basis." *Id.* The court added that all of the other circuits that have addressed this issue "have uniformly held that Title VII's damages cap applies to each party in an action, not to each claim." *Id.* The court found the reasoning of its sister circuits compelling and determined that the plain meaning of the statute dictates application of the cap on a "per party basis." *Id.*

CONCLUSION: The 5th Circuit held that "the plain language of [42 U.S.C.] § 1981a(b)'s cap applies to each party in an action." *Id.*

***Carder v. Cont'l Airlines, Inc.*, 636 F.3d 172 (5th Cir. 2011)**

QUESTION: Whether the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), "provides a service member with a cause of action against his employer for a hostile work environment." *Id.* at 174.

ANALYSIS: Based on the plain language of USERRA, the court found that USERRA is meant "to prohibit discrimination and acts of reprisal against service members because of their service." *Id.* at 176. Based on the statute's legislative history, the court observed that Congress intended courts to "broadly construe" USERRA in favor of service members. *Id.* The court noted, however, that Congress chose not to include the phrase "terms, conditions, or privileges of employment" which, in Title VII and other anti-discrimination statutes, give rise to a cause of action for hostile work environment. *Id.* at 178.

CONCLUSION: The 5th Circuit held that "based on the distinct text of USERRA, its legislative history, and its policies and purposes" there is no cause of action for hostile work environment under USERRA. *Id.* at 179.

***Martinez v. Caldwell*, 644 F.3d 238 (5th Cir. 2011)**

QUESTION: Whether a detainee's pretrial petition for federal habeas corpus under 28 U.S.C. § 2241, which does not specify a standard of review, should be reviewed "with the same deference that [the court] give[s] habeas corpus petitions filed under 28 U.S.C. § 2254," which are reviewed with the presumption "that a state court correctly determined questions of fact," and are deferred to unless based on an unreasonable determination of facts. *Id.* at 241–42.

ANALYSIS: The court noted that the 1st, 9th, and 10th Circuits "have all held that § 2254(d) deference never applies to habeas petitions brought by pretrial detainees under § 2241." *Id.* at 242. The court agreed with the other circuits' holdings, explaining that the deferential standard, "which is specifically articulated in § 2254, is not included in the text of § 2241." *Id.* As further proof, the court noted that "when Congress amended § 2254(d) in 1996 amid sweeping habeas reform, it did not similarly amend § 2241." *Id.* The court viewed this as strong support for de novo review of § 2241 petitions since "it is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *Id.* The court explained that "[t]he plain language of the statutes clearly demonstrates that § 2254 is textually distinct from § 2241: one explicitly mandates deference, the other does not." *Id.*

CONCLUSION: The 5th Circuit held that a pretrial detainee's petition for federal habeas corpus under 28 U.S.C. § 2241 should be reviewed under a de novo standard, not with the deferential standard afforded to state court decisions under § 2254. *Id.*

***NLRB. v. PDK Investments, L.L.C.*, 433 Fed. App'x 297 (5th Cir. 2011)**

QUESTION: Whether a union can satisfy its burden of proof by relying on hearsay as objective evidence to support a reasonable belief that an employer has breached its duty to bargain in good faith. *Id.* at 300.

ANALYSIS: The court began by stating that, "the duty to bargain collectively includes the duty to provide information needed by the bargaining representative for the proper performance of its duties." *Id.* (internal quotation marks omitted). "That duty unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement." *Id.* (internal quotation marks omitted). The court explained that a "[r]efusal to furnish information to a bargaining representative may constitute a breach of the employer's duty to bargain in good faith." *Id.* (internal quotation marks omitted). The court identified the key inquiry as whether the information the union seeks is relevant to its duties. *Id.* The court stated that a union can satisfy its burden of showing a legitimate union purpose "only by demonstrating a reasonable belief supported by objective evidence for requesting the information." *Id.* at 301 (internal quotation marks omitted). The court reasoned that "allowing hearsay at the information-request stage in the complaint process is consistent with the liberal, discovery-type standard for information requests that the Supreme Court has adopted." *Id.* at 302.

CONCLUSION: A union may use hearsay as evidence to show the "reasonableness of the union's belief that a violation occurred . . . ." *Id.*

***United States v. Bacon*, 646 F.3d 218 (5th Cir. 2011)**

QUESTION: Whether "a sentencing court can consider remote-in-time occurrences to establish a 'pattern of activity' under § 2G2.2 [of the United States Sentencing Guidelines]." *Id.* at 220.

ANALYSIS: Concurring with rulings of six other circuit courts, the court stated that a "district court may consider all 'relevant conduct' when fashioning a sentence." *Id.* at 221. The court noted that the Guidelines commentary specifically allows courts to consider "conduct not occurring during the course of the offense of conviction," so "relevant conduct" is intended to be broadly construed. *Id.* The court

concluded that considering remote-in-time conduct does not violate due process because it has a rational basis and is not subject to arbitrary application. *Id.* at 221–22.

CONCLUSION: The Fifth Circuit held that "remote-in-time conduct is relevant to § 2G2.2's 'pattern of activity' enhancement." *Id.* at 222.

***United States v. Block*, 635 F.3d 721 (5th Cir. 2011)**

QUESTION: Whether, under 18 U.S.C. § 2251A(a), "custody or control" over a child depicted in child pornography includes temporary custody. *Id.* at 723.

ANALYSIS: The court first noted that the plain language of the statute includes "temporary supervision." *Id.* at 724. Responding to the argument that "custody or control" is coextensive with the permanent custody or control of a parent, the court agreed with the 11th Circuit in finding that such a reading would render this language meaningless. *Id.* The court reasoned that, because the statute "refers to a 'parent, legal guardian, or *other person having custody or control*[,] . . .' the reference to custody or control describes the 'other person,' not the parent or legal guardian." *Id.* Such other people, the court stated, necessarily refers to people who exercise parental rights, though without a permanent character, such as the proprietor of a day care center. *Id.*

CONCLUSION: The 5th Circuit held that, under 18 U.S.C. § 2251A(a), "custody or control" of a child includes temporary custody. *Id.* at 723–24.

***United States v. Portillo-Munoz*, 643 F.3d 437 (5th Cir. 2011)**

QUESTION: "Whether the protections contained in the Second Amendment extend to aliens illegally present in [the United States]." *Id.* at 439

ANALYSIS: The court observed that the Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008) held that the Second Amendment extends to law-abiding responsible citizens, members of the political community, and to all Americans. *Id.* Because "[i]llegal aliens are not law-abiding, responsible citizens or members of the political community . . . [and] are not Americans as that word is commonly understood," the court reasoned that the language used in *Heller* "invalidates [the defendant's] attempt to extend the protections of the Second Amendment to illegal aliens." *Id.* The court also noted, however, that in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), the Supreme Court concluded that the First, Second, and Fourth Amendments protect "a class of persons who are part of a national community or who have otherwise developed sufficient connections with

this country to be considered part of that community." *Id.* (internal quotations omitted). Lastly, the court noted that Supreme Court precedent has "made clear that the Constitution does not prohibit Congress from making laws that distinguish between citizens and aliens and between lawful and illegal aliens." *Id.* at 442.

CONCLUSION: The 5th Circuit held that "[w]hatever else the term means or includes, the phrase 'the people' in the Second Amendment of the Constitution does not include aliens illegally in the United States." *Id.*

SIXTH CIRCUIT

Adams v. Hanson, 656 F.3d 397 (6th Cir. 2011)

QUESTION: Whether "a prosecutor is entitled to absolute immunity for her false and misleading statements to a trial court in the course of criminal proceedings about the availability of a witness." *Id.* at 403.

ANALYSIS: The court first noted that other circuits have held that "prosecutors are ordinarily entitled to absolute immunity for conduct falling within a prosecutorial function." *Id.* The court reasoned that "a prosecutor's statements to the court regarding the availability of witnesses are intimately associated with the judicial phase of the criminal process . . . and are connected with the initiation and conduct of a prosecution." *Id.* (internal quotation marks omitted). Next, the court stated that "conduct related to the preparation and presentation of witness testimony may be protected whether it occurs in or out of court." *Id.* at 405. Finally, the court stated that a prosecutor's improper motive alone will not defeat absolute immunity, provided that the prosecutor's actions fall within the scope of his duties as an advocate. *Id.*

CONCLUSION: The 6th Circuit held that a prosecutor's statements to a trial court about the availability of a witness fall within the prosecutor's role as an advocate and as such are entitled to absolute immunity. *Id.*

Hachem v. Holder, 656 F.3d 430 (6th Cir. 2011)

QUESTION: Whether 8 C.F.R. § 1240.26(i), terminating a grant of voluntary departure, and promulgated by the Attorney General, is a valid regulation. *Id.* at 438.

ANALYSIS: The court reasoned that the "unambiguously expressed intent of Congress controls" where "Congress has directly spoken to the precise question at issue." *Id.* The court noted that "Congress has . . . unambiguously stated that the Attorney General may promulgate

regulations to limit the eligibility for voluntary departure." *Id.* The court further found that, here, "the Attorney General has promulgated a regulation under a permissible construction of the statute." *Id.*

CONCLUSION: The 6th Circuit held that 8 C.F.R. § 1240.26(i), promulgated by the Attorney General, is a valid regulation. *Id.* at 438–39.

***Jones v. Nissan N. Am., Inc.*, 438 Fed. Appx. 388 (6th Cir. 2011).**

QUESTION: Whether *McKennon v. Nashville Banner Publ. Co.*, 513 U.S. 352 (1995), applies to an employee's wrongdoing that did not occur until after some sort of adverse action was already taken by the employer against the plaintiff employee." *Id.* 406.

ANALYSIS: The court began by noting that the 8th and 10th Circuits, as well as a number of District Courts, have acknowledged the possibility that *McKennon* may impose limitations on an employee's remedies for wrongful discharge "but counsel against applying it to limit recovery where the misconduct can be attributable to the defendant's prior illegal action . . . ." *Id.* at 407. The court also cited several District Court cases that refused to apply *McKennon* because of a lack of an employment relationship. *Id.* at 406. However, the court found these cases unpersuasive because the Plaintiff in the present case, while on medical leave, was still technically an employee at the time. *Id.* at 407. The 6th Circuit opined that, had the employeR not wrongfully imposed medical restrictions rendering the employee unfit to work, the employee would not have had to seek work without the employer's permission, and in violation of its rules. *Id.*

CONCLUSION: Accordingly, the 6th Circuit held that *McKennon*'s rule would not apply when an adverse action has been taken by an employer against the plaintiff employee and their employment relationship has not yet been terminated. *Id.*

***United States v. Benton*, 639 F.3d 723 (6th Cir. 2011)**

QUESTION: Whether solicitation of aggravated assault qualifies as a "violent felony" under 18 U.S.C. § 924(e)(2)(B)(i) of the Armed Career Criminal Act (ACCA). *Id.* at 730.

ANALYSIS: The court observed that the crime of aggravated assault involves the use or threat of force, and therefore, qualifies as a violent felony for ACCA purposes. *Id.* To determine whether a defendant was convicted of a violent felony, the court considered only the statutory elements of the offense to which the defendant actually pleaded. *Id.* The court found that the statutory definition of solicitation to commit aggravated assault does not require as an element "the use, attempted

use, or threatened use" of force, but rather, the "command, request or hire" of another to employ such force. *Id.* at 731.

CONCLUSION: The 6th Circuit held that "[b]ecause the crime of solicitation to commit aggravated assault is at least one step removed from the requisite level of force contemplated in § 924(e)(2)(B)(i) of the ACCA, it does not qualify as a 'violent felony.'" *Id.*

***Williamson v. NLRB*, 643 F.3d 481 (6th Cir. 2011)**

QUESTION: Whether the gathering and reporting of information by an employee is a protected activity under § 8(b)(1)(B) of the National Labor Relations Act. *Id.* at 487.

ANALYSIS: The 6th Circuit first detailed the history of the interpretation of § 8(b)(1)(B), noting that the section had been expanded greatly between the years 1968 and 1974 to include discipline of management representatives. *Id.* at 488. The court noted however, that "[i]n 1974, the Supreme Court rejected the [National Labor Relations Board's (NLRB)] expansive view of § 8(b)(1)(B), holding that the section did not prohibit a union from disciplining its supervisor-members for their 'performance of rank-and-file work,' even though that work was done in the employer's interest." *Id.* (citation omitted). The court stated that "[t]he language of § 8(b)(1)(B) protects only the activities of collective bargaining and grievance adjustment, . . . and the Supreme Court added 'some other closely related activity' in the course of narrowing interpretation of the section." *Id.* (internal citations and quotation marks omitted). The court explained that negotiations between a particular union and an employer, which the Supreme Court had found protected under § 8(b)(1)(B), were qualitatively different from the act of gathering information from multiple unions and reporting back to a single employer. *Id.* at 489.

CONCLUSION: The 6th Circuit held "the [NLRB] had a rational basis to conclude that information-gathering is qualitatively different from the activities § 8(b)(1)(B) protects . . . ." *Id.* at 490.

SEVENTH CIRCUIT

***United States v. Phillips*, 645 F.3d 859 (7th Cir. 2011)**

QUESTION: Whether a defendant who pleads guilty without raising an as-applied vagueness challenge in the trial court waives his right to raise that issue on appeal. *Id.* at 862.

ANALYSIS: The court first stated a general rule that "a defendant who pleads guilty waives his right to appeal all non-jurisdictional

issues." *Id.* The court then found that an as-applied challenge is a non-jurisdictional issue because it does not dispute the court's authority to hale the defendant into court. *Id.* at 863. The court then reasoned that a defendant who pleads guilty affirms as true the underlying facts and cannot re-argue these facts on appeal in a vague as-applied challenge. *Id.*

CONCLUSION: The 7th Circuit held that "a defendant who pleads guilty without raising an as-applied vagueness challenge in the trial court is barred from raising that issue on appeal." *Id.* at 862.

EIGHTH CIRCUIT

Dakota, Minn. & Eastern R.R. Corp. v. Schieffer, 648 F.3d 935 (8th Cir. 2011)

QUESTION: Whether an individually negotiated contract between an employer and a single employee may be classified as a plan covered by the Employee Retirement Income Security Act (ERISA). *Id.* at 938.

ANALYSIS: The court first noted that the use of "plan" in 29 U.S.C. § 1002(1) "strongly impl[ies] benefits that an employer provides to a class of employees." *Id.* The court further noted that "the plain language of this statute . . . reflects the congressional intent that a covered plan is one that provides welfare benefits to more than one person." *Id.* (internal quotations omitted). The court next analyzed the relationship between ERISA and state law, finding that "Congress has never preempted state laws that regulate and enforce individual employment contracts between employers and their executives." *Id.* Finally, the court noted that "[n]either the administrative nor the remedial purposes of ERISA preemption apply to the resolution of contractual disputes between an employer and a single, salaried employee." *Id.*

CONCLUSION: The 8th Circuit held that "an individual contract providing severance benefits to a single executive employee is not an ERISA employee welfare benefit plan within the meaning of 29 U.S.C. § 1002(1)." *Id.*

Owner-Operator Indep. Drivers Ass'n. Inc. v. Supervalu, Inc., 651 F.3d 857 (8th Cir. 2011)

QUESTION: "Whether, under [49 U.S.C.] § 14103(a), the shipper or receiver reimbursing a trucker's lumping fees must be the same shipper or receiver who originally required the lumping." *Id.* at 862.

ANALYSIS: The court first found the plain language of § 14103(a) to be ambiguous. *Id.* It next turned to the legislative history, and stated that § 14103(a) is part of the Motor Carrier Act, an Act aimed primarily

at deregulating shipping activities such as lumping. *Id.* at 863. The court explained that the legislative history behind § 14103(a) was to "curtail coercive and extortionate lumping practices by inducing shippers, receivers, and truckers to freely negotiate lumping among themselves in pre-delivery contract." *Id.* at 866. The court further noted that Congress did not impose a specific duty on any party to bear the cost of lumping fees. *Id.*

CONCLUSION: The 8th Circuit held that "the shipper or receiver who required the lumping must either provide the lumping or pay for it, and added that a plaintiff trucker suing under § 14103(a) "must show as part of his prima facie case that he has not been reimbursed by *either* the shipper *or* the receiver." *Id.* at 863.

***United States v. Cavanaugh*, 643 F.3d 592 (8th Cir. 2011)**

QUESTION: Whether "an uncounseled conviction resulting in a tribal incarceration that involved no actual constitutional violation may be used later in federal court," for the purposes of sentencing enhancement. *Id.* at 603.

ANALYSIS: The 8th Circuit placed substantial weight on the fact that the defendant's prior convictions did not involve any actual constitutional violation. *Id.* at 603–04. The court also stated that the technical validity of a conviction should be given greater weight than whether or not a violation of defendant's constitutional rights would have occurred (i.e. the 6th amendment right to counsel) in a non-tribal court. *Id.* The court found that "[p]recluding the use of an uncounseled tribal conviction in federal court would in no manner restrict a tribe's own use of that conviction; it would simply restrict a federal court's ability to impose additional punishment at a later date in reliance on that earlier conviction." *Id.*

CONCLUSION: The 8th Circuit held that "in the absence of any other allegations of irregularities or claims of actual innocence surrounding the prior convictions, [it] cannot preclude the use of [the uncounseled] conviction in the absence of an actual constitutional violation." *Id.*

NINTH CIRCUIT

Cal. Shock Trauma Air Rescue v. State Comp. Ins. Fund, 636 F.3d 538 (9th Cir. 2011)

QUESTION: Whether a plaintiff who seeks declaratory relief, in federal court, from a state regulation, on the ground that the state regulation is preempted, presents a federal question. *Id.* at 543 .

ANALYSIS: The court first explained that the claim for declaratory relief is based on a Supreme Court case permitting injunctive relief in federal courts where federal statute had preempted state regulations. However, the court distinguished the claim for declaratory relief from Supreme Court precedent because the present case did not involve any state officials. *Id.* at 543. The court stated that since there was no proffered "case in which there exists federal subject matter jurisdiction over a declaratory judgment claim brought by a private party against another private party, [the] argument necessarily fails." *Id.* The court further explained that Supreme Court precedent "held that Declaratory Judgment Act actions are procedural claims as opposed to substantive ones that would confer jurisdiction." *Id.* at 543–44

CONCLUSION: The 9th Circuit held that a plaintiff is not entitled to declaratory relief in federal courts based on the preemption of state regulations because declaratory judgment is procedural, rather than substantive. *Id.* at 544.

Countrywide Home Loans, Inc. v. Mortg. Guar. Ins. Corp., 642 F.3d 849 (9th Cir. 2011)

QUESTION: "[W]hether a district court's discretion under the [Declaratory Judgment Act (DJA)] allows the court to decline to consider and to award relief under the [Federal Arbitration Act (FAA)]." *Id.* at 852.

ANALYSIS: The court first affirmed that a district court has "the ability [under the DJA] to 'accept' or 'decline' 'discretionary' jurisdiction, or to decide whether to 'exercise jurisdiction,' in an action seeking declaratory relief." *Id.* The court further stated that, unlike the DJA, "the FAA gives the adjudicating court no discretion as to whether to award relief." *Id.* at 854. Instead the FAA "mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Id.* (internal citation omitted). Lastly, the court noted that the "express terms of the [FAA] do not allow a district court to abstain from granting relief in cases where its jurisdiction is proper." *Id.*

CONCLUSION: The 9th Circuit held that the mandatory terms of the FAA "require a federal court to decide an FAA motion that is properly brought before [the court]." *Id.* at 856.

***Gonzalez-Medina v. Holder*, 641 F.3d 333 (9th Cir. 2011)**

QUESTION ONE: Whether "applying the one-year filing deadline to [an] asylum application violates the Equal Protection Clause . . . ." *Id.* at 335.

ANALYSIS: The court first noted that the Immigration and Nationality Act (INA) 8 U.S.C. §1158(a)(2)(B) "requires that an alien file an asylum application within one year of arrival in the United States." *Id.* at 336. The court reasoned that in order "[t]o establish an equal protection violation, [plaintiff] must show that she is being treated differently from similarly situated individuals." *Id.* The court next explained that because this case "does not allege discrimination on the basis of a suspect class, any differential treatment violates equal protection only if it lacks a rational basis." *Id.* (internal quotations omitted). The court stated that the burden shifts to the plaintiff "to negate every conceivable basis which might support a legislative classification . . . whether or not the basis has a foundation in the record." *Id.* (internal citation and quotations omitted). The court determined that "there is a legitimate government purpose for the one-year deadline . . ." *Id.* at 337.

CONCLUSION: The 9th Circuit held that "the government's treatment of [plaintiff] is rationally related to a legitimate government purpose," and that applying a one-year filing deadline to an asylum claim does not violate the Equal Protection Clause. *Id.* at 337 (internal quotations omitted).

QUESTION TWO: Whether "domestic abuse that occurs in the United States can constitute past persecution," where the United States is not the proposed country of removal. *Id.* at 335.

ANALYSIS: The court first noted that the INA regulation in question, 8 C.F.R. § 1208.16(b)(1)(i), "provide[s] that past persecution must have occurred in the proposed country of removal." *Id.* at 337 (internal quotations omitted). The court then analyzed the regulation under the *Chevron* doctrine and considered "whether Congress has directly spoken to the precise question at issue. If the statute is unclear, we ask whether the agency's answer is based on a permissible construction of the statute." *Id.* (internal citations and quotations omitted). The court next determined that the statute did not "speak to the issue" at bar, and proceeded to the second step of the analysis. *Id.* at 338. The court stated that "[t]he regulation mandating that past

persecution occur in the proposed country of removal is a permissible construction of the statute" and "[i]t is reasonable to link the past persecution provision to the proposed country of removal." *Id.* The court further stated that "there is no logical nexus between persecution in the United States . . . and risk of persecution in the country of removal." *Id.*

CONCLUSION: The 9th Circuit held that the INA regulation is "a valid construction of the statute and past persecution must have occurred in the proposed country of removal." *Id.* at 338.

***Goodman v. Staples The Office Superstore, LLC*, 644 F.3d 817 (9th Cir. 2011)**

QUESTION: "[Whether] a treating physician is transformed into an expert offering testimony on matter beyond the treatment rendered, for purposes of [Fed. R. Civ. P.] 26 disclosures . . . ." *Id.* at 824.

ANALYSIS: The court first noted that doctors are generally exempt from the written report requirements of Rule 26(a)(2)(B), to the court as the doctor's role is that of a "percipient witness of the treatment," not as an expert retained for one party's benefit. *Id.* at 824. The court then explained that treating physicians are not categorically exempt from the written report requirement, as that would circumvent the policies of Rule 26. The court then sided with the 6th and 7th Circuits, which have required parties to disclose a treating physician's written report in absence of some evidence that the physician formed his opinion during the course of treatment. *Id.* at 825.

CONCLUSION: The 9th Circuit held that a doctor who testifies at trial is "only exempt from Rule 26(a)(2)(B)'s written report requirement to the extent that his opinions were formed during the course of treatment." *Id.* at 826.

***Haney v. Adams*, 641 F.3d 1168 (9th Cir. 2011)**

QUESTION: Whether "the state court's decision to deny a [habeas corpus petition on a] *Batson* claim when a defendant made no contemporaneous objection to the use of peremptory challenges in the trial court is contrary to, or an unreasonable application of, clearly established federal law." *Id.* at 1171.

ANALYSIS: The court analyzed whether the state court's habeas corpus denial was an "unreasonable application" of law clearly established in *Batson v. Kentucky*, 476 U.S 79 (1986). *Id.* First, the court looked at the *Batson* elements for alleging the discriminatory use of peremptory challenges: membership in a cognizable racial group, the prosecution's use of peremptory challenges to remove the members of

that racial group, and that these and any other relevant facts raise an inference of intentional discrimination. *Id.* at 1172. Second, the court examined the Supreme Court's remedies for *Batson* violations: seating the wrongfully struck jurors or discharging the venire and selecting a new jury. *Id.* The court found the elements and remedies presupposed a timely objection during trial. and added that it would be unwise and prejudicial to the prosecution to allow defendants to bring post-conviction *Batson* claims. *Id.* at 1172–73.

CONCLUSION: The Ninth Circuit held that "a timely objection to the prosecutor's use of peremptory challenges is a prerequisite to a *Batson* challenge." *Id.* at 1173.

***Hinds Invs. L.P. v. Angioli*, 654 F.3d 846 (9th Cir. 2011)**

QUESTION: What acts of contribution are sufficient to trigger liability under the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C.S. § 6972(a)(1)(B)? *Id.* at 848.

ANALYSIS: The court noted that the RCRA holds liable any person who has "contributed or who is contributing" to the handling, storage, treatment, transportation[,] or disposal of hazardous waste," but does not itself define what acts of contribution are sufficient to trigger liability. *Id.* at 850. However, the court explained that the language Congress used in drafting the statutory prohibition speaks only of active functions with a direct connection to the waste itself. *Id.* at 851. Therefore, the court posited that Congress was only concerned with those who played an active role in handling, storing, transporting, or disposing of hazardous waste, and not people such as manufactures of machines that might generate a waste byproduct. *Id.*

CONCLUSION: The 9th Circuit held that "to state a claim predicated on RCRA liability for contributing to the disposal of hazardous waste, a plaintiff must allege that the defendant had a measure of control over the waste at the time of its disposal or was otherwise actively involved in the waste disposal process." *Id.* at 852.

***In Re Korean Air Lines Co., Ltd.*, 642 F.3d 685 (9th Cir. 2011)**

QUESTION: Whether the Airline Deregulation Act (ADA) preempts state regulation of foreign air carriers. *Id.* at 689.

ANALYSIS: The court first noted that "Congress's occasional use of the term "air carrier" to include "foreign air carrier" counsels strongly that the meaning of "air carrier" is ambiguous in the ADA's statutory preemption provision." *Id.* at 692. The court analyzed the context of the provision to ascertain whether Congress intended that term to apply to foreign air carriers. *Id.* at 693. The court concluded the statutory subpart

was regulating "both domestic and foreign air carriers, [and] a sensible reading of the preemption provision implies that 'air carrier' was intended to have its broader and ordinary meaning in this section of the statute." *Id.* at 693. The court further reasoned that the legislative purpose of insuring a "uniform system of regulation" would be undermined if the preemption provision were to be applied to domestic airlines only. *Id.* at 694. Analyzing the legislative history of the provision, the court noted that deletion of the limiting term "interstate" to extend preemption to "any air carriers having authority . . . to provide air transportation" suggested that "Congress intended to expand the ADA's preemptive scope to cover state regulation of" foreign air carriers as well. *Id.* at 694–95. Finally, the Court explained that allowing states to regulate only foreign air carriers would make it more challenging for the foreign carriers to enter the American market, which in turn would be detrimental to U.S. consumers and would be "contrary to U.S. treaty obligations mandating nondiscrimination." *Id.* at 696.

CONCLUSION: The 9th Circuit held that the "[ADA] preempts state regulation of foreign air carriers." *Id.* at 689.

***Islamic Shura Council of S. Cal. v. FBI*, 635 F.3d 1160 (9th Cir. 2011)**

QUESTION: Whether a district court may open a sealed order for the purpose of disclosing to plaintiffs, or just to counsel, unclassified materials withheld under the Freedom of Information Act (FOIA). *Id.* at 1169.

ANALYSIS: First, the 9th Circuit noted that FOIA permits the government to withhold many types of documents from plaintiffs, including unclassified materials, as long as they fall within one of FOIA's exceptions or exclusions. *Id.* at 1167–68. Second, the 9th Circuit agreed with the D.C. Circuit in finding disclosure of withheld materials would "adversely affect national security interests . . . [because] it would color public perception of the security of confidential information in government files . . . ." *Id.* at 1168. The court added that disclosure of such information only to counsel would also strain the attorney-client relationship. *Id.* Finally, the court noted that FOIA permits the lower courts to conduct *ex parte*, *in camera* examinations of all documents to protect against unlawful withholding. *Id.* at 1168–69.

CONCLUSION: The 9th Circuit held that due process does not require the disclosure of all unclassified materials, and a district court may not disclose to counsel a sealed order when it contains information that is rightfully withheld under the FOIA. *Id.*

***Kaiser Found. Hosps. v. Sebelius*, 649 F.3d 1153 (9th Cir. 2011)**

QUESTION ONE: Whether the procedural requirement, imposed by the Provider Reimbursement Review Board ("PRRB") on Medicare providers who appeal a Notice of Provider Reimbursement ("NPR"), to provide position papers when appealing "is reasonable and necessary to the efficient administration of the provider appeals process." *Id.* at 1158.

ANALYSIS: The court recognized that the 4th, 6th, and 10th Circuits, "have held that the procedural requirement of two position papers is reasonable and necessary to the efficient administration of the provider appeals process." *Id.* The court agreed with the reasoning of these cases because "[t]he position paper requirements assist in narrowing the issues on appeal . . . and efficiently managing the [PRRB's] caseload" and "allow the [PRRB] to ignore late or improperly presented claims." *Id.* (internal quotation marks omitted). The court noted that the procedural requirements should be analyzed the same for both final and preliminary position papers. *Id.* The court concluded that "a provider's statutory right to a hearing is not unduly burdened by a rule allowing dismissal for failure to file a timely position paper." *Id.*

CONCLUSION: The 9th Circuit held that the PRRB's procedural requirement for Medicare providers to provide position papers when appealing their NPR is "reasonable and necessary to the administration of the [PRRB's] substantial caseload." *Id.*

QUESTION TWO: Whether a PRRB decision to dismiss a Medicare provider's appeal of an NPR for failure to timely submit a position paper constitutes arbitrary and capricious conduct in violation of the Administrative Procedure Act (APA). *Id.* at 1159.

ANALYSIS: The court stated that the 4th and 10th Circuits and the District Court for the District of Columbia have held that the PRRB's "decision to dismiss an appeal for failure to timely submit a position paper does not constitute arbitrary and capricious conduct." *Id.* The court affirmed its application of the arbitrary and capricious standard of review, by discussing "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* (internal quotation marks omitted). The court reasoned that the PRRB did not abuse its discretion because Medicare providers are provided with sufficient instructions and are "forewarned that failure to file the position paper will result in dismissal of the appeal." *Id.* at 1160.

CONCLUSION: The 9th Circuit held that the PRRB's "dismissal of [a Medicare provider's] appeal for failure to file a preliminary position paper as required by the [PRRB's] procedural rules" does not constitute arbitrary or capricious conduct. *Id.* at 1160–61.

***L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644 (9th Cir. 2011)**

QUESTION: Whether the hospice cap regulation, 42 C.F.R. §418.309(b)(l) conflicts with the hospice cap statute, 42 U.S.C. § 1395f(i)(2)(C), and is facially invalid. *Id.* at 660.

ANALYSIS: To resolve the question of whether 42 U.S.C. § 1395f(i)(2)(C) was facially invalid, the 9th Circuit used the *Chevron* test. *Id.* at 660. Under the first *Chevron* prong, the court had to determine whether Congress spoke to the precise question at hand, in which case deference to the agency is inappropriate. *Id.* The court noted that the hospice cap statute plainly states that, to determine the number of Medicare beneficiaries, there must be a count of every individual who received care reduced by the proportion of hospice care each individual was provided in a previous year. *Id.* The court stated that the hospice cap regulation, however, requires an individual patient to be counted as a beneficiary in a single year, regardless of how much care the patient received that year or whether the patient received the bulk of care in a previous year. *Id.* The court then addressed the second *Chevron* step, which requires deference to the agency interpretation of ambiguous language, so long as it is reasonable. *Id.* The court noted, however, that the terms of the statute were not ambiguous or imprecise. *Id.*

CONCLUSION: The court concluded that the hospice cap regulation was inconsistent with the statute and is facially invalid. *Id.* at 661.

***Lyon v. Chase Bank USA, N.A.*, 656 F.3d 877 (9th Cir. 2011)**

QUESTION: Whether evidence of detrimental reliance is required "to support an award of actual damages resulting from violations of the Fair Credit Billing Act (FCBA)." *Id.* at 882.

ANALYSIS: The court noted that a debtor's lack of detrimental reliance is immaterial to a determination of whether a creditor's violations of the FCBA resulted in actual damages. *Id.* at 887. The court reasoned that requiring "evidence of detrimental reliance on an unmade explanation would necessarily bar recovery of actual damages because such evidence could never exist." *Id.* at 887–88. Such a requirement would contradict the purpose of the FCBA by allowing creditors to "avoid actual damages under the FCBA by never responding to billing disputes—the exact conduct the statute aims to prevent." *Id.* at 888.

CONCLUSION: The 9th Circuit held that "evidence of detrimental reliance is not required to support an award of actual damages resulting from violations of [the FCBA]." *Id.*

***Pac. Indem. Co. v. Atlas Van Lines, Inc.*, 642 F.3d 702 (9th Cir. 2011)**

QUESTION: Whether the provision of the Carmack Amendment that sets an amount for the replacement value of household goods also limits the replacement value of household goods of undeclared value. *Id.* at 708.

ANALYSIS: The court noted that the Carmack Amendment of the Interstate Commerce Act (ICA) expressly subjects "replacement value" to a formula by the Surface Transportation Board ("the Board") and on applicable tariff rates. *Id.* The court also noted that Congress has delegated broad authority to the Board for the enforcement of the ICA. *Id.* 708–09. The court held that when the Carmack Amendment is ambiguous and the Board's rule provides a permissible construction of the statute, the court must defer to the Board's rule. *Id.* at 709. After finding the Carmack Amendment ambiguous, the court determined that the Board's rule limiting replacement value was a permissible interpretation of the Amendment because subsection (f) of the Carmack Amendment is entitled "Limiting liability of household goods carriers" and because the board had approved the limiting tariff rate after full notice and comment rulemaking. *Id.*

CONCLUSION: The 9th Circuit held the "replacement value" of household goods of undeclared value is subject to the limitations that the Carmack Amendment sets forth. *Id.* at 710.

***Reeb v. Thomas*, 636 F.3d 1224 (9th Cir. 2011)**

QUESTION: Whether a district court may exercise subject matter jurisdiction to review individualized residential drug abuse program (RDAP) determinations of the Bureau of Prisons (BOP). *Id.* at 1225.

ANALYSIS: As an initial matter, the court noted that "[t]he [Administrative Procedure Act (APA)] provides a cause of action for persons suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, but withdraws that cause of action to the extent that the relevant statute preclude[s] judicial review or the agency action is committed to agency discretion by law." *Id.* at 1226 (citation and internal quotations omitted). The court then noted that in determining whether or not the statute precludes judicial review the court looks to "express language, . . . structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Id.* Analyzing the plain meaning of 18 U.S.C. § 3625, the court found that the "statute specifies that the judicial review provisions of the APA . . . do not apply to 'any determination, decision, or order' made pursuant to 18 U.S.C. §§ 3621–3624." *Id.* at 1227. Rejecting petitioner's contention that "the

BOP's Administrative Remedy Program . . . provides a vehicle for aggrieved inmates to challenge . . . discretionary BOP determinations[,]" the court found that "a habeas claim cannot be sustained solely upon the BOP's purported violation of its own program statement because noncompliance with a BOP program statement is not a violation of federal law." *Id.*

CONCLUSION: The 9th Circuit held that "federal courts lack jurisdiction to review the BOP's individualized RDAP determinations made pursuant to 18 U.S.C. § 3621[.]" *Id.* at 1228.

***Simonoff v. Expedia, Inc.*, 643 F.3d 1202 (9th Cir. 2011)**

QUESTION: Whether, under the Fair and Accurate Credit Transactions Act (FACTA), an "'electronically printed' receipt includes an email receipt [with the credit card's expiration date] displayed on a computer screen." *Id.* at 1207.

ANALYSIS: The court noted that FACTA, which applies only to electronically printed receipts, "prohibits merchants from printing credit card expiration dates . . . on 'electronically printed receipts.'" *Id.* The 9th Circuit first looked to dictionary definitions of the word "print," which the court summarized as "a physical imprint onto paper or another tangible medium." *Id.* at 1208. The court then examined the physical position of the word "electronically," in relation to the word "print," determining that "electronically" did not alter the definition of "print," but rather served to differentiate "receipts printed with electronic devices from receipts printed by hand or by manual imprint." *Id.* The court went on to note that FACTA's staggered implementation provision applies only to devices that print physical receipts, "exclude[ing] machines that do no more than electronically display information." *Id.* at 1209. Finally, the court pointed out that FACTA's limited applicability to devices that generate receipts at the point of sale "furnishes additional evidence that a printed receipt is one given to the customer in a tangible form." *Id.* at 1210.

CONCLUSION: The 9th Circuit held that "'electronically printed' receipts include only receipts impressed onto a tangible medium by electronic devices at the point of sale or transaction, not receipts that are electronically transmitted to an email account or displayed on a computer screen" *Id.*

***Soriano-Vino v. Holder*, 653 F.3d 1096 (9th Cir. 2011)**

QUESTION: Whether the confidentiality provisions of the Special Agricultural Workers program (SAW) are contravened when information

is obtained as a result of questioning at an inspection checkpoint. *Id.* at 1099.

ANALYSIS: The 9th Circuit began by looking to statutory language to determine Congressional intent regarding the scope of confidentiality provisions. *Id.* at 1100–01. The court found "that Congress was as concerned with fraud in the application process as it was with shielding applicants from unauthorized disclosure of the SAW application contents." *Id.* at 1101. The court also noted that "[b]y its plain terms, the confidentiality provision applies expressly and exclusively to the application itself." *Id.* The court further reasoned that "[a]pplying the confidentially provision to information that was not obtained from the application would violate a cardinal principle of statutory interpretation—that a statute be analyzed and applied in accordance with its plain language." *Id.*

CONCLUSION: The 9th Circuit held that there was no violation of the SAW confidentiality provisions when the challenged information was obtained as the result of questioning at an inspection checkpoint rather than from the application itself." *Id.*

***United States v. Bibbins*, 637 F.3d 1087 (9th Cir. 2011)**

QUESTION: Whether the "resisting" offense of 36 C.F.R. § 2.32(a)(1) contains a mens rea element of willfulness. *Id.* at 1090–91.

ANALYSIS: The court considered the plain meaning of the word "resisting" and concluded that a person "cannot 'resist' someone or something without forming an intention to do so." *Id.* The court then noted that strict liability is "strong medicine" which has led it, on several other occasions, to read an intent element into other regulations. *Id.* at 1092. Finally, the court observed the Model Penal Code requires purposefulness in two misdemeanors that are similar to the "resisting" offense of 36 C.F.R. § 2.32(a)(1). *Id.* The court concluded the word "resisting" legally connotes an element of willfulness. *Id.*

CONCLUSION: The 9th Circuit held that a mens rea of willfulness is a required element of the "resisting" violation of § 2.32(a)(1). *Id.*

***United States v. Cotterman*, 637 F.3d 1068 (9th Cir. 2011)**

QUESTION: Whether "the search of a laptop computer that begins at the border and ends days later at a far removed government facility still falls under the border search doctrine." *Id.* at 1070.

ANALYSIS: The court first defined the issue as "whether the inherent power of the Government to subject incoming travelers to inspection before entry also permits the Government to transport property not yet cleared for entry away from the border to complete its

search." *Id.* at 1076. The court stated that "the border search doctrine applies to searches and seizures that occur hundreds or thousands of miles from the physical border." *Id.* The court noted that "the border search doctrine is guided—like all Fourth Amendment jurisprudence—by reason and practicality, not inflexible rules of time and space." *Id.* The court went on to explain that time and space are relevant only "to the extent that that they inform us whether an individual would reasonably expect to be stopped and searched at a geographic point beyond the international border." *Id.* at 1076–77. The court cited Supreme Court case law recognizing that a "thorough search of property under the border search power does not implicate an individual's privacy expectation . . . ." *Id.* at 1078. The court also relied on its prior cases regarding the transportation of complex property, specifically computer equipment, to "a secondary site in order to adequately conduct a meaningful search." *Id.*

CONCLUSION: The 9th Circuit held that "[s]o long as property has not been officially cleared for entry into the United States and remains in the control of the Government, any further search is simply a continuation of the original border search—the entirety of which is justified by the Government's border search power." *Id.* at 1079.

***United States v. Dann*, 652 F.3d 1160 (9th Cir. 2011)**

QUESTION ONE: Whether, under California law, "child support arrearages belong to a criminal defendant such that they may be assigned to a victim by a restitution order while the defendant's children are still minors." *Id.* at 1163.

ANALYSIS: The court explained that, "[a]s a general rule, a parent's obligation to pay child support runs to *the child*, rather than to the other parent, and the parent, to whom such support is paid, is but a mere conduit for the disbursement of that support." *Id.* at 1179 (internal quotation marks omitted). The court noted that in certain circumstances, the right of reimbursement may be assigned, but not while the children are minors. *Id.* The court added that these child support arrearages could not be assigned to a victim of a crime solely for the term of the defendant-parent's incarceration because of the troubling implications of denying support to children who will still need to be provided for. *Id.* at 1181.

CONCLUSION: The 9th Circuit held "that under California law, a creditor (in this case a crime victim with a restitution order) is not entitled to accrued child support payments owed to a custodial parent of children who have not yet reached the age of majority." *Id.* at 1180.

QUESTION TWO: "What it means to commit a crime 'in connection with' forced labor" under the U.S. Sentencing Guidelines Manual pertaining to "Peonage, Involuntary Servitude, Slave Trade, and Child Soldiers." *Id.* at 1177.

ANALYSIS: The court observed that, "the commentary in this section does not define the term and no court has interpreted the language of this enhancement." *Id.* The court then noted that there was an analogous provision in the Manual relating to unlawful possession of a firearm with commentary using the phrase "in connection with" to mean "the potential of facilitating, another felony offense or another offense." *Id.* at 1177–78. The court then reasoned that, "[c]learly, the drafters must be held to define terms consistently throughout the Guidelines. Thus 'in connection with' must mean *facilitation*." *Id.* at 1178.

CONCLUSION: The 9th Circuit held "[i]n the forced labor context, a felony is committed 'in connection with' forced labor where that crime facilitates or has the potential of facilitating forced labor—or conversely where forced labor facilitates or has the potential of facilitating another felony offense." *Id.* at 1177–78.

***United States v. Evanston*, 651 F.3d 1080 (9th Cir. 2011)**

QUESTION: "[W]hether a district court may, over defense objection and after the administration of an unsuccessful *Allen* charge, inquire into the reasons for a trial jury's deadlock and then permit supplemental argument focused on those issues, where the issues in dispute are factual rather than legal." *Id.* at 1082.

ANALYSIS: The court first established that an Allen charge "is a supplemental instruction given by the court to reach a verdict after that jury has been unable to agree after some period of deliberation." *Id.* at 1082. The court noted that courts generally enjoy great discretion in regulating jury deliberations, but the court's exercise of discretion in managing deliberations is not without limits. *Id.* at 1084. The court illustrated one such limit, that much caution must be taken not to influence or coerce the jury when intervening to stop a jury deadlock. *Id.* at 1084–85. The court noted that by allowing additional argument to supplement a particular issue, courts may be wrongfully highlighting a particular issue, thus overshadowing other issues in the case. *Id.* at 1086–87. By allowing this type of inquiry, the court noted it may be sanctioning an injustice. *Id.*

CONCLUSION: The 9th Circuit concluded "that allowing such a procedure in a criminal trial is an abuse of the discretion accorded district courts in the management of jury deliberations." *Id.* at 1082.

***United States v. Harrell*, 637 F.3d 1008 (9thCir. 2011)**

QUESTION: Whether "the 'relating to' parentheticals within [the Aggravated Identity Theft Statute,] 18 U.S.C. § 1028A(c) limit the statute's otherwise clear articulation of which offenses may serve as predicates for application of § 1028A(a)." *Id.* at 1009.

ANALYSIS: The court's analysis focused on the language of the statute, considering "not only the words used in a particular section but also the statute as a whole." *Id.* at 1010. The court opined that the plain meaning of the phrase "'relating to' does not itself imply exclusivity; rather it plainly reflects a descriptive character." *Id.* at 1010–11. Moreover, to accord the parenthetical a limiting effect would make other provisions of the statute superfluous. *Id.* at 1011. The court further observed that, when Congress intends a limiting clause it uses clear and distinct language such as that provided in § 1028A(c)(4). *Id.* Lastly, the court remarked that other circuits have widely understood Congress' use of "relating to" parentheticals to have a descriptive import. *Id.*

CONCLUSION: The 9th Circuit held that "the plain text of § 1028A(c) demonstrates that the 'relating to' parentheticals serve as descriptive aids intended by Congress to make reading the statute easier[.]" *Id.* (internal quotation marks omitted).

***United States v. Sanchez*, 639 F.3d 1201 (9th Cir. 2011)**

QUESTION: Whether an individual under a "no contact" court order that does not explicitly prohibit "physical force, abuse or harm" commits an unlawful act under 18 U.S.C. § 922(g)(8) by possessing a firearm. *Id.* at 1202–05.

ANALYSIS: The court first observed that "[t]he [1st, 4th, and 11th Circuits] have reached a consensus: [subsection] 8(C)(ii) is satisfied by a court order that includes explicit terms, similar—if not identical—in meaning to 'the use of physical force that would be reasonably expected to cause bodily injury.'" *Id.* at 1204 (internal citations omitted). The court then noted that no court "has found that a court order barring 'no contact'—but containing no explicit prohibitions on physical force, abuse or harm—satisfies 8(C)(ii)." *Id.* at 1205. The court stated that the statutory language required "explicit" reference to these prohibitions and that the term "explicit" should be given its plain meaning. *Id.*

CONCLUSION: The 9th Circuit held that "while a conviction under 18 U.S.C. § 922(g)(8) does not require that the precise language of [subsection] (8)(C)(ii) be contained in a court order, a court order must contain explicit terms substantially similar in meaning to the language of (8)(C)(ii)" for a defendant to be guilty of violating a "no contact" court order for possession of a firearm. *Id.* at 1205.

***Van Dusen v. United States Dist. Court for the Dist. of Ariz.*, 654 F.3d 838 (9th Cir. 2011)**

QUESTION: Whether a district court may rule on the applicability of an arbitration provision to a § 1 exemption to the Federal Arbitration Act (FAA), or whether it must instead delegate that threshold question to an arbitrator. *Id.* at 843.

ANALYSIS: The court explained that "[the] question of arbitrability is an issue for judicial determination [unless] the parties clearly and unmistakably provide otherwise." *Id.* The court noted that, though a district court may compel arbitration under § 4 of the FAA, § 1 "explicitly carves out a category of cases exempt from the provisions of the Act." *Id.* at 843–44. The court further noted that "a district court has no authority to compel arbitration under § 4 where § 1 exempts the underlying contract from the FAA's provisions." *Id.* The court reasoned that "whatever the contracting parties may or may not have agreed upon is a distinct inquiry from whether the FAA confers authority on the district court to compel arbitration." *Id.* at 844.

CONCLUSION: The 9th Circuit held that "the best reading of the law requires the district court to assess whether a § 1 exemption [of the FAA] applies before ordering arbitration." *Id.* at 846.

TENTH CIRCUIT

***Countryman v. Farmers Ins. Exch.*, 639 F.3d 1270 (10th Cir. 2011)**

QUESTION: Whether a defendant's failure to attach a co-defendant's summons to a joint notice of removal constitutes a *de minimis* procedural defect that would necessitate remand of the case to state court. *Id.* at 1272.

ANALYSIS: The court observed that a minority of district courts within the circuit have held a "removing party's failure to attach the required state court papers to a notice of removal is a fatal defect that necessitates remand." *Id.* The court also noted a majority view among district courts have held a "removing party's failure to attach the required state court papers to a notice of removal is a mere procedural defect that is curable." *Id.*

CONCLUSION: The 10th Circuit agreed, without discussion, with the majority view in holding that the "omission of a summons from a defendant's joint notice of removal was an inadvertent, minor procedural defect that was curable, either before or after expiration of the thirty day removal period." *Id.* at 1273.

***Salazar v. Butterball, LLC*, 644 F.3d 1130 (10th Cir. 2011)**

QUESTION: Whether "donning and doffing poultry processing workers' personal protective equipment is 'changing clothes,'" under 29 U.S.C. § 203(o) of the Fair Labor Standards Act (FLSA). *Id*. at 1133 (internal quotations omitted).

ANALYSIS: The court first noted that the meaning of the phrase "changing clothes" is ambiguous, explaining, "[a]s evidenced by the differing interpretations of several courts and the United States Department of Labor Wage and Hour Division . . . , the word 'clothing' is susceptible of multiple meanings, particularly in the industrial labor context where specialized apparel and equipment is often worn." *Id*. at 1137. The court held that the "donning and doffing" provision of the FLSA was not an "exemption" within the Act and thus was not required to be read narrowly or construed in favor of the plaintiff by operation of law. *Id*. at 1138. The court reasoned that Congress employed language to be used in its ordinary meaning. *Id*. at 1139. The court went on to hold that "[a]n expansive construction is consistent with the ordinary meaning of the word 'clothes,' and makes more sense than a construction that would differentiate between apparel and equipment designed for safety purposes and other apparel and equipment, or between non-unique and unique apparel and equipment." *Id*. at 1138–39.

CONCLUSION: The 10th Circuit held that "donning and doffing the [personal protective equipment] at issue" is considered changing clothes. *Id.* at 1136.

***United States v. Acosta-Gallardo*, 656 F.3d 1109 (10th Cir. 2011)**

QUESTION: Whether venue is proper for a charge of using the telephone to facilitate a drug conspiracy, where alleged telephone calls were neither placed nor received in the venue district.. *Id.* at 1119.

ANALYSIS: The court first stated that 21 U.S.C. § 843(b) does not contain a specific venue provision. *Id.* The court then analogized this offense to venue questions of firearm offenses that were ancillary to kidnapping charges that cross state lines, even if the firearm offense was not "committed" in the venue state. *Id.* at 1120. Based on this precedent, the court reasoned that the defendant must be complicit in an underlying drug felony, and found that venue for a "violation committed in furtherance of a conspiracy would be proper in any district where the communication facility was used or the underlying conspiracy was committed." *Id.* at 1122.

CONCLUSION: The 10th Circuit held that venue may be proper for the inchoate crime of conspiracy when a phone call that was placed and

received in a different venue and "touched" the present venue facilitated that conspiracy. *Id.* at 1119.

***United States v. Langford*, 641 F.3d 1195 (10th Cir. 2011)**

QUESTION: "[W]hether there is federal jurisdiction for a victimless crime, perpetrated by a non-Indian in Indian country." *Id.* at 1197.

ANALYSIS: The court stated that, pursuant to a long line of Supreme Court cases, "federal jurisdiction over crimes in Indian country is contingent upon the existence of either an Indian victim or perpetrator." *Id.* Despite the plain language of several criminal statutes that granted federal jurisdiction, the Supreme Court "created an exception premised upon the sovereign equality of the individual states." *Id.* at 1198. The court noted that the Supreme Court has suggested in dicta that the same principle applies to victimless crimes by non-Indians in Indian country. *Id.* at 1199.

CONCLUSION: The 10th Circuit held that there is no federal jurisdiction and that "states possess exclusive criminal jurisdiction over crimes occurring in Indian country if there is neither an Indian victim, nor an Indian perpetrator." *Id.* at 1197.

ELEVENTH CIRCUIT

***John Wiley & Sons, Inc. v. Kirtsaeng*, 654 F.3d 210 (2d Cir. 2011)**

QUESTION: Whether the first sale doctrine, codified at 17 U.S.C. § 109(a) of the Copyright Act, applies to works manufactured outside of the United States. *Id.* at 214.

ANALYSIS: The court first noted that the district courts within the 11th Circuit have determined that § 109(a) does not apply to foreign-manufactured goods imported into the United States. *Id.* at 212 (internal citations omitted). The 9th Circuit previously held that "§109(a) does not apply to items manufactured outside the United States unless they were previously imported and sold in the United States with the copyright holder's permission." *Id.* (internal citation omitted). The court also noted that the Supreme Court held that 17 U.S.C. § 109(a), in conjunction with 17 U.S.C. § 106(a) limits the scope of 17 U.S.C. § 602(a). *Id.* at 217 (internal citation omitted). The court then determined that the text of § 109(a) was too ambiguous to rely on a textual analysis. *Id.* at 220. Interpreting § 109(a) to apply to works manufactured outside of the United States, however, would render § 602 useless in most cases. *Id.* at 221. On the other hand, interpreting § 109 to not apply to works manufactured outside of the United States would

allow copyright holders to control the circumstances in which copies manufactured abroad could be legally imported into the United States. *Id.*

CONCLUSION: The 11th Circuit held that the first sale doctrine, codified by § 109(a), did not apply when all of the books in question were manufactured outside of the United States. *Id.* at 222.

***United States v. Hung Thien Ly*, 646 F.3d 1307 (11th Cir. 2011)**

QUESTION: Whether a district court is required to correct a *pro se* defendant who chooses not to testify because the defendant is not aware that he is able to testify in narrative form. *Id.* at 1313.

ANALYSIS: The court first stated that a "*pro se* criminal defendant may to testify in narrative form," *id.* at 1312, and that the right to choose is personal, as well as fundamental, and the defendant must make this decision himself." *Id.* at 1315–16. Additionally, the court noted that, "[l]ike other fundamental trial rights, the right to testify is truly protected only when the defendant makes his decision knowingly and intelligently." *Id.* A *pro se* defendant, the court stated, foregoes the benefit of an attorney who could advise him and provide necessary information to make a knowing and intelligent decision about whether or not to testify. *Id.* at 1314. Thus, the court reasoned that a *pro se* defendant also foregoes a remedy under the ineffective assistance of counsel paradigm. *Id.* Therefore, the court decided that "a district court can—and sometimes must—aid an ignorant *pro se* defendant." *Id.* at 1316. The court stated that this does not mean that "district courts must engage in a colloquy with every *pro se* defendant regarding his decision whether to testify," but, a district court may not begin the colloquy and subsequently reinforce the defendant's misunderstanding of the choice to testify. *Id.*

CONCLUSION: The 11th Circuit held that absent evidence to the contrary, district courts should presume that the defendant, even a *pro se* defendant, has made a knowing and intelligent decision about whether to testify. *Id.* at 1317. However, where a district court has knowledge that a defendant has not exercised his right to decide whether to testify knowingly and intelligently because of a misunderstanding, the district court is required to correct defendant's misunderstanding. *Id.* at 1316.

***United States v. Willis*, 649 F.3d 1248 (11th Cir. 2011)**

QUESTION: "Whether harmless error applies to a violation of 18 U.S.C. § 3552(d)[:]" granting a defendant ten days to review a pre-sentence investigation report (PSR). *Id.* at 1257.

ANALYSIS: The court first noted that "[the] purpose of the ten-day requirement is to ensure accuracy and fairness in sentencing by allowing

the defendant adequate time to review and verify the information contained in the PSR prior to sentencing." *Id.* at 1256–57 (internal quotation marks omitted). The court then noted that "at least two other courts of appeals have applied harmless error to untimely disclosure of a PSR," in holding that a probation officer's delinquency in filing an amended presentence report did not significantly affect the defendant's right to a fair sentencing hearing. *Id.* at 1257. The court further reasoned that "federal statutes and criminal-procedure rules lay a background assumption of harmless-error analysis." *Id.*

CONCLUSION: The 11th Circuit held that "§ 3552(d) is susceptible to harmless-error analysis." *Id.*

***United Steel, Paper and Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union AFL-CIO-CLC Local 320 v. Wise Alloys, LLC*, 642 F.3d 1344 (11th Cir. 2011)**

QUESTION: Whether "a party adversely affected by an arbitration award in § 301 [of the Labor Management Relations Act (LMRA)] arbitration cases must challenge the award by judicial action within the statute of limitations or else be barred from raising any defenses to the award." *Id.* at 1352.

ANALYSIS: The 7th Circuit previously reasoned that "statutes of limitations apply to defenses as well as suits because arbitration awards are themselves the creations of statutes, not common law." *Id.* The 11th Circuit agreed with the 7th Circuit and reasoned that where a right of action which did not exist by the common law is provided by statute, the statute fixes the time period in which the right may be enforced and "the time so fixed becomes a limitation" on that right. *Id.*

CONCLUSION: The 11th Circuit held that a party in a § 301 arbitration case who is adversely affected "must challenge the award by judicial action within the statute of limitations or else be barred from raising any defense to the award." *Id.*

FEDERAL CIRCUIT

***In re BP Lubricants USA Inc.*, 637 F.3d 1307 (Fed. Cir. 2011)**

QUESTION: Whether the particularity requirement of Fed. R. Civ. P. 9(b) applies to false marking claims under 35 U.S.C. § 292. *Id.* at 1310.

ANALYSIS: The court noted that Rule 9(b) requires a plaintiff to plead "with particularity the circumstances constituting fraud or mistake." *Id.* The court added that Rule 9(b) serves as a safety valve by

assuring that only viable claims of fraud and mistake proceed to discovery and preventing the use of discovery as a fishing expedition. *Id.* The court pointed to an analogous statute, the False Claims Act (FCA), in which the plaintiff must also meet the requirements of Rule 9(b), because the FCA "condemns fraud, 'but not negligent errors or omissions.'" *Id.* The court noted that, "like the [FCA], § 292 condemns fraudulent or false marking," and "Rule 9(b)'s gatekeeping function is also necessary to assure that only viable claims reach discovery or arbitration." *Id.* at 1311.

CONCLUSION: The 11th Circuit held that Rule 9(b)'s particularity requirement applies to false marking claims under § 292. *Id.* at 1311.

***Smith v. Shinseki*, 647 F.3d 1380 (Fed. Cir. 2011)**

QUESTION: Whether the Veterans Administration (VA) "is obligated to supply a vocational expert as a matter of course in cases where the veteran cannot perform his old job" to determine whether the veteran qualifies for total disability based on individual unemployability (TDIU) status. *Id.* at 1383.

ANALYSIS: The court noted first that "[t]he explicit reference to medical expert reports without a reference to vocational expert reports provides evidence that Congress did not view such industrial surveys as 'necessary.'" *Id.* at 1384. Also, the court examined the administrative scheme of the VA and concluded that the "VA regulation governing TDIU claims includes no requirement that the agency consider the availability of work and makes no reference to vocational experts or industrial surveys." *Id.* Finally, in deferring to the Veteran Court's interpretation of the TDIU regulation, the court explained that since "a TDIU determination does not require any analysis of the actual opportunities available in the job market, [it] decline[d] to conclude that an industrial survey is 'necessary' for that purpose in connection with TDIU claims." *Id.* at 1385.

CONCLUSION: The Federal Circuit held that the VA is not obligated to supply a vocational expert in TDIU determinations. *Id.*

D.C. CIRCUIT

***Pettaway v. Teachers Ins. & Annuity Ass'n of Am.*, 644 F.3d 427 (D.C. Cir. 2011)**

QUESTION: Whether, in an Employment Retirement Income Security Act (ERISA) benefits denial case, the court may consider multiple presented documents in order to determine if a "[particular]

benefit[s] plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Id.* at 433 (internal quotations omitted).

ANALYSIS: The District of Columbia Circuit first looked to the language of the statute and stated that "ERISA's statutory text suggests that multiple plan documents can be legally relevant." *Id.* The court reasoned that ERISA also "clearly contemplates multiple relevant documents" because it states that there are multiple documents that will lay out the terms of the plan. *Id.* at 434. Finally, the court noted that other circuits have "generally concluded that multiple plan documents are legally relevant." *Id.*

CONCLUSION: The D.C. Circuit determined that a court may correctly consider multiple documents to determine whether the plan gives an administrator or fiduciary the authority to determine benefits eligibility. *Id.*