First Impressions

The following pages contain brief summaries, drafted by the members of the Seton Hall Circuit Review, of issues of first impression identified by a federal court of appeals opinion announced between February 1, 2006 and August 31, 2006. This collection is organized by circuit.

Each summary presents an issue of first impression, a brief analysis and the court's conclusion. It is intended to give only the briefest synopsis of the first impression issue, not a comprehensive analysis. This compilation makes no claim to be exhaustive, but will hopefully serve the reader well as a reference starting point.

FEDERAL CIRCUIT

Ruggieri v. Merit Sys. Prot. Bd., 454 F.3d 1323 (Fed. Cir. 2006)

QUESTION: "[W]hether an agency triggers the Whistleblower Protection Act by 'fail[ing] to take . . . a personnel action,' 5 U.S.C. § 2302(b)(8), when the agency declines to hire an applicant pursuant to a vacancy announcement, but instead of hiring a different person cancels the vacancy announcement and hires no one for the position at that time." *Id.* at 1325.

ANALYSIS: The court recognized that the Whistleblower Protection Act "provides that an appointment is a personnel action and that a failure to make an appointment is a trigger for an Individual Right of Action appeal." *Id.* at 1326. The agency's cancellation of the vacancy announcement and failure to hire anyone for the position "is sufficient, under the plain language of the statute, to constitute a 'fail[ure] to take . . . a personnel action.'" *Id.* at 1326-27.

CONCLUSION: The Federal Circuit held that the applicant's "evidence regarding his nonselection for the position of electrical engineer was sufficient to satisfy the requirement that an appellant in an Individual Right of Action appeal make a nonfrivolous allegation that the agency has failed to take a personnel action." *Id.* at 1327.

***Jentoft v. United States*, 450 F.3d 1342 (Fed. Cir. 2006)**

QUESTION: "[W]hether a dual status [National Guard] technician could be considered a 'civilian' employee for purposes of the Equal Pay Act." *Id.* at 1345.

ANALYSIS: The court looked to the language of the Equal Pay Act, 29 U.S.C. § 216(d)(1), which proscribes an employer from paying wages to an employee at a rate less than that which it pays employees of the opposite sex for "equal work on jobs the performance of which requires equal skill, effort, and responsibility." *Id.* at 1348. Further, the court noted that for purposes of § 216, an employee can be "any individual employed by the Government of the United States . . . as a civilian in the military departments (as defined in section 102 of Title 5)." *Id.* The court observed that "neither party . . . contests that [appellant] was a dual status National Guard technician," and that the National Guard Technician Act § 709(b) states "a dual status technician position is 'defined' under [10 U.S.C.] § 10216(a)," and finally that § 10261(a) "provides '[f]or purposes of this section and *any other provision of law*, a military technician (dual status) is a Federal civilian employee.'" *Id.* Thus, the court found that "the plain language of § 10216(a) makes clear that [appellant] has a justiciable claim under the Equal Pay Act." *Id*. The court further noted that "given the plain language of § 10216(a), we have no discretion *not* to adjudicate [appellant's] rights under the Equal Pay Act, even under the *Feres* [*v. United States*, 340 U.S. 135 (1950)] doctrine . . . ." *Id.* at 1349.

CONCLUSION: The Federal Circuit held that the Claims Court "erred in determining that [appellant] was not a federal civilian employee for the purpose of the Equal Pay Act." *Id.* at 1343.

***Hinck v. United States*, 446 F.3d 1307 (Fed. Cir. 2006)**

QUESTION: "[W]hether the Court of Federal Claims has jurisdiction over [Internal Revenue Code, 18 U.S.C.] § 6404(e)(1) interest abatement decisions." *Id.* at 1310.

ANALYSIS: The court noted that "[p]rior to 1996, several courts had held that district courts had subject matter jurisdiction over § 6404(e)(1) claims, but that the Administrative Procedure Act ("APA") barred judicial review of those claims." *Id*. Furthermore, "[s]ubsequent to the [enactment of § 6404(h) granting jurisdiction to the Tax Courts in 1996], . . . courts considering that same issue have not been in agreement." *Id.* at 1311. The court analyzed the statute's language and legislative history and concluded that "[b]ecause § 6404(h) provides a specific procedure for reviewing IRS determinations of interest abatement, specifies that the proper forum for those reviews is the Tax Court, and grants the Tax Court the power to issue an abatement . . . Congress intended the Tax Court to be the sole forum in which denials of interest abatement claims may be challenged." *Id.* at 1314. The court further rejected the 5th Circuit's argument against "construi[ing] differently a statute that is clear on its face." *Id.* at 1316.

CONCLUSION: The Federal Circuit determined "that § 6404(h) grants exclusive subject matter jurisdiction to the Tax Court to review the IRS's denials of interest abatement." *Id*.

***In re Slokevage*, 441 F.3d 957 (Fed. Cir. 2006)**

QUESTION: Whether a determination that a trade dress is a product design is a legal or factual determination. *Id.* at 959.

ANALYSIS: The court explained that the answer to such a question is similar to the process of determining whether a trademark is "inherently distinctive" and "whether a mark is descriptive," both of which are factual determinations. *Id.* The court noted that these sorts of determination have to be ones of fact, as they are based on customer perception and "based on testimony, surveys, and other evidence." *Id.* at 960.

CONCLUSION: The court found that a trade dress product design is a factual determination. *Id.* at 959.

***Intel Corp. v. Commonwealth Sci. & Indus. Research Org.*, 455 F.3d 1364 (Fed. Cir. 2006)**

QUESTION: Whether business negotiations with an agency of a foreign state, which do not result in a binding contract, qualify as "commercial activity," making the foreign agency immune to the

jurisdiction of the United States courts under 28 U.S.C. § 1605(a)(2) in a declaratory judgment action. *Id.* at 1369.

ANALYSIS: The court examined the legislative history of 28 U.S.C. § 1603(d), which creates an exception to the sovereign immunity of a foreign state in a suit based on commercial activity, and noted that the drafters contemplated granting the courts wide latitude in interpreting the meaning of "commercial activity" under the statute. *Id*. at 1370. Relying on a Supreme Court interpretation of another immunity statute, § 1605(a)(2), the court adopted the principle that the exception to sovereign immunity applied when the foreign state exercised powers that private individuals could also use. *Id*. The court also held that even an unconsummated contract could constitute commercial activity under § 1603(d). *Id*. Finally, the court held that this declaratory judgment action could be considered "based on" commercial activity because the evidence of commercial activity would be used to support elements of the claim. *Id*. at 1371.

CONCLUSION: The court affirmed the district court's judgment that the foreign agency defendant was not entitled to immunity. *Id*.

D.C. CIRCUIT

Abigail Alliance v. Von Eschenbach, 445 F.3d 470 (D.C. Cir. 2006)

QUESTION: "[W]hether the Due Process Clause protects the right of terminally ill patients to decide, without FDA interference, whether to assume the risks of using potentially life-saving investigational new drugs that the FDA has yet to approve . . . but . . . are safe enough for further testing on a substantial number of human beings." *Id.* at 472.

ANALYSIS: The court noted that "the right at issue, carefully described, is the right of a mentally competent, terminally ill adult patient to access potentially life-saving post-Phase I investigational drugs, upon a doctor's advice, even where that medication carries risks for the patient." *Id*. The court found that "upon examining 'our Nation's history, legal traditions, and practices,' that the government has not blocked access to new drugs throughout the greater part of our Nation's history." *Id.* Furthermore, "the right claimed by [appellants] can be inferred from the Court's conclusion in *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 279 (1990), that an individual has a due process right to refuse life-sustaining medical treatment." *Id.* The court noted that "here, the claim implicates a similar right . . . to access

potentially life-sustaining medication where there are no alternative government-approved treatment options." *Id.*

CONCLUSION: The D.C. Circuit held that "[w]here there are no alternative government-approved treatment options, a terminally ill, mentally competent adult patient's informed access to potentially life-saving investigational new drugs determined by the FDA after Phase I trials to be sufficiently safe for expanded human trials warrants protection under the Due Process Clause." *Id.* at 486.

NRDC v. EPA, No. 04-1438, 2006 U.S. App. LEXIS 22074 (D.C. Cir. Aug. 29, 2006)

QUESTION: Whether "decisions" made by an international committee under the Montreal Protocol after the passage of the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, tit. VI, 104 Stat. 2399, 2648 are enforceable as law in the United States. *Id.* at *21.

ANALYSIS: The Natural Resource Defense Council ("NRDC") claimed that the EPA rules violated the post-ratification agreements of the Montreal Protocol. *Id.* at *18. The court determined that "NRDC's interpretation raises significant constitutional problems. If the 'decisions' are 'law'—enforceable in federal court like statutes or legislative rules—then Congress either has delegated lawmaking authority to an international body or authorized amendments to a treaty without presidential signature or Senate ratification, in violation of Article II of the Constitution." *Id.* at *20. The court noted that "[t]he Supreme Court has not determined whether decisions of an international body created by treaty are judicially enforceable." *Id.* The court compared this situation to the establishment of the International Court of Justice, noting that "[i]n *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929. 942 (D.C. Cir. 1988), we held that rulings of the ICJ do not provide 'substantive legal standards for reviewing agency actions,' because the rulings, though authorized by the ratified treaty, were not themselves self-executing treaties." *Id.*

CONCLUSION: The court concluded that "[w]ithout congressional action . . . side agreements reached after a treaty has been ratified are not the law of the land; they are enforceable not through the federal courts, but through international negotiations." *Id.* at *26.

FIRST CIRCUIT

Senior v. NSTAR Elec. & Gas Corp., 449 F.3d 206 (1st Cir. 2006)

QUESTION: The court construed the standard it should employ when modifying "labor agreements [that provide] for vested lifetime dental plan benefits." *Id.* at 207.

ANALYSIS: The court stated that an unambiguous contract "must be enforced according to its terms, under both the common law and labor law." *Id.* at 219. Ambiguity, the court explained, "is generally a question of law for the judge, and is subject to de novo review." *Id.* The court noted the Supreme Court's instruction that if a court finds ambiguity in a labor agreement, "it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage, and customs pertaining to such agreements." *Id.* at 220.

CONCLUSION: The court held that it must examine "related agreements, the practices in the company, and the custom and usage as to retiree dental benefits" in order to determine whether those benefits have been vested and whether they are subject to change. *Id.* at 221.

Narragansett Indian Tribe v. Rhode Island, 449 F.3d 16 (1st Cir. 2006)

QUESTION: Whether "officers of the State, acting pursuant to an otherwise valid search warrant, [may] enter upon tribal lands and seize contraband (in this case, unstamped, untaxed cigarettes) owned by the Tribe and held by it for sale to the general public." *Id.* at 18.

ANALYSIS: The resolution of a land dispute between the Narragansett Indian Tribe and the State of Rhode Island entailed an agreement ("the J-Mem") under which the Tribe received a tract of land from the State, and the Tribe agreed that "all laws of the State of Rhode Island shall be in full force and effect on the settlement lands." *Id.* at 19. Rhode Island agreed to exempt the Tribe's land from local taxation. *Id.* Thereafter, Congress passed the Settlement Act, which put the terms of the agreement into law. *Id.*

Rhode Island has a cigarette tax scheme that includes a special excise tax requiring the vendor to purchase a special stamp and affix it to every cigarette pack. *Id.* at 20. Any pack without such a stamp is considered contraband in Rhode Island. *Id.* The Tribe opened a cigarette shop on its lands, but did not comply with any of the tax laws for its cigarettes, which it sold to the general public. *Id.* Pursuant to a search warrant issued by a Rhode Island state court, the state police raided the Tribe's shop and seized the contraband cigarettes. *Id.*

The court found that in light of the history of the negotiations surrounding the J-Mem and the Settlement Act, the Tribe's concession allowing Rhode Island laws to be enforced on its land was an essential part of the consideration Rhode Island received in exchange for its grant of lands to the Tribe. *Id.* at 22. The court held that in both the J-Mem and the Settlement Act, the Tribe explicitly waived its sovereign immunity from Rhode Island law. *Id.* at 25. The court found Rhode Island free to enforce its laws on Tribal property absent federal preemption, which the court did not find here. *Id.* at 23.

CONCLUSION: Essentially, "the J-Mem and the Settlement Act authorized state officers to enter the settlement lands and execute a search warrant as part of the enforcement of the State's cigarette tax scheme." *Id.* at 31.

United States v. Leja, 448 F.3d 86 (1st Cir. 2006)

QUESTION: Whether a defendant's failure to personally sign a jury waiver constituted reversible error. *Id.* at 88.

ANALYSIS: The record showed that even though the defendant did not sign his jury waiver, his lawyer had signed the waiver, he was present when the judge discussed waiving the jury, and the defendant assented to the jury waiver by facial expressions after the judge had fully explained the ramifications of the waiver. *Id.* at 89-91. The court noted that although the Bench Book for Federal District Court Judges makes a defendant's signature mandatory, the Bench Book is not binding law, and the controlling federal provision, FED. R. CRIM. P. 23(a), does not address the matter. *Id.* at 93. The court found the jury waiver valid, emphasizing the defendant's business sophistication and college education, as well as the defendant's active involvement in his own defense. *Id.* at 94-95.

CONCLUSION: The court concluded that because the "defendant knowingly, voluntarily, and intelligently waived his right to a jury trial . . . the errors committed do not warrant reversal of the conviction." *Id.* at 96.

Furr v. Brady, 440 F.3d 34 (1st Cir. 2006)

QUESTION: In a petition for habeas corpus relief, whether "subsection 10G(a) [of the Massachusetts Armed Career Criminal Statute] is 'unduly vague' because it failed to place [defendant] on fair and adequate notice that his prior juvenile adjudications counted as prior 'convictions,' thereby contravening his federal due process rights." *Id.* at 42.

ANALYSIS: The court adopted the state court's finding that the subsection's cross-reference to the definition of "violent crime" communicated "a legislative intent that an adjudication of a juvenile as a youthful offender, a form of aggravated juvenile delinquency, be taken as a 'conviction' for purposes of [§] 10G." *Id.*

CONCLUSION: The 1st Circuit affirmed the district court's denial of the defendant's petition for habeas corpus relief. *Id.* at 35.

***Kater v. Maloney*, 459 F.3d 56 (1st Cir. 2006)**

QUESTION: Whether "in a federal habeas proceeding on de novo review of a state court's judgment, . . . [the federal court] may apply a new rule of law, which was not clearly established by existing precedent at the time the state conviction became final," where the state court's judgment was reached by "not adjudicat[ing] the presented constitutional issue on the merits." *Id.* at 58, 62.

ANALYSIS: The court noted that this issue arose in the aftermath of a state court's judgment under *Fortini v. Murphy*, 257 F.3d 39 (1st Cir. 2001) which held that, "post-AEDPA, preserved federal constitutional claims on habeas would be reviewed de novo, when such claims were not 'adjudicated on the merits in State court proceedings.'" *Id.* at 62. However, it rejected the defendant's claim that this allowed the court to promulgate a new rule to decide those issues. *Id.* at 62-63. The 1st Circuit determined that *Teague v. Lane*, 489 U.S. 288 (1989) still applied and required that the court follow clearly established federal precedent. *Id.* at 63.

CONCLUSION: The court held that "[d]e novo review under *Fortini* does not eliminate the need for a habeas court to engage in the analysis mandated by *Teague*." *Id.*

SECOND CIRCUIT

***United States v. Temple*, 447 F.3d 130 (2d Cir. 2006)**

QUESTION: Whether a reasonable jury could find that the defendant, a former IRS employee, who at the time of her arrest threatened police detectives that she would initiate an audit of their incomes, violated 26 U.S.C. § 7214, which imposes criminal liability upon "any officer or employee of the United States acting in connection with any revenue law . . . who is guilty of willful oppression under color of law." *Id*. at 137.

ANALYSIS: The court began by parsing the phrase "willful oppression under color of law," and, having found that the defendant's behavior was both "willful" and "oppressive," moved to determine whether she acted under "color of law." *Id*. The court recalled an earlier ruling that "misuse of power, possessed by virtue of [federal] law and made possible only because the wrongdoer is clothed with the authority of [federal] law, is action taken 'under color of [federal] law.'" *Id*. at 138. The court, while conceding that it is difficult to delineate "actions taken under color of law from personal pursuits," decided that the difference hinges on "whether the [action] was 'made possible only because the wrongdoer [was] clothed with the authority of [federal] law.'" *Id*. Indeed, the court emphasized, the defendant must have the "perceived ability to invoke . . . real or apparent authority." *Id*. at 139.

CONCLUSION: A reasonable jury could find that, although the defendant made the threats while under police control, she nonetheless acted under color of law. *Id*.

At Home Corp. v. Cox Commc'ns, Inc., 446 F.3d 403 (2d Cir. 2006)

QUESTION: "[W]hether an insider's acquisition of stock in the issuer by acquisition of a third-party intermediary company gives rise to . . . liability [under section 16(b) of the Securities and Exchange Act of 1934] for short-swing profits (when matched with a sale of the issuer's stock)." *Id*. at 408.

ANALYSIS: The court explained that "[s]ection 16(b) of the Securities and Exchange Act of 1934 requires insiders to disgorge profits earned in short-swing trading . . . 'which may have been obtained . . . by reason of [the insider's] relationship to the issuer . . . from any purchase and sale, or any sale and purchase, of any equity security of such issuer.'" *Id*. at 407. The court found that "[u]se of the singular ('any equity security' and 'such issuer') supports an inference that a transaction in the equity securities of one company cannot be matched with a transaction in the equity securities of another." *Id*. at 409. Moreover, the court noted that this reasoning was affirmed by the SEC's observation that "the risks that arise when the issuer's stock is acquired indirectly by merger with another company" make it unlikely that companies will use this method as a vehicle for circumventing § 16(b). *Id*. The court found that such a method "would be like speculating in tractors by buying a farm." *Id*.

CONCLUSION: "[S]ection 16(b) generally does not take account of transactions in which an insider's acquisition of an enterprise holding the issuer's stock entails appreciable risks and opportunities independent of

the risks and opportunities that inhere in the stock of the issuer." *Id*. at 410.

***S.N. v. Pittsford Cent. Sch. Dist.*, 448 F.3d 601 (2d Cir. 2006)**

QUESTION: "[W]hether a parent representing his child in an IDEA case can obtain attorneys' fees." *Id*. at 603.

ANALYSIS: At the outset, the court noted that the 3rd and 4th Circuits have answered this question in the negative, relying on a Supreme Court decision concerning the Civil Rights Attorney's Fees Award Act. *Id*. In that case, the Supreme Court held that the primary purpose of a provision authorizing the court to award "a reasonable attorney's fee" was to "enable potential plaintiffs to obtain the assistance of competent counsel in vindicating their rights." *Id*. As such, the Supreme Court argued, the "statutory policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case," and thus courts should not award attorneys' fees to pro se litigants. *Id*. Applying this reasoning to the present case, the court found that awarding attorneys' fees to parents representing their children in IDEA cases would create a similar disincentive for parents to obtain counsel, and thus would jeopardize the child's opportunity for effective representation. *Id*. at 603.

CONCLUSION: The court held that "[i]n order to best promote the effective litigation of a child's meritorious claims under the IDEA, we hold that attorney-parents are not entitled to attorneys' fees." *Id*. at 604.

***City of New York v. Permanent Mission of India to the U.N.*, 446 F.3d 365 (2d Cir. 2006)**

QUESTION: "[W]hether, pursuant to the 'immovable property' exception to the Foreign Sovereign Immunity Act's ("FSIA") general rule that a foreign country is immune from suit in our courts, a federal court has jurisdiction to settle [a] dispute" concerning an "attempt[] to collect property taxes from certain foreign missions to the United Nations." *Id*. at 366.

ANALYSIS: The court focused its analysis on the "immovable property" exception to the FSIA, "the sole basis for obtaining jurisdiction over a foreign state in federal court, . . . which provides that a foreign state shall not be immune from jurisdiction in any case in which 'rights in immovable property situated in the United States are in issue.'" *Id*. at 369. The court recognized that the dispute between the parties concerned solely the meaning of "rights in" as used in that phrase, such as whether a dispute concerning taxation constitutes a dispute of "rights in" property. *Id*. The court found that the text of the FSIA was not

sufficiently clear in order to render a decision, and turned to the legislative history for clarification. *Id*. at 369-70. The legislative history, the court found, demonstrated that "Congress's intent in enacting the FSIA was to largely codify the restrictive theory of sovereign immunity set forth in the Tate Letter." *Id*. at 370. The Court further found that "the general principle that animates the Tate Letter" is that "immunity is available only where a state is acting in a sovereign capacity, and not with respect to a state's 'private acts'" and that "ownership of real estate in a foreign country must be considered the latter." *Id*. The court then scoured contemporaneous legal documents and enactments, both in domestic and foreign jurisdictions, and determined that the "immovable property" exception "is most naturally read to cover not only the foreign state's rights in the property but also its obligations, *i.e.*, rights retained in the property by the local state or another party." *Id*. at 372.

CONCLUSION: "[T]he 'immovable property' exception to foreign sovereign immunity should be construed to include any case where what is at issue is: (1) the foreign country's rights to or interest in immovable property situated in the United States; (2) the foreign country's use or possession of such immovable property; or (3) the foreign country's obligations arising directly out of such rights to or use of the property." *Id*. at 374.

***Saloum v. U.S. Citizenship & Immigration Servs.*, 437 F.3d 238 (2d Cir. 2006)**

QUESTION: "[W]hether this Court has jurisdiction to review an order of the Board of Immigration Appeals ("BIA") affirming a decision of an immigration judge ("IJ") denying a petitioner's request for a waiver of inadmissibility under INA section 212(d)(11) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(d)(11)." *Id.* at 239.

ANALYSIS: The 2nd Circuit noted that the plain language of the statute barred judicial review of an immigration judge's decision. *Id.* at 242. The court explained that the statute specifies that the Attorney General, and not the courts, may, in his discretion, waive the inadmissibility bar "under certain enumerated circumstances." *Id.* The 2nd Circuit noted that there was an exception to this rule established by Congress for "constitutional claims or questions of law" under § 106 of the REAL ID Act, 8 U.S.C. § 1252(a)(2)(D); however, the 2nd Circuit dismissed the petition for review because the defendant was unable to "raise any colorable 'constitutional claims or questions of law.'" *Id.* at 242-43.

CONCLUSION: The court held that courts "lack jurisdiction under 8 U.S.C. § 1252(a)(2)(B)(ii) to review the IJ's discretionary denial of

petitioner's request for a waiver of inadmissibility," unless defendants are able to raise any "colorable 'constitutional claims or questions" under § 106 of the REAL ID Act. *Id.* at 244.

***Beechwood Restorative Care Ctr. v. Leeds*, 436 F.3d 147 (2d Cir. 2006)**

QUESTION: "[W]hether, under New York law, notice and an opportunity for a hearing [were] necessary" for due process after the "'annulling' by [the New York State Department of Health] of [a nursing home's] establishment approval." *Id.* at 156.

ANALYSIS: The 2nd Circuit explained that "where a due process violation results from a 'random unauthorized act' by state officials—as opposed to an 'established state procedure'—the availability of a 'meaningful postdeprivation remedy' defeats the claim." *Id.* The court held that "[a]n Article 78 proceeding . . . afforded a meaningful post-deprivation remedy for Appellants' claimed violation." *Id.* at 157. The 2nd Circuit found that it "need not decide the issue because, even assuming that [the nursing home] was entitled under State law to notice and a hearing, there was no due process violation." *Id.* at 156.

CONCLUSION: The court held that a meaningful postdeprivation remedy such as an Article 78 proceeding was sufficient to defeat the nursing home's claim of a due process violation. *Id.* 156-57.

***Gibbs v. Cigna Corp.*, 440 F.3d 571 (2d Cir. 2006)**

QUESTION: Whether a district court, "when reviewing the administrator's denial of benefits under an ERISA-governed long-term disability plan," should refer to the version of the summary plan description ("SPD") "in effect at the time the claim is denied or the one in effect when the beneficiary became disabled." *Id.* at 572.

ANALYSIS: The court recognized that "absent explicit language to the contrary, a plan document providing for disability benefits promises that these benefits vest with respect to an employee no later than the time that the employee becomes disabled." *Id.* at 576. The court noted that the defendant's summary plan description stated that the beneficiary's "right to benefits vested when he became disabled," and thus "CIGNA's attempt to alter the terms of the SPD was ineffective with respect to Gibbs's benefits." *Id.* at 577.

CONCLUSION: "[W]here an ERISA plan beneficiary's benefits have vested, the summary plan description in effect at the time the benefits vest governs for purposes of determining the standard of review." *Id.* at 572.

***McClellan v. Smith*, 439 F.3d 137 (2d Cir. 2006)**

QUESTION: Whether the return of a "No True Bill" by the first grand jury negates any presumption of probable cause arising from a second grand jury indictment. *Id.* at 146-47.

ANALYSIS: The court noted that newly-discovered evidence could form a basis for resubmission to a new grand jury after a "No True Bill" determination, and disagreed with defendant's characterization that new evidence in his case was "inconsequential." *Id.* at 147.

CONCLUSION: The court held that "resubmission was properly authorized and the consequent grand jury indictment was valid to establish probable cause for prosecution." *Id.*

***United States v. Parker*, 439 F.3d 81 (2d Cir. 2006)**

QUESTION: Whether a district court's determination of financial eligibility for mid-case appointment of counsel was proper under § 3006A(c) of the Criminal Justice Act. *Id.* at 92.

ANALYSIS: The 2nd Circuit conducted a two-fold review of the district court's determination, by first checking if it made an "appropriate inquiry" into the defendant's financial eligibility, then evaluated the lower court's determination of financial eligibility to gauge whether it appropriately weighed the "interests of justice." *Id.* at 92-93. The court adopted the approach of the Supreme Court and other circuits by examining many factors rather than limiting itself to one particular method of assessing financial eligibility. *Id.* at 94.

CONCLUSION: The court held that the district court conducted an appropriate inquiry and was "not clearly erroneous in concluding that defendant was financially ineligible for mid-case appointment" under the statute. *Id.* at 109.

***Ming Shi Xue v. Bd. of Immigration Appeals*, 439 F.3d 111 (2d Cir. 2006)**

QUESTION: Whether an immigration judge "may properly base an adverse credibility finding on perceived inconsistencies without first bringing them to the applicant's attention when the supposed discrepancies or contradictions . . . are premised on 'dramatically different' accounts of the alleged persecution." *Id.* at 121.

ANALYSIS: The 2nd Circuit noted that immigration judges must give an asylum seeker a chance to submit evidence before denying asylum, and indicated that allowing a petitioner to address inconsistencies in his testimony would limit the risk of immigration

judges rejecting applicants they disfavored on a mere basis of a "list of [perceived inconsistencies that] can be expanded indefinitely." *Id.* at 123.

CONCLUSION: The 2nd Circuit held that "where the perceived incongruities in an asylum applicant's testimony are not plainly obvious, an immigration judge cannot rely on them to support an adverse credibility ruling without first identifying the alleged inconsistencies for the applicant and giving the applicant an opportunity to address them." *Id.* at 121. Consequently, the court granted the immigrant's petition for review, vacated the decision below, and remanded the case for further proceedings. *Id.* at 128.

Ali v. Gonzales, 448 F.3d 515 (2d Cir. 2006)

QUESTION: "Whether [the court has] jurisdiction to review the Board of Immigration Appeals ("BIA") decision not to exercise its '*sua sponte* authority' to reopen removal proceedings under 8 C.F.R. § 1003.2(a)." *Id.* at 516.

ANALYSIS: The court first looked to statutory language, which provides that "the BIA 'may at any time reopen or reconsider on its own motion any case in which it has rendered a decision . . . [and] [t]he decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board, subject to restrictions of [§ 1003.2]." *Id.* at 518. Continuing, the court noted that "[t]he Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief." *Id.* The court noted that "[s]everal other circuits have concluded that the BIA's failure to reopen removal proceedings *sua sponte* is a discretionary decision that cannot be reviewed by the Courts of Appeals." *Id.*

CONCLUSION: The 2nd Circuit "join[ed] its sister circuits in holding that a decision of the BIA whether to reopen a case *sua sponte* under 8 C.F.R. § 1003.2(a) is entirely discretionary and therefore beyond [the court's] review." *Id*.

Sompo Japan Ins. Co. of Am. v. Union Pac. R.R., 456 F.3d 54 (2d Cir. 2006)

QUESTION: "[W]hether the Carmack Amendment applies to the domestic rail portion of a single, continuous shipment of goods originating in a foreign country." *Id.* at 67.

ANALYSIS: The court reasoned that "[b]ecause the scope of the [Interstate Commerce Commission] jurisdiction provision is co-extensive with the scope of Carmack's applicability and because the *Woodbury* Court interpreted the 'from . . . to' language as applying to goods traveling in foreign commerce regardless of direction," "from . . . to"

should be interpreted to apply to "goods in foreign commerce regardless of the direction of travel." *Id.* at 68-69.

CONCLUSION: The 2nd Circuit held that the Carmack Amendment "applies to the domestic inland portion of a foreign shipment regardless of the shipment's point of origin." *Id.* at 68.

***United States v. Giordano*, 442 F.3d 30 (2d Cir. 2006)**

QUESTION: Whether 18 U.S.C. § 2425 applies to intrastate telephone calls and exceeds Congress's power under the Commerce Clause in the United States Constitution. *Id.* at 38.

ANALYSIS: The court noted that Congress passed § 2425 based "on the second type of Commerce Clause power categorized in *Lopez*, that is, the power to regulate and protect the instrumentalities of interstate commerce 'even though the threat may only come from intrastate activities.'" *Id.* at 41. The court commented that well-established law allows Congress to regulate "even purely intrastate use of those instrumentalities" under the Commerce Clause. *Id.*

CONCLUSION: The 2nd Circuit denied the defendant's constitutional challenge to the statute. *Id.* at 41-42.

***Sista v. CDC IXIS N. Am., Inc.*, 445 F.3d 161 (2d Cir. 2006)**

QUESTION: Whether an employee has a cause of action under the Family and Medical Leave Act ("FMLA") for involuntary leave imposed by an employer. *Id*. at 174-75.

ANALYSIS: The FMLA established certain rights for employees to take a leave of absence, to be restored to the same position upon return, and the right to maintain a civil action. *Id.* at 175. The Act does not address the employer's ability to impose such leave involuntarily upon the employee, and such a "forced leave, by itself, does not violate any right provided by the FMLA. . . . [T]he FMLA does not create a right to be free from suspension with or without pay, nor does the FMLA create a right against infliction of emotional distress." *Id*.

CONCLUSION: The FMLA does not therefore provide a cause of action against an employer when the employee is subjected to involuntary leave. *Id*.

***Goldman v. Cohen*, 445 F.3d 152 (2d Cir. 2006)**

QUESTION: "[W]hether a consumer debt collector's initiation of a lawsuit in state court seeking recovery of unpaid rent is an 'initial communication' within the meaning of the Fair Debt Collection Practices Act [("FDCPA")], 15 U.S.C. § 1692, thereby requiring a debt collector to

provide 'validation notices' in accordance with 15 U.S.C. § 1692g(a)." *Id*. at 153.

ANALYSIS: The court found that the FDCPA's validation notice requirement applies to attorneys engaged in debt collection, even when that activity includes litigation. *Id*. The court relied on the Supreme Court's decision in *Heintz v. Jenkins*, 514 U.S. 291 (1995), wherein the Court held "that the term 'debt collector,' as defined in the FDCPA, 15 U.S.C. § 1692a(6), encompasses 'lawyer[s] who regularly tr[y] to obtain payment of consumer debts through legal proceedings.'" *Id*. at 155. Additionally, the court found that the drafters of the legislation intended "initial communication" to include legal pleadings because they expressly excluded legal pleadings from another section of the Act. *Id*. at 156.

CONCLUSION: Therefore, "in those portions of the statute that mention 'communication' without expressly excluding legal pleadings – such as § 1692g(a) – legal pleadings are included." *Id*.

***United States v. Gotti*, 459 F.3d 296 (2d Cir. 2006)**

QUESTION: The court evaluated "[t]he scope of the Supreme Court's holding in *Scheidler v. National Org. for Women, Inc.*, 537 U.S. 393 (2003) ("*Scheidler II*")" which defines the elements of extortion under the Hobbs Act. *Id.* at 300.

ANALYSIS: The court determined that *Scheidler II* held that an extortion of intangible property rights could be supported by the Hobbs Act and "simply clarified that for Hobbs Act liability to attach, there must be a showing that the defendant did not merely seek to deprive the victim of the property right in question, but also sought to obtain that right for himself." *Id.* The court determined that "[t]hat standard can be satisfied regardless of whether the property right at issue is tangible or intangible." *Id.*

CONCLUSION: The court "considered all of the defendants-appellants' contentions on these appeals and have not found any basis for reversing their convictions." *Id.* at 350.

***Jun Min Zhang v. Gonzales*, 457 F.3d 172 (2d Cir. 2006)**

QUESTION: "[W]hether the BIA's determination that the petitioner did not establish extreme hardship was discretionary." *Id.* at 175.

ANALYSIS: The court noted that it lacked jurisdiction to review any judgment granting relief and that judgments that grant relief are discretionary. *Id*. The court determined that "[be]cause these hardship determinations are made in the same manner under practically identical standards and because *De La Vega* holds that the cancellation-of-removal

hardship determination is discretionary, we join the Fourth Circuit in holding that the § 1182(i)(1) hardship determination is discretionary as well." *Id.*

CONCLUSION: "For the foregoing reasons, we lack jurisdiction to entertain this petition for review." *Id.* at 176.

***In re Med Diversified Inc.*, 461 F.3d 251 (2d Cir. 2006)**

QUESTION: Whether the scope of 11 U.S.C. §501(b) can extend beyond its legislative history and purpose. *Id.* at 255.

ANALYSIS: The court first determined that the "arising from" language of the statute was ambiguous. *Id.* Therefore, it looked outside the statute to determine its intended meaning. *Id.* From the legislative history, the court determined that §501(b) was "a Congressional judgment that, as between shareholders and general unsecured creditors, it is shareholders who should bear the risk of illegality in the issuance of stock in the event the issuer enters bankruptcy." *Id.* at 256. The court explained that it did not "require the subordination of a claim simply because the identity of the claimant happens to be a shareholder [], where the claim lacks any causal relationship to the purchase or sale of stock and when subordinating the claim[] would not further the policies underlying §510(b)." *Id.* at 259.

CONCLUSION: The court affirmed the lower court's decision, finding "that section 510's mandatory subordination of claims 'arising from the purchase or sale of [a security of the debtor]' requires subordination of Rombro's claim." *Id.*

***In re Nassau County Strip Search Cases*, 461 F.3d 219 (2d Cir. 2006)**

QUESTION: "Whether a court may employ Rule 23(c)(4)(A) to certify a class as to a specific issue where the entire claim does not satisfy Rule 23(b)(3)'s predominance requirement . . . ." *Id.* at 226.

ANALYSIS: The court agreed with the 9th Circuit's view that the plain language of Rule 23 allows a court to certify the class action under Rule 23(c)(4)(A) even if it does not satisfy Rule 23(b)(3). *Id.* The court noted "[a]s the rule's plain language and structure establish, a court must first identify the issues potentially appropriate for certification 'and . . . then' apply the other provisions of the rule, *i.e.*, subsection (b)(3) and its predominance analysis." *Id.* The court also looked to Advisory Committee Notes which confirmed its understanding of the rule. *Id.* Finally, the court noted that commentators agree that courts may use subsection (c)(4) to certify a single issue of a case. *Id.*

CONCLUSION: The court remanded the case back to the district court with instructions to certify the class action as to liability and also to "consider certifying a class for damages." *Id.* at 231.

***Ofori-Tenkorang v. Am. Int'l Group*, 460 F.3d 296 (2d Cir. 2006).**

QUESTION: Whether "Congress has . . . extended the coverage of [42 U.S.C. § 1981] beyond the territorial jurisdiction of the United States." *Id.* at 298.

ANALYSIS: The court noted that 42 U.S.C. § 1981 "unambiguously requires that a person be 'within the jurisdiction of the United States,' 42 U.S.C. § 1981(a), in order to assert rights under the statute." *Id.* at 303-04. The court did not find anything "in the statutory language indicating Congress's intent to allow those outside the territorial jurisdiction of the United States to raise Section 1981 claims" where "the relevant employment contract was initially formed in the United States or . . . the relevant discrimination was directed by persons who were themselves in the United States." *Id.* at 304.

CONCLUSION: The court held that "absent a 'clear statement,' of congressional intent to extend coverage 'beyond places over which the United States has sovereignty or has some measure of legislative control,' the statute[] . . . only protects persons within the United States' territorial jurisdiction." *Id.* at 304.

***Guiles v. Marineau*, 461 F.3d 320 (2d Cir. 2006)**

QUESTION: Whether a high school student's T-shirt depicting images of drugs and alcohol in connection with a political statement is "plainly offensive" within the meaning of the Supreme Court's holding in *Bethel School District v. Fraser*, 478 U.S. 675 (1986), to allow a school to abridge a student's First Amendment free speech rights. *Id.* at 327.

ANALYSIS: The court stated that "[w]e doubt the *Fraser* Court's use of the term ['plainly offensive'] sweeps as broadly as [its] dictionary definition, and nothing in *Fraser* suggests that it does." *Id.* at 328. The court reasoned that in light of *Tinker v. Des Moines Independent Community School*, 393 U.S. 503 (1969), which protects a student's right to express his political views so long as the speech is not potentially substantially disruptive, a broad reading of "plainly offensive" would render "the rule of *Tinker* [to] have no real effect because it could have been said that the school administrators in *Tinker* found wearing anti-war armbands offensive and repugnant to their sense of patriotism and decency." *Id.* The court concluded that the term "plainly offensive" relates only to lewd, vulgar or indecent speech which "normally

connote[s] sexual innuendo or profanity." *Id.* at 327. The court also noted that speech that is "offensive as profanity used to make a political point" could be prohibited as "plainly offensive" in a school environment because a school has an interest in protecting its students from exposure to offensive forms of speech but not from the content of speech. *Id.* at 329. The court found that pictures of cocaine and alcohol were not an offensive form of speech in itself "especially when considering that they [were] part of an anti-drug political message." *Id.*

CONCLUSION: The court held that "the images on plaintiff's T-shirt are [not] plainly offensive, especially when considering that they are part of an anti-drug political message." *Id.* at 329.

THIRD CIRCUIT

Alaka v. Att'y Gen., 456 F.3d 88 (3d Cir. 2006)

QUESTION: Whether an offense must be an aggravated felony as defined in the INA, 8 U.S.C. § 1101(a)(43), in order to be eligible for classification as a "particularly serious crime." *Id.* at 91.

ANALYSIS: The 3rd Circuit applied "fundamental principle[s] of statutory construction . . . that words in a statue must be given their ordinary meaning whenever possible." *Id.* at 104. The court stated that "the text and structure of the statute suggest that an offense must be an aggravated felony to be 'particularly serious.'" *Id.* The court quoted the relevant section and reasoned that "[t]he second sentence, authorizing the Attorney General to determine when a conviction is 'particularly serious,' is clearly tied to the first; it explicitly refers back to the 'previous sentence,' and accordingly implies that it is limited to aggravated felonies." *Id.*

CONCLUSION: The court concluded that "an offense must be an aggravated felony in order to be classified as a 'particularly serious crime.'" *Id.* at 105.

Malay. Int'l Shipping Corp. v. Sinochem Int'l Co., Ltd., 436 F.3d 349 (3d Cir. 2006)

QUESTION: "[W]hether courts must decide jurisdictional issues, here personal jurisdiction, before ruling on *forum non conveniens*." *Id.* at 358.

ANALYSIS: The court began by asking whether a dismissal for *forum non conveniens* was a determination on the merits and held it to be "[n]either a constitutional Article III jurisdictional issue nor a

substantive, merits-related issue . . . [but] a non-jurisdictional, non-merits procedural issue." *Id.* at 359-61. Next, the 3rd Circuit answered the question of whether courts must decide "whether jurisdiction existed before dismissing on *forum non conveniens* grounds" in the affirmative for two reasons. *Id.* at 361. "First, the very nature and definition of *forum non conveniens* presumes that the court deciding this issue has valid jurisdiction (both subject matter and personal jurisdiction) and venue." *Id.* "Second, at least two other circuit courts, and the Supreme Court (inferentially), have determined that *forum non conveniens* dismissals are invalid if the district court does not have subject matter jurisdiction." *Id.* at 362.

CONCLUSION: The 3rd Circuit explained that "[d]istrict courts either have jurisdiction to decide *forum non conveniens* motions or they do not." *Id.* at 363. The court held that "[courts] must have jurisdiction before they can rule on which forum, otherwise available, is more convenient to decide the merits." *Id.* at 363-64.

Ayuk Ako Obale v. Att'y Gen., 453 F.3d 151 (3d Cir. 2006)

QUESTION: Whether the 3rd Circuit had jurisdiction to stay the voluntary departure period granted to an alien by the Board of Immigration Appeals ("BIA"). *Id*. at 155-56.

ANALYSIS: The 3rd Circuit stated that in the review of agency decisions, the courts of appeals are granted statutory jurisdiction "of the proceeding." *Id.* at 156. The court also noted that Congress has explicitly made exceptions to the statutory authority of the courts of appeals when it deems appropriate. *Id.* In fact, the court found that Congress explicitly removed jurisdiction from the courts of appeals to hear appeals of grants or denials of voluntary departure. *Id.* The court determined from this that, if Congress had intended to remove jurisdiction from the courts of appeals to grant stays of voluntary departure, it would have also included this caveat in its express limitations stated in the statute. *Id.*

CONCLUSION: Since Congress did not explicitly remove jurisdiction from the courts of appeals to grant stays of voluntary departure, the 3rd Circuit has jurisdiction to hear such a motion. *Id.*

United States v. Nation, 451 F.3d 189 (3d Cir. 2006)

QUESTION: Whether the district court had the statutory authority to issue a criminal forfeiture of mail fraud proceeds where the fraud was not perpetrated against a financial institution, and whether the district court could direct a forfeiture order for an amount greater than defendant's available assets at the time of sentencing. *Id*. at 198.

ANALYSIS: The 3rd Circuit noted that the government sought criminal forfeiture against the defendant under 28 U.S.C. § 2461(c) through the civil forfeiture provision in 18 U.S.C. § 981(a)(1)(C). *Id.* at 199. Applying the plain language of the statutes, the court determined that the statutes act together as a "'bridge' or 'gap-filler' between civil and criminal forfeiture, in that it permits criminal forfeiture when no criminal forfeiture provision applies to the crime charged against a particular defendant but civil forfeiture for that charged crime is nonetheless authorized." *Id.* Under this reading of the statutes, the court first determined that § 2461(c) permits criminal forfeiture for mail fraud because § 981(a)(1)(C) authorizes civil forfeiture for mail fraud and second, that no statutory provision expressly provides for criminal forfeiture of mail fraud. *Id.*

Turning to the second issue, the court found that 21 U.S.C. § 853 states that "the amount of a criminal forfeiture is directly related to the amount of the criminal proceeds." *Id.* at 201. Under this statute, the court rejected the defendant's argument that the order could not be for an amount in excess of his available funds, stating that to rule otherwise would allow defendants to obtain funds unlawfully, spend them, and thereby preclude liability. *Id.* at 202.

CONCLUSION: The court rejected both of defendant's arguments, upheld his conviction for mail fraud, and affirmed his sentence. *Id.* at 209. The 3rd Circuit found that the district court had statutory authority to issue a criminal forfeiture judgment and that the judgment was proper despite the fact that the forfeiture amount exceeded defendant's available assets. *Id.*

***United States v. Hull*, 456 F.3d 133 (3d Cir. 2006)**

QUESTION: Whether unlawful possession of a pipe bomb, as opposed to the use or detonation of a pipe bomb, can qualify as a "federal crime of violence" under 18 U.S.C. § 842(p)(2)(A). *Id.* at 137.

ANALYSIS: As 18 U.S.C. § 842(p)(2)(A) does not define "federal crime of violence," the 3rd Circuit adhered to the Supreme Court's decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), which authorized the use of 18 U.S.C. § 16's definition for the purposes of a section 842(p) analysis. *Id.* at 138. That definition included "any other offense that is a felony and that, by its nature, *involves a substantial risk that physical force* against the person or property of another may be *used in the course of committing the offense*." *Id.* In applying that standard, the court noted the importance of the active nature of "used" as opposed to the inactive nature of "possession" and found that "[th]ere is no risk that physical force might be used against another to commit the offense of *possession*

. . . ." *Id.* at 139. The court explained that this was despite the fact that possession may increase the likelihood of a future crime of violence. *Id.*

CONCLUSION: Possession alone does not establish a "federal crime of violence" for purposes of either 18 U.S.C. § 842(p), or 18 U.S.C. § 16. *Id.* at 141.

Hill v. Borough of Kutztown, 455 F.3d 225 (3d Cir. 2006)

QUESTION: "[W]hether a public employee who was defamed in the process of being discharged may state a 'stigma-plus' due process claim, though he lacked a property interest in continued employment." *Id.* at 244 n.27.

ANALYSIS: The court explained that in order to state such a claim, the claimant would need to show that he had been deprived "of an actual constitutional right at all, and if so . . . whether that right was clearly established at the time of the alleged violation." *Id.* at 244. The court found that, while a qualified right may have been violated in this case, there was not enough information to determine whether the right in question had been clearly established. *Id.* at 243.

CONCLUSION: The court declined to rule on the matter until either the conclusion of discovery or further evidence was introduced at the summary judgment stage. *Id.* at 244-45.

In re Kaiser Aluminum Corp., 456 F.3d 328 (3d Cir. 2006)

QUESTION: "[W]hen a Chapter 11 debtor seeks to terminate multiple pension plans simultaneously under [ERISA's] reorganization test, [whether] a court [should] apply the test to each plan independently, or to all of the plans in the aggregate." *Id.* at 330.

ANALYSIS: Because the text of ERISA had not addressed this issue, the 3rd Circuit looked to the legislative history in order to determine congressional intent. *Id.* at 336. First, the court found that the statutory construction offered no guidance to Congress's intent. *Id.* at 335. Second, the court opined that administering the test plan-by-plan without further guidelines would be unworkable. *Id.* at 337. The court noted that a plan-by-plan analysis would require the Bankruptcy Court to make unrealistic judgment calls, such as the order in which the plans should be judged and the ramifications to the others depending on each plan's new status. *Id.* at 337-38. The court found that Congress would not have intended such an absurd result and would have delineated further guidelines had that been its intent. *Id.* at 338. Finally, the court held that because bankruptcy courts are courts of equity, it would be unfair to force them to choose arbitrarily to terminate one plan over another. *Id.* at 339-41.

CONCLUSION: **"**When an employer in Chapter 11 bankruptcy seeks to terminate multiple pension plans voluntarily under the reorganization test, Congress intended the bankruptcy courts to apply the test to all of the plans in the aggregate." *Id.* at 346.

***Khan v. Att'y Gen.*, 448 F.3d 226 (3d Cir. 2006)**

QUESTION: "[W]hether [8 U.S.C.] § 1252(a)(2)(B)(ii) bars jurisdiction [of the 3rd Circuit's power of review] when there is no statute expressly granting discretion to the Attorney General but discretionary authority is extant under a federal regulation." *Id.* at 231.

ANALYSIS: The government moved to dismiss Khan's appeal of a decision of the Board of Immigration Appeals on the basis that 8 U.S.C. § 1252(a)(2)(B)(ii) states "no court shall have jurisdiction to review . . . any other decision or action of the Attorney General . . . the authority for which is specified under this subchapter to be in the discretion of the Attorney General . . . ." *Id.* at 230. The court found that the immigration judge's discretion over continuances was not specified under the subchapter, although the corresponding federal regulations explicitly gave the immigration judge authority to grant continuances. *Id.* The court noted the current disagreement over this issue among the circuits, and held that the authority to grant or deny continuance motions was not specified in 8 U.S.C. § 1229a's broad grant of authority to conduct immigration hearings. *Id.* at 231-33. The court clarified that the specific authorization to grant continuances contained in the federal regulations could not satisfy the requirement that the specific grant of authority come from federal statute. *Id.* at 233.

CONCLUSION: "Because the [immigration judge's] authority to rule on a continuance motion is not 'specified under [8 U.S.C. §§ 1151-1378] to be in the discretion of the Attorney General,' we hold that § 1252(a)(2)(B)(ii) does not deprive this court of jurisdiction." *Id.* at 233.

***Jilin Pharm. USA, Inc. v. Chertoff*, 447 F.3d 196 (3d Cir. 2006)**

QUESTION: Whether 8 U.S.C. § 1252(a)(2)(B)(ii) "bar[s the court] from asserting jurisdiction over visa revocations at the discretion of the Attorney General even when the visa holder is already in the United States." *Id.* at 199.

ANALYSIS: The court looked to the language of § 1252(a)(2)(B)(ii), finding that "Congress has dictated that no court shall have jurisdiction to review 'any . . . decision or action of the Attorney General or the Secretary of Homeland Security *the authority for which is specified* under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security.'" *Id.* The court noted that § 1155

specifies authority to be in the discretion of the Attorney General (now the Secretary of Homeland Security) to a much greater degree than does § 1153, which the court found subject to review. *Id*. at 200. The court noted a split between the 7th and 9th Circuits on the issue of whether § 1155 decisions may be reviewed. *Id.* at 201. The court expressed preference for the dissent in the 9th Circuit split-panel opinion stating the decisions under § 1155 are unreviewable. *Id.* at 202. The court reviewed its "general standards to determine when a decision is unreviewable under § 1252(a)(2)(B)(ii)," noting that it previously held that another statute that "explicitly assigns [discretion] to the Attorney General" divested the court of jurisdiction. *Id.* The court found the language in § 1155, stating that the Attorney General (now Secretary of Homeland Security) "may revoke," "at any time," and "for what he deems to be good and sufficient cause," explicitly assigned discretion to the Attorney General. *Id.* at 203-04. The court further noted that "the requirement of 'for what he deems to be sufficient cause' . . . is so vague as to be useless as a guide to a reviewing court." *Id.* at 205.

CONCLUSION: The 3rd Circuit held that "the Attorney General's decision under . . . [section] 1155 to revoke the prior approval of a visa petition is an act of administrative discretion that is shielded from court review pursuant to . . . [section] 1252(a)(2)(B)(ii)." *Id.* at 206.

United States v. Stewart, 452 F.3d 266 (3d Cir. 2006)

QUESTION: Whether "a district court's § 4243(e) order committing an individual to the Attorney General's custody after his acquittal by reason of insanity is an appealable final order under § 1291" and, if so, what standard of review is appropriate. *Id.* at 272-73.

ANALYSIS: The court noted that a post judgment order is a final decision under 28 U.S.C. § 1291 if the district court completely disposes of the matter. *Id.* at 272. The 3rd Circuit explained that the underlying criminal case was disposed of by acquittal and the post judgment order committing the defendant to custody was final, even though it may be revisited. *Id.* at 272-73. As to the standard of review, the court posited that analogous situations use a standard of clear error, which allows for a proper amount of deference to the trial court. *Id.* at 273-74.

CONCLUSION: The 3rd Circuit joined the 5th, 8th and 11th circuits in permitting the appeal of an "order committing an individual to the Attorney General's custody after his acquittal." *Id.* at 272.

Wachtel v. Guardian Life Ins. Co. of Am., 453 F.3d 179 (3d Cir. 2006)

QUESTION: The court construed the requirements a district court must meet when necessarily defining "claims, issues, or defenses

appropriate for class treatment" under FED. R. CIV. P. 23(c)(1)(B). *Id.* at 184.

ANALYSIS: The court decided that "the proper substantive inquiry . . . is whether the precise parameters defining the class and a complete list of the claims, issues, or defenses to be treated on a class basis are readily discernible from the text either of the certification order itself or of an incorporated memorandum opinion." *Id.* at 185.

CONCLUSION: The 3rd Circuit established that "the plain text of the Subdivision, especially when considered in light of the text and structure of parallel provisions in Rule 23, indicate that Rule 23(c)(1)(B) requires district courts to include in class certification orders a clear and complete summary of those claims, issues, or defenses subject to class treatment." *Id.* at 184.

Stolt-Nielsen, S.A. v. United States, 442 F.3d 177 (3d Cir. 2006)

QUESTION: Whether separation of powers prevents federal courts from enjoining "the executive branch from filing an indictment." *Id.* at 178.

ANALYSIS: The court began by mentioning the Supreme Court's statement that "the executive branch 'has . . . absolute discretion to decide whether to prosecute a case.'" *Id.* at 183. The court, however, noted some exceptions, such as preventing any chilling effect on First Amendment rights and a requirement that "the Government must adhere strictly to the terms of agreements made with defendants – including pleas, cooperation, and immunity agreements – to the extent the agreements require defendants to sacrifice constitutional rights." *Id.* However, because federal courts can hold the government to the terms of the agreements it makes with defendants, the court had to address the question of whether such enforcement can be in the form of an injunction before any indictment can been made. *Id.* The court examined several promises not to charge a defendant in immunity agreements, finding that they have often been "construed to protect the defendant against conviction rather than indictment and trial." *Id.* at 184.

CONCLUSION: The 3rd Circuit found that the defendants' claims that the agreement provided them immunity from indictment was unsupported by precedent and reversed judgment and remanded to the district court with instruction to dismiss the complaints with prejudice. *Id.* at 187.

McAllister v. Att'y Gen., 444 F.3d 178 (3d Cir. 2006)

QUESTION: Whether the jurisdictional bar in 8 U.S.C. § 1252(a)(2)(C) is limited to removal based on enumerated offenses only,

or whether other criminal activity not specifically enumerated, such as terrorism, triggers the jurisdictional bar. *Id*. at 182-83.

ANALYSIS: In an immigration setting, the circuit courts generally have jurisdiction to review final removal orders. *Id*. at 182. However, Congress, at times, has expressly denied such jurisdiction to the courts. *Id*. at 183. In 8 U.S.C. § 1252(a)(2)(C), Congress provided that "no court shall have jurisdiction to review any final orders of removal against an alien who is removable by reason of having committed a criminal offense covered in section 212(a)(2) or 237(a)(2)(A)(iii), (B), (C), or (D)." *Id.* at 183 n.5. In this case, the 3rd Circuit joined the 1st, 4th and 7th Circuits in their strict reading of the statutory bar. *Id*. at 184.

CONCLUSION: The court "held that for purposes of the jurisdictional bar found in 8 U. S. C. § 1252(a)(2)(C), an alien is not 'removable for reason of having committed [an enumerated] criminal offense' unless the final order of removal is grounded, at least in part, on one of those enumerated offenses.'" *Id*. at 184.

Lattera v. Comm'r, 437 F.3d 399 (3rd Cir. 2006)

QUESTION: "Whether the sale of a right to lottery payments by a lottery winner can be treated as a capital gain under the Internal Revenue Code . . . ." *Id.* at 401.

ANALYSIS: The court adopted a "family resemblance" test to determine whether assets should be classified as a capital gain or as ordinary income. *Id.* at 406. The court explained the "family resemblance" test as "[f]irst, we try to determine whether an asset is like either the 'capital asset' category of assets . . . or like the 'income items' category . . . . If the asset does not bear a family resemblance to items in either of those categories, we move to the following factors." *Id.* at 409.

The court further opined that "[w]e look at the nature of the sale. If the sale or assignment constitutes a horizontal carve-out, then ordinary-income treatment presumably applies. If, on the other hand, it constitutes a vertical carve-out, then we look to the character-of-the-asset factor." *Id.* Continuing, the court explained that "if the sale is a lump-sum payment for a future right to *earned* income, we apply ordinary-income treatment, but if it is a lump-sum payment for a future right to *earn* income, we apply capital-gains treatment." *Id.*

CONCLUSION: "The lump-sum consideration paid to the [lottery winners] in exchange for the right to their future lottery payments is ordinary income." *Id.* at 410.

***Sommer v. Vanguard Group*, 461 F.3d 397 (3d Cir. 2006)**

QUESTION: "[W]hether Vanguard illegally interfered with Sommer's [Family and Medical Leave Act ("FMLA")] rights when, upon his return from approximately eight weeks of short-term disability FMLA leave, it did not award him a full annual bonus payment under its Partnership Plan, but instead awarded him a payment prorated on the basis of the time he was absent." *Id.* at 398.

ANALYSIS: The court first looked to the controlling language of the FMLA as well as Department of Labor regulations and opinion letters, and found that if a company bonus program "rewards employee production, then proration for FMLA absences is generally allowed; if it rewards the absence of an occurrence (like a safety or perfect attendance bonus), then proration is not allowed." *Id.* The court then examined Vanguard's bonus program and concluded that it was focused on giving employees incentives to meet company production goals. *Id.* at 404-05. The court rejected Sommer's argument that Vanguard violated the FMLA by calculating his bonus differently from employees who took paid sick leave or vacation leave. *Id.* The court observed that "as to calculating bonus amounts, and specifically proration—§ 825.215(c)(2) [the relevant Department of Labor regulation] does not require the equal treatment of those who take unpaid forms of FMLA leave and those who take paid leave." *Id.* at 405.

CONCLUSION: "Vanguard's proration of Sommer's Partnership Plan bonus for the time he spent on short-term disability FMLA leave did not interfere with his FMLA rights." *Id.* at 406.

***Telcordia Tech Inc. v. Telkom SA Ltd.*, 458 F.3d 172 (3d Cir. 2006)**

QUESTION: Whether abuse of discretion is the proper standard of review for a "district court's decision to defer to foreign annulment proceedings under Article VI of the New York Convention." *Id*. at 177.

ANALYSIS: Article VI of the New York Convention "provides a mechanism by which courts asked to enforce an arbitral award can adjourn to await the type of proceeding in the situs jurisdiction . . . ." *Id*. at 176. The 3rd Circuit agreed "with the [2nd] Circuit that 'in light of the permissive language of Article VI of the Convention and a district court's general discretion in managing its own caseload and suspense docket . . . the proper standard for reviewing a district court's decision whether to adjourn is for abuse of discretion.'" *Id*. at 177.

CONCLUSION: The parties agreed to be bound by the New York Convention. *Id*. at 175. Accordingly, the 3rd Circuit held that abuse of discretion is the proper standard of review. *Id*. at 177.

***Knight v. Int'l Longshoremen's Ass'n*, 457 F.3d 331 (3d Cir. 2006)**

QUESTION: "[W]hether a [labor] union must permit an individual who has been charged with a violation to record his or her disciplinary hearing" to satisfy due process as required by the Labor-Managing Reporting and Disclosure Act of 1959. *Id*. at 340.

ANALYSIS: The court noted that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands in order to minimize the risk of error." *Id*. To resolve this due process claim, the court balanced Knight's "interest in recording against the union's interest in prohibiting recording, and also consider the value of recording in safeguarding against error." *Id*. Because the union offered no "explanation of its interest in prohibiting such a recording" and because union disciplinary hearings are more likely to be conducted properly if recorded, plaintiff's interests in recording outweighed those against recording. *Id*. at 341. As a result, the union was required to allow plaintiff to record the proceedings. *Id*. at 343-44.

CONCLUSION: Based on these particular facts, the 3rd Circuit held that denying plaintiff the right to record the disciplinary hearing violated plaintiff's due process rights granted by the Labor-Managing Reporting and Disclosure Act of 1959. *Id*.

FOURTH CIRCUIT

***Yashenko v. Harrah's NC Casino Co., L.L.C.*, 446 F.3d 541 (4th Cir. 2006)**

QUESTION: Whether "the Family and Medical Leave Act ("FMLA") provide[s] a covered employee with an absolute right to be restored to his previous job after taking approved leave." *Id*. at 544.

ANALYSIS: The court began by pointing out that the FMLA provides for "any person who takes FMLA leave [to] be entitled, on return from such leave . . . to be restored by the employer to the position of employment held by the employee when the leave commenced." *Id.* at 547. The court noted that the FMLA further provided that "nothing in this section shall be construed to entitle any restored employee to . . . any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave." *Id*. Recognizing that these provisions create a statutory ambiguity, the court turned to pertinent regulation promulgated by the Secretary of Labor for resolution of the ambiguity. *Id*. Specifically, the regulation clarified that "an employee has no greater

right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period." *Id*. at 548 (quoting 29 C.F.R. § 825.216(a)). Since this interpretation resolved the statutory ambiguity, the court joined the 3rd, 6th, 8th, 10th and 11th Circuits "in concluding that the FMLA does not require an employee to be restored to his prior job after FMLA leave if he would have been discharged had he not taken leave." *Id*. at 547.

CONCLUSION: The court held that "the [FMLA] does not create an absolute right to restoration to a previous employment position; rather, an employer may deny restoration when it can show that it would have discharged the employee in any event regardless of the leave." *Id*. at 548.

***Green v. Young*, 454 F.3d 405 (4th Cir. 2006)**

QUESTION: Whether a third Prison Litigation Reform Act ("PLRA") action that was dismissed for failure to exhaust administrative remedies counts as a strike under the PLRA's three strikes provision pursuant to 28 U.S.C. § 1915(g), requiring the prisoner to pay all filing fees up front, rather than in installments. *Id.* at 407.

ANALYSIS: According to 28 U.S.C. § 1915(g), the three-strikes provision applies when a prisoner has had a claim dismissed on at least three prior occasions "on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted . . . ." *Id.* The exhaustion requirement was dealt with separately and distinctly from the dismissal provision. *Id.* at 408. The court expanded its analysis from *Anderson*, where it found that "Congress's leaving out references to exhaustion in some but not all of the subsections of § 1997e must be viewed as 'intentional congressional omission[s],' such that it would be improper to read the PLRA as authorizing *sua sponte* dismissal of a claim on exhaustion grounds." *Id.* The court noted that this decision applies to "routine" exhaustion dismissals only, and added that other situations may arise that would warrant treating a dismissal of an action based on the fact that the prisoner did not first exhaust his administrative remedies as a strike. *Id.* at 409.

CONCLUSION: "Routine dismissals based solely on the fact that exhaustion has not occurred . . . do not qualify as strikes under § 1915(g)." *Id.* at 410.

***Chawla v. Transamerica Occidental Life Ins. Co.*, 440 F.3d 639 (4th Cir. 2006)**

QUESTION: Whether a trust can possess an insurable interest in a person's life. *Id.* at 648.

ANALYSIS: The court noted that the district court had ruled that "the Trust lacked any insurable interest in [a person's] life." *Id.* The court recognized that "such a ruling could significantly impact Maryland law and how life insurance companies transact business in Maryland." *Id.* The court stated that "[b]ecause the district court correctly awarded summary judgment to Transamerica on the misrepresentation issue, its alternative ruling appears to have unnecessarily addressed an important and novel question of Maryland law. And, as a general proposition, courts should avoid deciding more than is necessary to resolve a specific case." *Id.*

CONCLUSION: The court vacated "as unnecessary the district court's alternative ruling that the Trust lacked any insurable interest in Giesinger's life." *Id.*

Consolidation Coal Co. v. Williams, 453 F.3d 609 (4th Cir. 2006)

QUESTION: Whether a patient's receipt of a first, misdiagnosed, doctor's report triggers the three-year statute of limitations for a second claim under 20 C.F.R. § 725.308(a). *Id.* at 616.

ANALYSIS: The court reasoned that "nothing bars or should bar claimants from filing claims *seriatim*, and the regulations recognize that many will." *Id.* The court also pointed to the inherent unfairness in running a statute of limitations on a second claim for a doctor's mistake on a first claim. *Id.* The court further noted "the Act's remedial nature instructs us to interpret its provisions favorably toward miners." *Id.* at 618.

CONCLUSION: "[A] medical determination later deemed to be a misdiagnosis of pneumoconiosis by virtue of a superseding denial of benefits cannot trigger the statute of limitation for subsequent claims." *Id.*

FIFTH CIRCUIT

United States v. Wise, 447 F.3d 440 (5th Cir. 2006)

QUESTION: Whether, pursuant to United States Sentencing Guidelines ("U.S.S.G.") § 3D1.2, which provides that "counts involving substantially the same harm" shall be grouped together, should be applied to child pornography charges that involve the same child and occur over several days. *Id.* at 445.

ANALYSIS: The 5th Circuit interpreted U.S.S.G. § 3D1.2 as consistent with other circuits that had decided similar issues. *Id.* at 446. It

reasoned that the "production [of child pornography] counts occurring on different days [were] separate harms." *Id.* Thus, counting them as separate harms was "consonant with both the plain language of § 3D1.2 and the examples in the commentary." *Id.* The court held that each day a sexually explicit video was taken of the same child was a separate harm inflicted on the child. *Id.*

CONCLUSION: It is consistent with U.S.S.G. § 3D1.2 to refuse to "group the production of child pornography counts occurring on different days because each time involve[s] a separate harm." *Id.* at 447.

In re Cortez, 457 F.3d 448 (5th Cir. 2006)

QUESTION: "Whether a bankruptcy court should consider post-petition events in deciding whether to dismiss a case for substantial abuse under [11 U.S.C.] § 707(b)" when a debtor applies for Chapter 7 discharge of debts. *Id.* at 450.

ANALYSIS: The 5th Circuit agreed with other circuits that "a debtor's ability to repay his debts out of future income is a primary factor to be considered in determining whether to dismiss for substantial abuse. A consideration of the debtor's future earnings also follows the analysis favored by most bankruptcy commentators." *Id.* at 455. Furthermore, the court stated that an "abuse determination is necessarily forward looking because it asks whether creditors would receive more from the debtors' future earnings in a Chapter 13 than they would receive in a Chapter 7." *Id.* at 456. The court found that § 707(b) requires an analysis of Chapter 13 in comparison with Chapter 7 relief. Further, it held that "post-petition improvements in earnings can and should be taken into account up until the point at which the discharge is entered." *Id.* at 458.

CONCLUSION: The 5th Circuit remanded the case to the bankruptcy court because "post-petition events should be considered up until the date of discharge [of debts]." *Id.* at 458-59.

Okafor v. Gonzales, 456 F.3d 531 (5th Cir. 2006)

QUESTION: Whether "the signing of the oath form satisfied the public ceremony requirements of 8 U.S.C. § 1448(a)" in order to complete the process of obtaining U.S. citizenship. *Id.* at 533.

ANALYSIS: The 5th Circuit followed the 9th and 11th Circuits, which found that the clear statutory language of § 1448(a) required participation in a public ceremony, not merely a signed oath in front of an INS officer. *Id.* at 534. The court reasoned that a contrary interpretation of § 1448(a) "might create unnecessary obstacles to the removal of appropriately rejected naturalization applicants." *Id.*

CONCLUSION: The 5th Circuit denied petition for review because petitioner "failed to show that his signed oath form met the statutory requirements of a public oath ceremony, [and] he . . . failed to show that he met the requirements for becoming a naturalized citizen of the United States. *Id.*

***Bustamante-Barrera v. Gonzales*, 447 F.3d 388 (5th Cir. 2006)**

QUESTION: Whether under "[8 U.S.C.] § 1432(a)(3)'s 'legal custody' requirement . . . a child seeking derivative naturalization must have been under the sole (as distinguished from joint) legal custody of his one naturalized parent." *Id*. at 390.

ANALYSIS: The court reviewed the edition of § 1432(a)(3) operative in 1994, which required, among other things, "[t]he naturalization of the parent having legal custody of the child when there has been a legal separation of the parents." *Id*. at 395. The court found that, in light of "the text of § 1432(a)(3) and its relation to the overall scheme of the INA," together with the legislative history, § 1432(a)(3) did not support derivative naturalization where the child was under joint legal custody. *Id*. at 396. Specifically, the court held that the text stating "'the parent having legal custody' cannot be parsed to consider, in a vacuum, just 'the parent' or 'legal custody.'" *Id.* Rather, the phrase, when taken as a whole, requires that "when only one of two legally separated parents is a naturalized U.S. citizen, that parent is the one who must have legal custody." *Id*.

CONCLUSION: "[Section] 1432(a)(3)'s requirement that 'the parent having legal custody of the child' be a naturalized citizen of the United States is satisfied only when one of two living and legally separated parents is a naturalized U.S. citizen and that parent is vested with the sole legal custody of the child." *Id*. at 398.

***Dale v. Colagiovanni*, 443 F.3d 425 (5th Cir. 2006)**

QUESTION: Whether "conduct by an agent acting with apparent authority is [sufficient] to trigger the commercial activity exception and give a basis for jurisdiction against the state under FSIA [Foreign Sovereign Immunities Act]." *Id.* at 428.

ANALYSIS: The court recognized that in *Phaneuf v. Republic of Indonesia*, 106 F.3d 302 (9th Cir. 1997), the 9th Circuit concluded that "[w]hen an agent acts beyond the scope of his authority . . . that agent is not doing business which the sovereign has empowered him to do," and therefore "the agent's unauthorized act cannot be attributed to the foreign state; there is no 'activity of the foreign state.'" *Id.*

CONCLUSION: "[A]n agent's acts conducted with the apparent authority of the state is insufficient to trigger the commercial exception to FSIA." *Id.* at 429.

***Elementis Chromium L.P. v. Coastal States Petroleum Co.*, 450 F.3d 607 (5th Cir. 2005)**

QUESTION: "[W]hether liability is joint and several, or several only, in [CERCLA] § 113(f) contribution actions." *Id.* at 612.

ANALYSIS: CERCLA provides that all persons found liable under its provisions "may seek contribution from any other person who is liable or potentially liable under [CERCLA] § 107(a)." *Id.* The court noted that an "overwhelming majority of our sister circuits have concluded that liability is merely several under § 113(f)." *Id.* The court found two reasons supporting the imposition of several liability. *Id.* at 613. First, the court found that "under the principle of contribution, a liable party is entitled to recover only 'proportional shares of judgment from other tort-feasors whose negligence contributed to the injury and who were also liable to the plaintiff.'" *Id.* Second, the court reasoned that "to allow for the imposition of joint and several liability in contribution actions under CERCLA is to invite 'inefficiency, potential duplication, and prolongation of the litigation process.'" *Id.*

CONCLUSION: The Fifth Circuit held that only several liability is appropriate in CERCLA contribution actions. *Id.*

***Morris v. Powell*, 449 F.3d 682 (5th Cir. 2006)**

QUESTION: Whether "an inmate must allege more than a *de minimis* retaliatory act to proceed with a claim for retaliation" under 42 U.S.C. § 1983. *Id.* at 684.

ANALYSIS: The court noted that "[t]o prevail on a claim of retaliation, a prisoner must establish (1) a specific constitutional right, (2) the defendant's intent to retaliate against the prisoner for his or her exercise of that right, (3) *a retaliatory adverse act*, and (4) causation." *Id.* The court noted that "this court has refused to recognize retaliation claims based only on allegations of *insignificant* retaliatory acts." *Id.* at 685. However, "[w]hen confronted with more serious allegations of retaliation . . . we have not hesitated to recognize the legitimacy of an inmate's claim." *Id.* The court looked to other circuits for an appropriate standard, and adopted the D.C. Circuit's holding that a qualifying alleged adverse act is one that "would chill or silence a person of ordinary firmness from future First Amendment activities." *Id*. at 685-86. The court further articulated that "acts, though maybe motivated by retaliatory intent, [which] are so *de minimis* that they would not deter the

ordinary person from further exercise of his rights[,] . . . do not rise to the level of constitutional violations and cannot form the basis of a § 1983 claim." *Id.* at 686.

CONCLUSION: The 5th Circuit adopted the D.C. Circuit's *de minimis* standard, holding that "[r]etaliation against a prisoner is actionable only if it is capable of deterring a person of ordinary firmness from further exercising his constitutional rights." *Id*.

***Pacheco v. Mineta*, 448 F.3d 783 (5th Cir. 2006)**

QUESTION: Whether the good faith of the plaintiff is, by itself, a sufficient reason to defeat the cost-shifting provision in FED. R. CIV. P. 54(d). *Id.* at 793.

ANALYSIS: "Rule 54(d)(1) contains a strong presumption that the prevailing party will be awarded costs." *Id.* Further, "a court 'may neither deny nor reduce a prevailing party's request for cost without first articulating some good reason for doing so.'" *Id.* The court noted that "every circuit to expressly address the question . . . has ruled that good faith, by itself, cannot defeat the operation of Rule 54(d)(1)." *Id.* at 794. Moreover, "[a]ll federal litigants . . . have an obligation to bring suit in good faith." *Id.*

CONCLUSION: The 5th Circuit held that "the losing party's good faith alone is insufficient to justify the denial of costs to the prevailing party" and vacated the district court's ruling on the award of costs. *Id.* at 795.

***Hudson v. Tex. Racing Comm'n*, 455 F.3d 597 (5th Cir. 2006)**

QUESTION: "[W]hether the Texas absolute insurer rule, 16 TEX. ADMIN. CODE § 311.104(b), which provides, *inter alia*, that '[a] trainer shall ensure that a horse . . . that runs a race while in the care and custody of the trainer . . . is free from all prohibited drugs, chemicals, or other substance,' violates the due process clause." *Id.* at 598.

ANALYSIS: The court determined that "[t]o ensure the health of the horse, to protect the integrity of the sport, and to protect the betting public, the state has a valid objective in seeking to prevent the doping of horses." *Id.* at 600. The court found that "[t]he absolute insurer rule for horse trainers is a reasonable and valid exercise of the state's police power to achieve that objective." *Id.*

CONCLUSION: The 5th Circuit "agree[d] with the majority of jurisdictions that the absolute insurer rule does not violate due process. While the absolute insurer rule may be harsh, it is constitutional." *Id.* at 601.

***Am. Reliable Ins. Co. v. Navratil*, 445 F.3d 402 (5th Cir. 2006)**

QUESTION: Whether the failure of a client to elect to appeal an adverse judgment prevents the client from pursuing a malpractice suit against his attorney. *Id.* at 404.

ANALYSIS: Sitting in diversity, the district court determined how the question would be answered under Louisiana law, given that there were no state statutes or decisions by the Louisiana Supreme Court that were on point—an "Erie Guess." *Id.* The district court relied on *Pieno*, a state appellate case, which held that clients would be estopped from pursuing a malpractice suit in such circumstances. *Id.* The 5th Circuit felt the district court's reading of *Pieno* was overly broad and that the Louisiana Supreme Court would likely distinguish the present case from *Pieno* and find no such bar existing. *Id.* The court stated that in *Pieno*, the attorney had not been provided an opportunity to have a hearing on the issue of abandonment as his clients made a settlement with the other party. *Id.* at 405. The present case had proceeded through trial to a verdict, and thus any negligence on the part of the attorney in executing the case would be part of the record and could be determined. *Id.*

CONCLUSION: A client's decision not to pursue an appeal does not prevent the client from instigating a malpractice suit against his attorney. *Id.* at 407.

***Braud v. Transp. Serv. Co.*, 445 F.3d 801 (5th Cir. 2006)**

QUESTION: "Whether amending a complaint to add a defendant 'commences' a new suit under the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. 109-2, 119 Stat. 4." *Id*. at 802.

ANALYSIS: A suit that was originally filed before the passage of CAFA, but was amended to add a defendant to the suit "commence[s] the civil action as to the added party," entitling the defendant to the benefits of the CAFA provisions. *Id*. at 804. The court found that "case law holds that generally 'a party brought into court by an amendment, and who has, for the first time, an opportunity to make defense to the action, has a right to treat the proceeding, as to him, as commenced by the process which brings him to court.'" *Id*. at 805.

CONCLUSION: The court held that a defendant who was added post-CAFA is entitled to its application because the suit commenced post-CAFA as to him. *Id*.

***Deaton v. Comm'r*, 440 F.3d 223 (5th Cir. 2006)**

QUESTION: Whether "a remittance made in conjunction with a Form 4868 application for an extension of time to file . . . [should be

considered:] (1) a per se rule that all Form 4868 remittances are payments . . . [or] (2) a facts-and-circumstances inquiry that would require a case-by-case analysis of any Form 4868 remittance made." *Id.* at 231-32.

ANALYSIS: The court found that it was "unnecessary to decide whether a Form 4868 remittance . . . [was] a payment as a matter of law because . . . [it found] that the Deatons' remittance of $125,000 in conjunction with their Form 4868 application for an extension of time to file constituted a payment of estimated income tax under § 6513(b)(2)." *Id.* at 232. The court hesitated "to adopt a per se rule in a case in which the record clearly indicates that the taxpayers' remittance was a payment, not a deposit . . . ." *Id.* However, the court noted that "even under the facts-and-circumstances approach proposed by the Deatons, their $125,000 remittance must be considered a payment of estimated tax." *Id.*

CONCLUSION: The 5th Circuit left "for another day the question of whether all Form 4868 remittances should be treated as payments of estimated tax, even though . . . [it] recognize[d] that several of . . . [its] sister circuits ha[d] already answered this question in the affirmative." *Id.*

Lee v. Cytec Indus., Inc., 460 F.3d 673 (5th Cir. 2006)

QUESTION: In the context of hybrid claims under § 301 of the Labor Management Relations Act, 29 U.S.C.S. § 185 ("LMRA"), whether the six month statute of limitations starts to run "when the employees knew or should have known of the union's breach . . . [or] when they knew or should have know that the union would no longer process their grievances." *Id.* at 676.

ANALYSIS: The court noted that hybrid claims involve two issues: the first is an allegation of violation of the LMRA by breaching the collective bargaining agreement. *Id.* at 676 n.1. The court explained the second as an allegation "that the union acted in such a discriminatory, dishonest, arbitrary, or perfunctory fashion as to breach its duty of fair representation." *Id.* The court explained that "[t]he rationale for [equitable tolling] is that because some plaintiffs must exhaust internal contractual remedies (*e.g.* the grievance process) before suing, it would be unfair to say that the plaintiffs' claim is barred by limitations if, while the grievance is pending, the six-month federal statute of limitations expires." *Id.* at 676. Further, the court concluded that "this exception to the general accrual rule could not confer more rights than those that plaintiffs would have if they were not entitled to this exception, that is if plaintiffs did not have to exhaust internal remedies." *Id.* The court noted that "[e]quitable tolling is an exception to the general rule that an

employee has six months to sue from the discovery of the breach of the duty of fair representation." *Id.*

CONCLUSION: The court "held that to invoke equitable tolling, an employee must file a grievance with the union within six months of the adoption of a new seniority system." *Id.*

Scarborough v. Chase Manhattan Mortgage Corp., 461 F.3d 406 (5th Cir. 2006)

QUESTION: "[W]hether a [Chapter 11 Bankruptcy] claim secured by an interest in real property that includes the debtor's principal residence as well as other income-producing rental property is 'a claim secured only by a security interest in real property that is the debtor's principal residence.'" *Id.* at 410-11.

ANALYSIS: The court examined § 1332(b) of the Bankruptcy Code, and found that "in the phrase 'real property that is the debtor's principal residence,' Congress equated the terms 'real property' and 'principal residence.'" *Id.* at 410. Therefore, the court reasoned, "the real property that secures the mortgage must be only the debtor's principal residence in order for the anti-modification provision to apply." *Id.* The court further clarified that "[a] claim secured by real property that is, even in part, not the debtor's principal residence does not fall under the terms of § 1322(b)(2)." *Id.*

CONCLUSION: The court concluded that "[b]ased on the plain language of § 1322(b)(2), we conclude that a creditor does not receive anti-modification protection for a claim secured by real property that includes both the debtor's principal residence and other rental property that is not the debtor's principal residence." *Id.*

United States v. Hodges, 460 F.3d 646 (5th Cir. 2006)

QUESTION: The court looked at the "requirements [that] must be satisfied for a person on supervised release to waive his right to counsel in a revocation proceeding under Federal Rule of Criminal Procedure 32.1(b)(2)." *Id*. at 648.

ANALYSIS: The court observed that although "the standard for waiver of a right to counsel in criminal prosecutions" is well settled, and requires the defendant to be apprised of "the dangers and disadvantages of self-representation," the 5th Circuit has "not addressed the issue in the context of a revocation proceeding." *Id*. at 649-50. The court stated that the right to waive counsel in revocation proceedings does not invoke constitutional guarantees under the Sixth Amendment, but heeded the Supreme Court's warning that "'the loss of liberty' involved in revocation hearings 'is a serious deprivation,' even though such

proceedings are not a part of the criminal prosecution itself." *Id*. at 651. The court then recognized that "waivers of the rights protected by Rule 32.1 must be knowing and voluntary," and adopted the test of the 1st and 7th Circuits, which "have declined to require rigid or specific colloquies with the district court [to demonstrate whether the waiver was 'knowing and voluntary'], adopting instead a 'totality of the circumstances' standard." *Id*. at 651.

CONCLUSION: "[A] waiver [of right to counsel in a revocation proceeding under FED. R. CRIM. P. 32.1(b)(2)] need not meet the formal requirements required by the Sixth Amendment, [but] must be knowing and voluntary as demonstrated either through a colloquy with the district court, or by the totality of the circumstances, or both." *Id*. at 648.

United States v. Jensen, 462 F.3d 399 (5th Cir. 2006)

QUESTION: "[W]hether taking an unusual amount of time to pull over, coupled with nervous behavior by the driver, amounts to reasonable suspicion to justify prolonged detention." *Id*. at 404.

ANALYSIS: The court began by stating that "limited searches and seizures are not unreasonable when there is a reasonable and articulable suspicion that a person has committed a crime." *Id*. at 403. The court recognized that "detentions [have previously been found to be] unreasonable, based on the totality of the circumstances, where the driver exhibited signs of nervousness," but nervousness may be "more probative when coupled with [a] delay in pulling over." *Id*. at 404-05. While purportedly considering the aggregate impact of the delay and the nervousness, the court first held that the delay in itself was insufficient to create a reasonable suspicion, and then proceeded to hold separately the same for nervousness because "the government [did] not present adequate evidence of a nexus between [the] allegedly suspicious behavior and any specific criminal activity." *Id*. at 405.

CONCLUSION: While, in some cases, "an excessive delay in stopping may . . . give rise to reasonable suspicion [to justify prolonged detention]," a thirty to sixty second delay in stopping accompanied by suspicious behavior unrelated to any specific criminal activity does not give rise to such suspicion. *Id*.

Certain Underwriters at Lloyd's v. Warrantech Corp., 461 F.3d 568 (5th Cir. 2006)

QUESTION: What is the methodology for reviewing remand orders? *Id.* at 573.

ANALYSIS: The court applied a clear-statement requirement for review of remand orders, while recognizing that other circuits "analyze a

remand order for what the district court did rather than what the district court said it did." *Id*. The court noted that this question had been evaluated by the Supreme Court in *Kircher*, but was not decided upon a finding that "the result was the same under either approach." *Id.*

CONCLUSION: The court retained its clear-statement requirement methodology and did not address the issue further because the validity of the use of this methodology was not before the court. *Id.*

SIXTH CIRCUIT

Appoloni v. United States, 450 F.3d 185 (6th Cir. 2006)

QUESTION: Whether "payments made by school districts to public school teachers in exchange for the relinquishment of those teachers' statutorily granted tenure rights [are] considered 'wages' taxable under [the Federal Insurance Contributions Act ("FICA")]." *Id.* at 189.

ANALYSIS: The court looked to Internal Revenue Code, 26 U.S.C. 3121(a), defining "wages" as "all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash." *Id.* at 189-90. The court noted that in order to be eligible to qualify for a payment, a teacher needed to possess tenure rights which where gained as a result of working a minimum number of years. *Id.* at 191. The court observed that the payments were in exchange for "services performed, rather than for the relinquishment of tenure rights." *Id.* The court explained that "just because a teacher relinquishes a right when accepting early retirement does not convert what would be FICA wages into something else." *Id.* at 192. The court stated that the determinative factor is "how the right relinquished was earned" and determined that "the tenure rights at issue were earned through service to the employer." *Id.* at 192, 195.

CONCLUSION: The court found that the "relinquishment of the tenure rights was incidental to the acceptance of the severance payment" and definitively held that "where a payment arises out of the employment relationship, and is conditioned on a minimum number of years of service, such a payment constitutes FICA wages." *Id.* at 191, 196.

DaimlerChrysler Corp. v. Cox, 447 F.3d 967 (6th Cir. 2006)

QUESTION: "Whether Michigan's State Correctional Facility Reimbursement Act ("SCFRA"), in conjunction with other Michigan laws and with [State] directives . . . runs afoul of ERISA in cases where prisoners refuse to inform their pension plans of a change of address." *Id.* at 968.

ANALYSIS: The court observed that if a prisoner did not voluntarily inform his pension plan to send payments to his prison address, SCFRA directed the prison warden to do so on his behalf. *Id.* at 969. When payment was sent to the prison, it was deposited in an account assigned to the prisoner, and up to 90% of the amount was garnished to pay for the cost of keeping the prisoner. *Id.* The court found this practice to constitute alienation, since the payment went directly from the pension fund to the prison, without an opportunity for the prisoner to exercise control over the money. *Id.* at 974-76. The court ruled this practice violated ERISA, which orders pension plans to "provide that benefits provided under the plan may not be assigned or alienated." *Id.* at 969. Thus, the court held, ERISA preempted SCFRA, and prison wardens could not order pension plan money to be sent to the inmate's prison address. *Id.* at 976. The court noted the state could still encumber the funds once the prisoner had received them. *Id.*

CONCLUSION: The anti-alienation provisions of ERISA preempt the address notification regime in SCFRA, and prison wardens may not order pension plans to send payments to an inmate's prison address. *Id.*

FDIC v. Dover, 453 F.3d 710 (6th Cir. 2006)

QUESTION: Whether "an immediately payable restitution order entered under 18 U.S.C. § 3663(f)(3) expired at the end of the criminal defendant's probation period." *Id.* at 713.

ANALYSIS: The 6th Circuit followed most circuits and ruled that "[e]nforcement of [a] restitution order is governed not by subsection (f) . . . but by subsection (h)." *Id.* at 716. The court held that "[r]estitution is a debt, which may be collected using the means appropriate to other debts." *Id.* at 717.

CONCLUSION: The 6th Circuit reversed the judgment of the district court and held that "[d]efendants should not be able to escape payment of restitution permanently simply by avoiding payment for a while." *Id.* at 716.

Cobb v. Contract Transp., Inc., 452 F.3d 543 (6th Cir. 2006)

QUESTION: "[W]hether a merger or transfer of assets is a precondition to successor liability under the Family and Medical Leave Act ("FMLA")." *Id.* at 550.

ANALYSIS: The 6th Circuit found "persuasive the fact that both the FMLA and its implementing regulations evidence a congressional intent to adopt the doctrine of successor liability developed in federal labor law cases." *Id.* at 550-51. The court concluded that "[i]nasmuch as federal labor cases do not require a merger or transfer of assets as a precondition

to the imposition of successor liability, we decline to impose such a requirement." *Id.* at 551.

CONCLUSION: Contrary to the 11th Circuit's holding, the 6th Circuit ruled in line with federal labor cases, finding that a merger or transfer is not a precondition to successor liability. *Id.* at 550.

***United States v. Martin*, 438 F.3d 621 (6th Cir. 2006)**

QUESTION: "[W]hether the United States Sentencing Commission failed to comply with Congress's directive when it established ratios to estimate the amount of methamphetamine that can reasonably be manufactured from certain precursor chemicals." *Id.* at 624.

ANALYSIS: The court recognized that the "Commission . . . [must] base the conversion ratios on both scientific and law enforcement data . . . ." *Id.* at 632. However, "the presumption of regularity that attaches to the acts of government officials require[d] . . . [the court] to resolve in favor of the Commission any doubt as to the Commission's compliance with the congressional mandate." *Id.* at 634.

CONCLUSION: The 6th Circuit "ultimately conclude[d] that Martin ha[d] not met his burden of showing that the Commission actually failed to base the conversion ratios on both . . . [scientific and law enforcement data] when it relied on a report prepared by the Drug Enforcement Administration (DEA)." *Id.* at 624.

***Eastman v. Marine Mech. Corp.*, 438 F.3d 544 (6th Cir. 2006)**

QUESTION: Whether a state employment action for wrongful discharge based on federal public policies invokes federal subject matter jurisdiction. *Id.* at 551.

ANALYSIS: The court noted that "[a] 'substantial' federal question involves the interpretation of a federal statute that actually is in dispute in the litigation and is so important that it 'sensibly belongs in federal court.'" *Id.* at 552. The court further noted that the lack of a federal remedy for the state-law employment action was "tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently 'substantial' to confer federal-question jurisdiction." *Id.* The court noted that "[t]he Ninth Circuit reached the same conclusion in *Campbell v. Aerospace Corp.*, 123 F.3d 1308 (9th Cir. 1997), when it rejected the argument that resort to the Federal False Claims Act as a source of public policy justified the exercise of federal jurisdiction over a state wrongful termination action." *Id.* at 553. The court found that "accepting jurisdiction of this state employment action would be disruptive of the

sound division of labor between state and federal courts envisioned by Congress." *Id.*

CONCLUSION: The court held that "a state-law employment action for wrongful termination in violation of federal public policy does not present a substantial federal question over which federal courts may exercise 'arising under' jurisdiction under 28 U.S.C. § 1331." *Id.*

***Almuhtaseb v. Gonzales*, 453 F.3d 743 (6th Cir. 2006)**

QUESTION: "Whether the REAL ID Act grants the courts of appeals jurisdiction to review denials of asylum based on untimeliness previously barred by 8 U.S.C. § 1158(a)(3)." *Id.* at 747.

ANALYSIS: The court followed the reasoning of the 2nd Circuit in determining "[t]he term 'constitutional claims' clearly relates to claims brought pursuant to provisions of the Constitution of the United States." *Id.* The court also agreed with the 2nd Circuit that giving "questions of law" its broadest meaning would create an overflow of cases not dealing with "constitutional claims." *Id.*

CONCLUSION: The 6th Circuit denied the appeal for lack of jurisdiction because it did not deal with a "constitutional claim." *Id.*

***United States v. Caruthers*, 458 F.3d 459 (6th Cir. 2006)**

QUESTION: Whether a defendant's waiver of a right to appeal certain issues in an agreement with the government precludes, as a matter of law, an attack on a sentence because it exceeds the statutory maximum. *Id.* at 471.

ANALYSIS: The court noted that many sister circuits did not allow an appellate waiver to bar an appeal on the ground that a sentence exceeded the statutory maximum. *Id.* The court acknowledged that the circuits utilized varying justifications to allow such appeals, including lack of jurisdiction, due process considerations, and the application of the unconscionability principle in contract law. *Id.* at 471-72.

CONCLUSION: The 6th Circuit joined the 1st, 2nd, 3rd, 6th, 7th, 9th, 10th, and 11th circuits in allowing an appeal on the ground that a sentence exceeded its statutory maximum notwithstanding an appellate waiver, indicating its adoption of the position was based upon a "general soundness of the doctrine." *Id.* at 472.

***Reg'l Airport Auth. Of Louisville & Jefferson County v. LFG, L.L.C.*, 460 F.3d 697 (6th Cir. 2006)**

QUESTION: Whether "where a state agency responsible for overseeing remediation of hazardous wastes gives comprehensive input, and the private parties involved act pursuant to those instructions, the

state participation may fulfill the public participation requirement." *Id.* at 709.

ANALYSIS: The court first noted that "the State did not give 'comprehensive input.'" *Id*. Next, the court stated that "the Authority cannot be said to have acted pursuant to the State's instructions because all work commenced prior to State approval." *Id*. Finally, the court noted that "the Authority never completed a BRA (baseline risk assessment) as the State required for risk-based management remedies." *Id.*

CONCLUSION: Because the "State's participation in this case falls well short of the standards for vicarious public comment," the court chose not to "decide whether this approach is sound" because "the Authority cannot demonstrate compliance with the public comment requirements even under this standard." *Id*.

Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n, 459 F.3d 676 (6th Cir. 2006)

QUESTION: Whether the two prongs contained in the test set forth by the Supreme Court in *Smith v. Robinson*, 468 U.S. 992 (1984), namely "(1) whether the constitutional claim pursuant to § 1983 is virtually identical to the claim under Title IX, and (2) whether Title IX provides a remedy comprehensive enough to be exclusive," were meant to be independently evaluated. *Id.* at 685.

ANALYSIS: The dissent argued for the "need to engage in a separate analysis as required by the Supreme Court in *Smith*," and that the court "must address this issue as one of first impression in this circuit." *Id.* at 702. The dissent noted that "once a court determines that the constitutional claim pursuant to § 1983 is virtually identical to the statutory claim, we have reason to assume that Congress intended to preclude use of § 1983 to enforce those claims." *Id.* However, the majority reasoned that the dissent's "purported presumption finds no support in the caselaw," and "[n]either the Supreme Court nor any of our sister circuits have suggested that the second prong is a more difficult obstacle for a plaintiff to overcome once the first prong is satisfied." *Id.* at 685.

CONCLUSION: The court held that "the two prongs set forth in Smith are intended to be independently evaluated." *Id.*

SEVENTH CIRCUIT

United States v. Boscarino, 437 F.3d 634 (7th Cir. 2006)

QUESTION: "Whether a mail-fraud scheme that was carried out, in part, by depriving one person of another's honest services may be a predicate offense for a money-laundering conviction . . . ." *Id.* at 636.

ANALYSIS: While the court noted that "only 'proceeds' can be laundered," the court found that when an offense creates proceeds, "which are laundered to hide detection, it is sensible to treat them the same as any other proceeds of mail or wire fraud." *Id.*

CONCLUSION: The 7th Circuit held that "[t]he scheme to defraud itself violates [the mail fraud statute], which is a listed predicate offense for the money-laundering statute." *Id.*

Koch v. Koch, 450 F.3d 703 (7th Cir. 2006)

QUESTION: Whether a couple's children had become habitual residents of Germany such that their father's removing them to the United States violated the Hague Convention on the Civil Aspects of International Child Abduction and required their return to Germany. *Id*. at 710.

ANALYSIS: The 7th Circuit stated that, according to the Hague Convention, the removal of a child is wrongful where it violates the laws "of the State in which the child was habitually resident immediately before the removal . . . ." *Id.* at 712. The court looked at the 9th Circuit's decision in *Mozes v. Mozes*, 239 F.3d 1067 (2001) in order to determine in which country the children had become "habitual residents" prior to their removal to the United States. *Id.* at 712-13. Under *Mozes*, the court must first determine whether the parents shared the intent to abandon the former habitual residence, and then whether the children had so acclimated to their new residence that they are effectively habitual residents. *Id.* at 714. Applying this standard to the present matter, the court determined that despite the parents' desire to return eventually to the United States, they had moved all of their belongings to Germany and established a home there, the father had found employment in Germany, and the children had attended school in Germany. *Id.* Further, the court found that given the very young ages of the children, the three years that they had spent living in Germany had comprised the greater portions of their lives, supporting the idea that the children had so acclimatized to Germany that they were effectively habitual residents. *Id.* at 717.

CONCLUSION: Because the children were "habitual residents" of Germany immediately prior to their removal to the United States, the laws of Germany applied to this case and the children had to return to Germany. *Id.* at 719.

***In re McKinney*, 457 F.3d 623 (7th Cir. 2006)**

QUESTION: **"**Whether Section 1233 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 . . . is applicable to bankruptcy proceedings filed before the effective date of the provision, which was October 17, 2005." *Id.* at 624.

ANALYSIS: Despite the fact that procedural alterations are normally applied retroactively, the court noted that this particular provision specifically stated that it is not to be applied to pending cases. *Id.* The circuit offered further evidence of this by stressing that the statute expressly stated other exceptions, while omitting the requested exception. *Id.*

CONCLUSION: Based on the premature nature of the case in relation to the effective date of the statute, the court found the appeal to be outside of its jurisdiction. *Id.*

***United States v. Bonner*, 440 F.3d 414 (7th Cir. 2006)**

QUESTION: Whether a court should order a district court judge to carry out a limited remand in light of a sentencing judge's recusal. *Id.* at 415.

ANALYSIS: The court recognized that it had held in *United States v. Paladino*, 401 F.3d 471 (7th Cir. 2005), that a "case should be remanded to the sentencing judge, not just any judge who might be available." *Id.* at 416. However, the court noted that "[v]acating the appellants' sentences and remanding for a new sentencing hearing allows the newly assigned judge to proceed with a clean slate." *Id.* at 417.

CONCLUSION: "If the sentencing judge becomes unavailable following a limited remand under *Paladino* . . . this court . . . will then vacate the defendant's sentence and remand for a complete resentencing hearing in order to permit the successor judge to sentence the defendant in conformity with the mandates of *Booker*." *Id.*

***United States v. Grigg*, 442 F.3d 560 (7th Cir. 2006)**

QUESTION: Whether the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), striking down 18 U.S.C. § 3553(b)(1), also eliminated § 3553(b)(2). *Id.* at 564.

ANALYSIS: The court noted that the 2nd and 10th Circuits faced the question and both ruled "that § 3553(b)(2) possesses the same Sixth Amendment defect as does § 3553(b)(1)." *Id*. The 7th Circuit agreed with the previous circuits, finding the language of the two sections similar and the problems found in *Booker* regarding § 3553(b)(1) to exist within § 3553(b)(2) as well. *Id.*

CONCLUSION: Section 3553(b)(2) violated the Sixth Amendment for the same reason § 3553(b)(1) was found unconstitutional in *Booker*, and therefore, "subject to the same remedy that *Booker*" imposed on § 3553(b)(1), replacing language calling for mandatory sentencing with language calling for "advisory" sentencing. *Id.*

***Square D Co. v. Comm'r*, 438 F.3d 739 (7th Cir. 2006)**

QUESTION: Whether Treasury Regulation § 1.267(a)-3, which "provides for the cash method of accounting when claiming deductions for payments to a related foreign person" survives *Chevron* analysis. *Id.* at 742.

ANALYSIS: The court recognized that "the Third Circuit specifically dealt with this question in its *Tate & Lyle* decision, eventually concluding that Treas. Reg. § 1.267(a)-3 was valid" *Id.* at 744. "As a general matter, 'respect for the decisions of other circuits is especially important in tax cases because of the importance of uniformity, and the decision of the Court of Appeals of another circuit should be followed unless it is shown to be incorrect." *Id.*

As to the first step in the *Chevron* analysis, the court found that the plain meaning of the Code neither clearly supported nor opposed the regulation. *Id.* As to the second step, the court noted that "Congress considered and sanctioned the use of the cash method as a way to implement the matching principle to solve the problem of payments to a foreign related party." *Id.* at 747.

CONCLUSION: The 7th Circuit found "the regulation a reasonable interpretation of the relevant Code provisions, and thus, defer[red] to it." *Id.*

***United States v. McCaffrey*, 437 F.3d 684 (7th Cir. 2006)**

QUESTION: "Whether unprosecuted, but uncontroverted, crimes fall within the double-counting exception of Application Note 2 [of the United States Sentencing Guidelines § 2G2.2] . . . ." *Id.* at 688.

ANALYSIS: The court found that the defendant's "explicit on-the-stand confessions during the sentencing phase, corroborated by extensive victim testimony and contemporaneous documentary evidence, [demonstrated that] the acts were proven beyond a reasonable doubt." *Id.*

The court further explained that "[t]his approach is consistent with the intention of the Guidelines to enable district judges to give extended sentences to those with a long history of abusing children." *Id.* The court stated that "the Guidelines permit judges to depart upward where the defendant's history of abusive behavior is so extensive or so vicious that a five-level pattern enhancement is inadequate." *Id.* at 688-89.

CONCLUSION: The court concluded that "the district court properly used the defendant's *admitted, uncontroverted, and corroborated* acts of abuse to justify two distinct upward departures from the guidelines." *Id.* at 688.

EIGHTH CIRCUIT

United States v. St. Luke's Hospital, Inc., 441 F.3d 552 (8th Cir. 2006)

QUESTION: "Whether to relax [FED. R. CIV. P.] 9(b)'s pleading requirements for complaints brought under the FCA [False Claims Act] and to permit early discovery." *Id.* at 559.

ANALYSIS: The court noted that some courts "have recognized in theory that the particularity requirements of Rule 9(b) may be relaxed in an FCA *qui tam* action where the information relevant to the fraud is peculiarly within the perpetrator's knowledge," though "few courts have actually applied [the] standard." *Id.* The court also noted that "neither the Federal Rules nor the FCA offer any special leniency under these particular circumstances to justify [Dr. Joshi] failing to allege with the required specificity the circumstances of the fraudulent conduct he asserts in his action." *Id.* at 560.

CONCLUSION: The court refused "to relax Rule 9(b)'s pleading requirements and allow discovery." *Id.* at 561.

Ace Prop. and Cas. Ins. Co. v. Fed. Crop Ins. Corp., 440 F.3d 992 (8th Cir. 2006)

QUESTION: Whether dismissal was warranted where "insurers had neither exhausted their administrative remedies nor established any exception to the exhaustion requirement." *Id.* at 994.

ANALYSIS: The court noted that while the language of § 6912(e) of the Federal Crop Insurance Reform and Department of Agriculture Act of 1994 "requires exhaustion, nothing in the text indicates that exhaustion was intended as a jurisdictional bar." *Id.* at 998. The court referenced the Prison Litigation Reform Act, among other legislation, that contained similar language, but "does not contain the sort of

'sweeping and direct' language necessary to impose a jurisdictional requirement, but only governs the timing of the action." *Id.*

CONCLUSION: The court concluded that "§ 6912(e) is nothing more than a codified requirement of administrative exhaustion and is thus not jurisdictional." *Id.* at 999.

***Geach v. Chertoff*, 444 F.3d 940 (8th Cir. 2006)**

QUESTION: Whether the court had subject matter jurisdiction over an alien's constitutional challenge regarding a failure to exhaust administrative remedies, which resulted in the alien's ineligibility for a suspension of deportation. *Id.* at 945.

ANALYSIS: The 8th Circuit agreed with other circuits that had considered this issue. *Id.* The court noted that it had subject matter jurisdiction over unexhausted constitutional claims by aliens, unless the claims concerned procedural errors that could be corrected by an administrative tribunal. *Id.*

CONCLUSION: Because the defendant's constitutional claim did not concern a procedural error, the court asserted its subject matter jurisdiction to consider the case on its merits. *Id.* at 946.

***United States v. Oslund*, 453 F.3d 1048 (8th Cir. 2006)**

QUESTION: Whether "the [Mandatory Victim Restitution Act, 18 U.S.C. § 3663A] authorizes an award of future lost income." *Id.* at 1062.

ANALYSIS: The court noted that "the statute plainly states that a victim can recover income that is lost due to a crime causing bodily injury, and if that victim dies, then the estate can recover in the victim's place." *Id.* at 1063. Yet, the court further determined, "that does not mean that it is always proper for lost future income to be awarded in a restitution order." *Id*. The 8th Circuit explained that "[i]f the amount of future income is contested by a defendant and the district court finds that determining the proper amount would be unduly burdensome and time-consuming, the court has the discretion to decline to award future income in the restitution order." *Id.*

CONCLUSION: "Because there was not an undue burden cast upon the court in this case, it was not improper for lost future income to be included in the restitution order." *Id.*

NINTH CIRCUIT

Garcia-Quintero v. Gonzales, 455 F.3d 1006 (9th Cir. 2006)

QUESTION: Whether an immigrant's acceptance in the Family Unity Program ("FUP") "renders him 'admitted in any status' for the purposes of cancellation of removal." *Id.* at 1009.

ANALYSIS: The court found that "[t]he FUP permits qualified alien spouses or unmarried children of legalized aliens, who entered the United States before 1988 and have continuously resided in the United States . . . , to apply for the benefits of the program, which include protection from deportation and authorization to work in the United States." *Id.* at 1009. The 9th Circuit reasoned that acceptance into the FUP qualified as "admission" to the United States because "admission is not always limited to inspection and authorization at the point of entry." *Id.* at 1016. The court also determined that "it is only logical that acceptance into the FUP confer[red] some type of immigration status on the beneficiaries of the program," and thus satisfied the meaning of "in any status" for the purposes of cancellation of removal. *Id.* at 1018.

CONCLUSION: "The plain meaning of 'admitted in any status,' the legislative history of § 1229b, and the precedential decisions of the BIA [Board of Immigration Appeals] and this circuit, lead us to hold that acceptance into the Family Unity Program constitutes 'admitted in any status' for the purposes of cancellation of removal." *Id.* at 1018-19.

Chuck v. Hewlett Packard Co., 455 F.3d 1026 (9th Cir. 2006)

QUESTION: "Whether ERISA's statute of limitations may bar a claim for benefits notwithstanding a plan's failure to fulfill its disclosure and review obligations under ERISA § 503, 29 U.S.C. § 1133." *Id.* at 1029.

ANALYSIS: The court noted that "an ERISA cause of action accrues either at the time the benefits are actually denied or when the insured has reason to know that the claim has been denied." *Id.* at 1031. The court found that "a plan's violation of § 1133 does not always prevent the triggering of ERISA's statutory limitations period." *Id.* at 1033. First, there are "unusual circumstances" where a claimant may have reason to know that they will be denied ERISA benefits. *Id.* Thus a "claimant with actual knowledge of his internal appeal rights under a plan, for example, could not contend that a benefits denial was non-final simply because the plan did not remind him of those rights." *Id.* Second, the court stated an interest in a "policy of finality and repose" that would be compromised by delay and have "negative effects on the availability of witnesses and

evidence." *Id.* at 1034. Finally, the court stated that an extended statute of limitation would obstruct "claimants' access to meaningful remedies." *Id.*

CONCLUSION: The court held that "the plan's violation of its notification and review obligations under ERISA is a highly significant factor, but not a dispositive one." *Id.* at 1031. "An investigation of the facts of each case is necessary to determine whether a plan nevertheless foreclosed a claimant from any reasonable belief that the plan had not finally denied benefits." *Id.* at 1036.

***Kepilino v. Gonzales*, 454 F.3d 1057 (9th Cir. 2006)**

QUESTION: "[W]hether a state law conviction [for prostitution] renders an alien inadmissible under federal immigration law." *Id.* at 1059.

ANALYSIS: The court stated that in order "[t]o determine whether a specific crime falls within a particular category of inadmissible predicate crimes, we apply the categorical approach . . . and focus narrowly on the elements of the crime as defined by its statutory language." *Id.* at 1060. When the federal statute of conviction is "categorically broader than the State Department's definition of the crime, we next employ the modified categorical approach, which requires that we 'look beyond the language of the statute to a narrow, specified set of documents that are part of the record or conviction . . . .'" *Id.* at 1062. The court specified that the state record of conviction must "demonstrate[] that [the defendant] was convicted of the crime" as defined in the federal statute. *Id.*

CONCLUSION: The state's record of conviction does not "establish[]that [the defendant's] conduct falls within the C.F.R.'s definition of 'prostitution.' Accordingly, we find that [the defendant's] offense was not a crime of prostitution under the modified categorical approach." *Id.* at 1063.

***United States v. Scott*, 450 F.3d 863 (9th Cir. 2006)**

QUESTION: "[W]hether police may conduct a search based on less than probable cause of an individual released while awaiting trial." *Id.* at 864.

ANALYSIS: The court dictated that when an individual is released while awaiting trial, "the Government's proposed conditions of release . . . [must] not be 'excessive' in light of the perceived evil." *Id.* at 867. The court posited that in "cases where the risk of flight is so slight . . . any amount of bail is excessive [and] release on one's own recognizance would then be constitutionally required, which could further limit the government's discretion to fashion conditions of release." *Id.* The court

explained that while the Government may have the right to keep someone in jail, that right does not confer the right to subject a release to unconstitutional conditions. *Id.*

CONCLUSION: The court determined that a release conditioned on consent to search based on less than probable cause is excessive. *Id.*

***Moyer v. Alameida*, 184 F. App'x 633 (9th Cir. 2006)**

QUESTION: "Whether an 'administrative fee' attached to a restitution fine is punitive under the Ex Post Facto Clause . . . ." *Id.* at 636.

ANALYSIS: The court examined legislative intent in order to determine whether a statutory scheme is civil or punitive. *Id.* The court posited that if the statute is punitive, or if it is civil, but the purpose or effect is so punitive "as to negate [the legislature's] intention to deem it civil," then it is a violation of the Ex Post Facto Clause. *Id.* The court was unwilling to find non-punitive intent where the legislature's stated purpose contradicted with the legislative history. *Id.* at 638. The court declared that where "evidence of legislative intent . . . is ambiguous, [the court] must rely more heavily on an analysis of whether the statute is punitive in effect." *Id.*

CONCLUSION: The court held that in order to determine punitive effect, the seven Kennedy factors should be used as useful guideposts. *Id.* The court noted that these factors are neither dispositive nor exhaustive. *Id.*

***Mendoza v. Carey*, 449 F.3d 1065 (9th Cir. 2006)**

QUESTION: "Whether a habeas petitioner's inability to obtain Spanish-language materials or procure translation assistance can be grounds for equitable tolling of the [Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA")]'s one-year limitations period." *Id.* at 1069.

ANALYSIS: The court announced two elements that a litigant who cannot communicate in English, seeking equitable tolling of the AEDPA limitations period, must establish: "(1) that he has been pursuing his rights diligently and (2) that some extraordinary circumstance stood in his way." *Id.* at 1068. The court examined a 9th Circuit holding that the "unavailability of a copy of the AEDPA . . . could be grounds for statutory tolling" and determined that the petitioner's inability to procure Spanish-language legal materials was analogous to a copy not being available. *Id.* at 1069.

CONCLUSION: The court rejected "a per se rule that a petitioner's language limitations can justify equitable tolling," but held that where a

petitioner lacks English language ability, access to Spanish-language materials, or cannot obtain the services of a translator, the petitioner may be entitled to equitable tolling of the AEDPA's one-year limitations period. *Id.* at 1069-71.

***Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006)**

QUESTION: Whether "a [Visa Waiver Program ("VWP")] entrant [who] files an adjustment of status application as an immediate relative . . . is no longer subject to the Visa Waiver Program's no-contest clause," and whether "an alien widow whose citizen spouse filed the necessary immediate relative petition form but died within two years of the qualifying marriage nonetheless remains a spouse for purposes of 8 U.S.C. § 1151(b)(2)(A)(i)." *Id*. at 1033-34.

ANALYSIS: Turning to the first question, the court outlined the VWP, which "authorizes the government to waive visa requirements for citizens of certain favored countries," but prohibits persons who enter the country under this program from contesting their right to remain in the United States. *Id*. at 1034. Specifically, the court noted, "under the no-contest clause, [one agrees] to waive any right . . . 'to contest . . . any action for removal.'" *Id*. The court recognized that aliens who enter the country under the VWP may file an application to adjust their status, which triggers "certain procedural safeguards." *Id*. The court then ruled that these procedural protections trumped the no-contest clause, because "having granted VWP visitors the right to seek an adjustment of status, it makes no sense for Congress to have intended that these preferred visitors by definition . . . should have second-class status [to non-favored aliens] once they enter into the adjustment of status process." *Id*. at 1035.

Addressing the second question, the court considered the contested language of § 1151(b)(2)(A)(i), which states that "[i]n the case of an alien who was the spouse of a citizen of the United States for at least 2 years at the time of the citizen's death . . . the alien . . . shall be considered . . . to remain an immediate relative after the date of the citizen's death." *Id*. at 1038. The court interpreted this provision as creating a pre-application definition of "immediate relative," as opposed to a post-application requirement that the alien remain married to the citizen-spouse for two years. *Id*. In reaching this conclusion, the court determined that the Board of Immigration Appeals's interpretation to the contrary was not entitled to deference under *Chevron* because "Congress clearly intended an alien widow whose citizen spouse has filed the necessary forms to be and to remain an immediate relative (spouse) . . . even if the citizen spouse dies within two years of the marriage." *Id*. at 1039.

CONCLUSION: With respect to the first question, "once a VWP entrant files an adjustment of status application as an immediate relative . . . the alien is entitled to the procedural guarantees of the adjustment of status regime . . . and to that extent is no longer subject to the Visa Waiver Program's no-contest clause." *Id*. at 1033-34. In regard to the second question, the alien widow "remains a spouse for purposes of 8 U.S.C. § 1151(b)(2)(A)(i), and is entitled to be treated as such." *Id*. at 1034.

***Watson v. Weeks*, 436 F.3d 1152 (9th Cir. 2006)**

QUESTION: "Whether certain provisions of the Medicaid Act, 42 U.S.C. §§ 1396a(a)(10) and 1396a(a)(17), create individual rights enforceable under 42 U.S.C. § 1983." *Id.* at 1154.

ANALYSIS: The court noted that "[a]ccording to [§ 1396a(a)(10)], a state plan for medical assistance must provide 'for making medical assistance available, including at least the care and services listed in paragraphs (1) through (5) . . . of [§ 1396d(a)] of this title,' to 'all individuals' meeting specified financial eligibility standards." *Id.* at 1159. The court utilized the set forth by the Supreme Court in *Blessing v. Freestone*, 520 U.S. 329 (1997), holding that § 1396a(a)(10) created a private right of action because "1) [Congress] intended the statutory provision to benefit the plaintiff; 2) [the] asserted right is not so 'vague and amorphous' that its enforcement would strain judicial competence; and 3) that the provision couch the asserted right in mandatory rather than precatory terms." *Id.* at 1158. However, the court held that § 1396a(a)(17), which "provides that a state plan for medical assistance 'must . . . include reasonable standards (which shall be comparable for all groups . . .) for determining eligibility for and the extent of medical assistance under this plan," did not create an individual cause of action. *Id.* at 1162. The court held that because the statute mentioned neither individuals nor persons and did not "provide meaningful instruction for the interpretation of 'reasonable standards' in terms of medical need," § 1396a(a)(17) failed both the first and second prongs of the *Blessing* test. *Id.* at 1162-63.

CONCLUSION: The 9th Circuit held "that section 1396a(a)(10) creates an individual right enforceable under section 1983 . . . [and] that section 1396a(a)(17) does not create such an individual right. *Id.* at 1155.

***United States v. Ye*, 436 F.3d 1117 (9th Cir. 2006)**

QUESTION: Whether the court had "jurisdiction to hear the government's interlocutory appeal under [18 U.S.C.] § 1835" when the district court's order "[did] not mandate the disclosure of any trade secret

materials that [had] not already been previously disclosed by the government." *Id.* at 1120.

ANALYSIS: The court found that by the plain language of the statute, "§ 1835 grants interlocutory appellate jurisdiction *only* when a district court's order authorizes or directs the disclosure of a trade secret," and here "the district court's order does not direct the disclosure of a trade secret." *Id.* at 1121. The 9th Circuit held that "[b]ecause the purpose of the district court's order was only to clarify exactly which materials the government contends constitute the protected trade secrets, and all relevant materials had already been turned over, the district court's order [did] not direct or authorize the 'disclosure' of trade secrets as required by the plain language of § 1835." *Id.* The court also found that the legislative history, which emphasized protecting corporations involved in litigation from exposing trade secrets to the public, supported this interpretation. *Id.*

CONCLUSION: The court held that "§ 1835 [did] not provide [the Court] with jurisdiction over this appeal because the government had already disclosed all of the relevant trade secret materials prior to the making of the order at issue." *Id.* at 1119.

United States v. Blandin, 435 F.3d 1191 (9th Cir. 2006)

QUESTION: "[W]hether an escapee's subjective intent to return to custody could qualify for a downward adjustment under § 2P1.1(b)(2) [of the United States Sentencing Guidelines]." *Id.* at 1194.

ANALYSIS: The court noted that the commentary to section 2P1.1 explains, "'returned voluntarily' includes voluntarily returning to the institution or turning one's self in to a law enforcement authority as an escapee." *Id.* at 1195. The 9th Circuit agreed with the 7th and 8th Circuits, which held that choosing to surrender to authorities when faced with the prospect of being arrested was not the "willingness to cooperate" that § 2P1.1(b)(2) "had in mind." *Id.*

CONCLUSION: "[R]egardless of whether the [escapee] had formed the subjective intent voluntarily to surrender, his return to custody cannot be considered voluntary under § 2P1.1(b)(2) because his willingness to cooperate arose in connection with his arrest for [another crime]." *Id.*

Brittain v. Hansen, 451 F.3d 982 (9th Cir. 2006)

QUESTION: Whether a plaintiff was so deprived of her protected liberty interest in visiting her son that she has a cognizable substantive or procedural due process claim under 28 U.S.C. § 1983. *Id*. at 993.

ANALYSIS: In analyzing the substantive due process argument, the 9th Circuit followed precedent set by other circuits in cases that are

factually similar to the present matter. *Id.* at 992-93. The court reasoned that because the right at issue was only for visitation, not for custody, and the visitation period deprived was only a week in duration, plaintiff's claim does not support a substantive due process violation. *Id.* at 996. The court also reasoned that since the police had statutory authority not only to remove the child from plaintiff's custody, but also to arrest plaintiff pursuant to the terms of the court visitation order, the police's actions were "objectively reasonable" and plaintiff's substantive due process rights were not violated. *Id.* at 997. Turning to plaintiff's procedural due process claim, the court restated that plaintiff has a protected liberty interest in her right to visitation with her son. *Id.* at 1000. The court then applied the balancing test from *Mathews v. Eldridge*, 424 U.S. 319 (1976), and looked to other circuit precedents for guidance. *Id.* at 1000-02. The court determined that the *Mathews* balancing test, as applied here, favors a finding that plaintiff's procedural due process rights were not violated. *Id.* Further, the court rejected plaintiff's argument that a pre-deprivation hearing was necessary, finding that other circuits have determined that no pre-deprivation hearing is required in cases such as this. *Id.* at 1002.

CONCLUSION: The court held that the plaintiff unsuccessfully pled a violation of both her substantive and procedural due process rights, and reversed the decision of the lower court entitling plaintiff to a pre-deprivation hearing. *Id.* at 1003.

United States v. Weber, 451 F.3d 552 (9th Cir. 2006)

QUESTION: Whether the district court may impose penile plethysmograph testing as a condition for supervised release of convicted sex offenders. *Id*. at 554.

ANALYSIS: The 9th Circuit noted that under the applicable statutes, 18 U.S.C. §§ 3583 and 3553(a), conditions of supervised release are permissible only when they are "reasonably related to the goal of deterrence, protection of the public, or rehabilitation of the offender." *Id.* at 558. In addition, the condition must not involve a deprivation of liberty any greater than is necessary to meet the above-stated goals. *Id.* In analyzing the condition in the present matter under this two-prong standard, the court determined that the relative success of the plethysmograph testing in treating sex offenders proves that it reasonably related to the goals of deterrence, public protection and rehabilitation. *Id.* at 566-67. However, the court also determined that the district court did not make the necessary record findings showing that there is no less intrusive means available and that the deprivation of defendant's liberty was no greater than necessary. *Id.* at 570.

CONCLUSION: The court vacated the order requiring defendant to submit to the plethysmograph test as a condition of his supervised release because the district court did not present the necessary record findings to show that the condition involved no greater deprivation of liberty than was necessary. *Id.*

***Lively v. Wild Oats Mkts., Inc.*, 456 F.3d 933 (9th Cir. 2006)**

QUESTION: Whether the nature of the "forum defendant rule contained in [28 U.S.C.] § 1441(b)" is procedural or jurisdictional. *Id.* at 935.

ANALYSIS: First, the court dealt with its jurisdiction to hear the appeal. *Id.* at 938. The court noted that "this is one of those rare cases in which we must decide the merits [of the appeal] to decide [the propriety of our] jurisdiction." *Id.* at 938. The court then discussed a related case involving a local, diverse defendant and his post-removal joinder. *Id.* at 936 n.3. The 9th Circuit previously held that joinder did not require remand to state court as it is procedural rather than jurisdictional. *Id.* In affirming the *Spencer* court's conclusion there, the court in the present matter based its decision on "the fact that the local defendant was joined *after* the case had been removed to federal court, and, therefore, the defendants did not violate the forum defendant rule at the time of removal." *Id.* The court further noted that it affirmed without disagreeing with the district court's determination that § 1441(b) was a procedural rule. *Id.*

CONCLUSION: "We join eight of the nine circuits that have decided this issue and hold that the forum defendant rule is procedural, and therefore a violation of this rule is a waivable defect in the removal process that cannot form the basis for a district court's sua sponte remand order." *Id.*

***United States v. Casch*, 448 F.3d 1115 (9th Cir. 2006)**

QUESTION: Whether a court's failure to instruct a jury on venue constitutes reversible error. *Id.* at 1116.

ANALYSIS: The defendant, Mark Casch, was indicted for crimes committed "in the District of Idaho or elsewhere." *Id.* The jury instructions after trial did not include any instruction on venue. *Id.* The court acknowledged the trial court's failure to instruct on venue constituted error, but held "[t]he error, which deprives the command in Article III of effect, is of constitutional magnitude, but it is not structural—that is, it does not deprive the trial of fundamental fairness." *Id.* at 1117. The court applied a harmless error analysis used in similar cases in the 4th and 8th Circuits, and found that "[b]ecause the evidence

that Casch committed conspiracy in Idaho was 'substantial' and 'uncontroverted,' the district court's error was harmless." *Id.* at 1118.

CONCLUSION: The court held that "proof of venue may be so clear that failure to instruct on the issue is not reversible error." *Id.*

***United States v. Thomas*, 447 F.3d 1191 (9th Cir. 2006)**

QUESTION: What is the "extent of an unauthorized driver's standing to challenge a rental automobile search." *Id.* at 1197.

ANALYSIS: The court stated that a legitimate expectation of privacy was necessary to have standing to challenge the constitutionality of a search. *Id.* at 1196. The court noted 9th Circuit precedent which held that a person must have "possessory or ownership interest" in an item in order to possess a reasonable expectation of privacy. *Id.* The court clarified that a "possessory or ownership interest" had a broad definition, including common authority and joint control arising from an owner's grant of permission to another to exercise control over the owner's property. *Id.* at 1197-99.

CONCLUSION: "An unauthorized driver may have standing to challenge a search if he or she has received permission to use the car." *Id.* at 1199.

***Lindsey v. SLT L.A., L.L.C.*, 447 F.3d 1138 (9th Cir. 2006)**

QUESTION: How should the four elements necessary to establish a prima facie case of employment discrimination be adapted to suit contract discrimination claims arising under 42 U.S.C. § 1981. *Id.* at 1145.

ANALYSIS: The four elements necessary to establish a prima facie case of employment discrimination are: "that [the plaintiff] belongs to a racial minority; . . . he applied and was qualified for a job for which the employer was seeking applicants; . . . despite his qualifications, he was rejected; and . . . after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *Id.* at 1144 n.2. The court followed the 6th and 7th Circuits in adapting the first three elements as follows: "(1) [plaintiff] is a member of a protected class, (2) [plaintiff] attempted to contract for certain services, and (3) [plaintiff] was denied the right to contract for those services." *Id.* at 1145.

The court noted that the 6th and 7th Circuits are split over the proper adaptation of the fourth element, noting that the 7th Circuit "requires that such services remained available to similarly-situated individuals who were not members of the plaintiff's protected class. *Id.* However, the court noted the Sixth Circuit concluded "that this flat

requirement is too rigorous in the context of the denial of services by a commercial establishment, because customers often have no way of establishing what treatment was accorded to other customers." *Id.* The court resolved this difference by stating that the 6th Circuit therefore adapted the fourth element "to require: 'that (a) plaintiff was deprived of services while similarly situated persons outside the protected class were not and/or (b) plaintiff received services in a markedly hostile manner and in a manner which a reasonable person would find objectively discriminatory.'" *Id.* The court declared the 6th Circuit's reasoning to be more persuasive but found it unnecessary to decide the issue since the defendants in the case had clearly met the 7th Circuit's more demanding requirement. *Id.*

CONCLUSION: The court followed the 6th and 7th Circuit's joint adoption of the first three elements of a prima facie case of contract discrimination, and found it unnecessary to choose a side on their split regarding the fourth element, because the defendant's conduct clearly met the stricter standard. *Id.*

***Crowley Marine Servs. v. Maritrans Inc*., 447 F.3d 719 (9th Cir. 2006)**

QUESTION: Whether the district court properly applied "[Rule 2(b)] of the International Regulations for Preventing Collisions at Sea, . . . [codified by] 33 U.S.C. § 1602, better known by [the] acronym as the 'COLREGS.'" *Id.* at 721.

ANALYSIS: The court rejected the lower court's finding that "courts have either expanded the scope of Rule 2(b)'s special circumstances [exception] or have created a wholly separate category of special circumstances involving vessels operating in concert and pursuant to agreed maneuvers." *Id.* at 725. The court turned to the plain language of Rule 2(b), which provides that "in construing and complying with these Rules due regard shall be had to all dangers of navigation and collision and to any special circumstances, including limitations of the vessels involved, which may make a departure from these Rules *necessary to avoid immediate danger*." *Id*. The court held that "vessels may justify departure from the COLREGS in order to avoid immediate danger, but not for more generic special circumstances." *Id.* The court noted that "[t]his interpretation is echoed in one of the leading admiralty law treatises." *Id.* The court also noted that the Rules are "strictly and literally construed, and compliance is insisted upon." *Id.* at 726.

CONCLUSION: The 9th Circuit held that vessels are not excused under Rule 2(b) from adhering to the COLREGS except in situations of immediate danger, and the lower court "should consider the pre-arranged

escort plan, along with all the other facts, when it apportions fault." *Id.* at 728.

***Jonah R. v. Carmona*, 446 F.3d 1000 (9th Cir. 2006)**

QUESTION: "Whether [the Federal Bureau of Prisons ("BOP") must give] a juvenile whose status is adjudicated under [the Federal Juvenile Delinquency Act ("FJDA")] . . . credit against his or her sentence for time spent in pre-sentence custody." *Id.* at 1003.

ANALYSIS: The court noted that "before 1999 the BOP consistently applied [18 U.S.C.] § 3585 [requiring the BOP to give credit for any time spent in official detention prior to sentencing] to juveniles when calculating their sentences under the FJDA." *Id.* at 1002. However, "[t]he BOP reversed course in 1999 . . . [and] revised its policy to . . . refuse[] to credit juveniles with pre-sentence time served." *Id.* After an extended review of related statutes, legislative history, and statutory purpose, the court recognized that Congress, in enacting the Sentencing Reform Act of 1984, which included revisions to § 3585 and the FJDA, "intended for the BOP to continue to credit juveniles with time spent in pre-sentence custody." *Id.* at 1010.

CONCLUSION: The 9th Circuit held that the Federal Bureau of Prisons must give "juveniles . . . credit for pre-sentence custody and accordingly reverse[d the district court ruling]." *Id.* at 1002.

***United States v. Beng-Salazar*, 452 F.3d 1088 (9th Cir. 2006).**

QUESTION: "Whether [the defendant] preserved his challenge to the court's mandatory use of the Sentencing Guidelines," when he failed, prior to his briefing in appellate court, to "explicitly argue that the federal Sentencing Guidelines were unconstitutional because of their mandatory nature, or that mandatory application of the Guidelines to his case was error." *Id.* at 1093.

ANALYSIS: The court recognized that it was "unlikely that any defendant would have objected to a judge's use of mandatory Sentencing Guidelines, prior to the Supreme Court's January 2005 decision in *Booker*." *Id.* The court also noted that the "First, Second, Fourth, Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits each have recognized that a defendant's argument that *Apprendi* or *Blakely* undermined the Federal Guidelines, or that he was entitled to have a jury determine the sentencing factors in his case, preserved his claim of nonconstitutional *Booker* error." *Id.* at 1093-94.

CONCLUSION: The 9th Circuit held that defendant's "timely Sixth Amendment objections, based on *Apprendi* and *Blakely* were sufficient

to preserve his *Booker* challenge to the court's imposition of his sentence using the erstwhile mandatory Guidelines." *Id.* at 1090.

***Mendez-Gutierrez v. Gonzales*, 444 F.3d 1168 (9th Cir. 2006)**

QUESTION: "Whether the Board [of Immigration Appeals] is bound by the scope of [a 9th Circuit] remand" or whether new issues can be raised during a remand proceeding. *Id*. at 1173.

ANALYSIS: The court found that just as in civil and criminal cases, where the circuit court's remand limits the district court, the Board here must consider only specific issues already presented, provided that the scope of the remand is clear. *Id*. The court explained that "[t]he Board, like the district court, has no power to expand our remand beyond the boundary ordered by the court. This is consistent with orderly administration of justice." *Id*.

CONCLUSION: The court held that "the Board was bound by the scope of our remand to resolve the only remaining issue . . . [and] the proper method [for future plaintiffs] to raise this argument would [be] to file a motion to reconsider with the Board." *Id*.

***Johnson v. Columbia Props. Anchorage, L.P.*, 437 F.3d 894 (9th Cir. 2006)**

QUESTION: Whether a limited liability company should be treated as a partnership or as a corporation to determine citizenship for purposes of diversity jurisdiction. *Id.* at 899.

ANALYSIS: The court found that "LLCs resemble both partnerships and corporations. Notwithstanding LLCs' corporate traits, however, every circuit that has addressed the question treats them like partnerships for the purposes of diversity jurisdiction." *Id.* The court noted that "[t]his treatment accords with the Supreme Court's consistent refusal to extend the corporate citizenship rule to non-corporate entities, including those that share some of the characteristics of corporations." *Id.*

CONCLUSION: The 9th Circuit held that, "like a partnership, an LLC is a citizen of every state of which its owners/members are citizens." *Id.*

***Aguirre v. Los Angeles Unified Sch. Dist.*, 461 F.3d 1114 (9th Cir. 2006)**

QUESTION: Whether "the 'degree of success' standard announced in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), appl[ies] to attorney's fees awards under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400." *Id.* at 1115.

ANALYSIS: The court first considered Supreme Court precedent stating that "a partially prevailing plaintiff generally may not recover fees for her unsuccessful claims . . . ." *Id.* at 1118. Next, the court found that Congress instituted a fee shifting provision that allowed attorney's fees to be awarded to the prevailing party in the predecessor to the IDEA statute. *Id.* Finally, the court ruled that Congress is assumed to be aware of the controlling law, in this case, *Hensley*'s definition of prevailing party in relation to attorney's fees, when it makes new law as per *Strom v. Goldman, Sachs & Co*., 202 F.3d 138, 147 (2d Cir. 1999). *Id.*

CONCLUSION: The 9th Circuit found that the rule for apportioning attorney's fees only to successful claims as stated in *Hensley* applies to claims brought under the IDEA. *Id.* at 1121.

United States v. Choudhry, 461 F.3d 1097 (9th Cir. 2006)

QUESTION: Whether a parking violation is considered an administrative civil violation or traffic violation, the latter of which can provide reasonable suspicion for a search. *Id.* at 1101.

ANALYSIS: The court considered the Supreme Court's decision in *Whren v. United States*, 517 U.S. 806, which "stands for the proposition that if the officers have probable cause to believe that a traffic violation occurred, the officers may conduct a traffic stop." *Id.* at 1100. While California law considers parking violations to be civil violations, the court still found that "[t]he structure of the California Vehicle Code, the authority of law enforcement officers to enforce the Vehicle Code, and the specific authority granted to San Francisco City and County police officers to enforce the violation at issue lead us to conclude that *Whren* controls Choudhry's case." *Id.* at 1103.

CONCLUSION: The court sided with the 5th, 6th and 7th Circuits in finding that *Whren* controlled parking violations, and therefore a parking violation can provide reasonable suspicion for an investigatory stop. *Id.* at 1101.

Clark v. Capital Credit & Collection Servs., Inc., 460 F.3d 1162 (9th Cir. 2006)

QUESTION: Whether a consumer may waive a "cease-communication directive" pursuant to the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692c(c). *Id.* at 1168.

ANALYSIS: Under § 1692c(c), a debt collector subject to a cease-communication directive may only contact the debtor: (1) to advise the debtor that future collection efforts will be terminated; (2) to notify the debtor that the debt collector may invoke special remedies; or (3) to notify the debtor that the debt collector intends to invoke a specified

remedy. *Id.* at 1169. The 9th Circuit determined that where, as here, Congress has not intended to preclude waiver of the rights contained in a federal statute, those rights may be waived by the voluntary agreement of the parties. *Id.* at 1170. The court determined that such waiver may be made here under the heightened voluntariness standard of the "least sophisticated debtor." *Id.* at 1171. In choosing to apply this standard, the court explained that the FDCPA is a remedial statute aimed to protect debtors from "an industry-wide pattern of and propensity towards abusing debtors." *Id.* In allowing debtors to waive the remedial rights contained in the FDCPA, the court opined that it is necessary to use a heightened standard of voluntariness to ensure that the FDCPA protects all consumers, including "the gullible, as well as the shrewd . . . the ignorant, the unthinking and the credulous." *Id.*

CONCLUSION: A debtor may waive a cease-communication directive pursuant to the FDCPA if it is proven that the debtor voluntarily waived such rights under the heightened voluntariness standard of the "least sophisticated debtor." *Id.* at 1171-72.

***Ford v. Long Beach Unified Sch. Dist.*, 461 F.3d 1087 (9th Cir. 2006)**

QUESTION: Whether "a parent performing legal services for her own child [is] entitled to attorneys' fees pursuant to the IDEA." *Id.* at 1088.

ANALYSIS: The 9th Circuit looked to *Kay v. Ehler*, 499 U.S. 432 (1991), where the Supreme Court denied attorneys' fees to a pro se litigant under 42 U.S.C. § 1988, which contains a fee-shifting provision "virtually identical" to the one at issue in this case. *Id.* at 1090. In *Kay*, the Supreme Court determined that the intent behind § 1988 was to "ensure that victims of civil rights violations benefit from 'the judgment of an *independent* third party [to] mak[e] sure that reason, rather than emotion, dictates the proper tactical response to unforeseen developments in the courtroom.'" *Id.* The 9th Circuit stated that it "can discern no reason" to interpret the IDEA differently from § 1988. *Id.* at 1091. The court opined that, like a pro se attorney, a parent appearing on behalf of a child in court proceedings would likely be emotionally charged and unable to provide adequate representation. *Id.* Therefore, parents should be encouraged to hire independent counsel who would be "emotionally neutral" and could better represent the child's interests. *Id.*

CONCLUSION: Th court found that because the "better rule" is to encourage parents to seek independent counsel for their child as opposed to representing the child themselves, a parent performing legal services on behalf of a child is not entitled to attorneys' fees under the IDEA. *Id.*

TENTH CIRCUIT

High Country Citizens Alliance v. Clarke, 454 F.3d 1177 (10th Cir. 2006)

QUESTION: "Whether the APA [Administrative Procedures Act, 5 U.S.C. §§ 701-706] waives sovereign immunity for Plaintiffs, who claim no adverse interest in the land, to bring a suit challenging the issuance of a patent under the 1872 Mining Law." *Id.* at 1180.

ANALYSIS: The court ruled that "[p]laintiffs can only sue the BLM [Bureau of Land Management] to the extent it waived its sovereign immunity." *Id.* at 1181. The 10th Circuit found that the "APA serves as a limited waiver of sovereign immunity . . . the APA withdraws that waiver of sovereign immunity, however, when the relevant statute, in this case the 1872 Mining Law, 'precludes judicial review.'" *Id.* The court determined that since the plaintiffs did not have any "competing interest in the land, [they] have no right of action to challenge the issuance of a patent." *Id.* at 1188. The court stated that certainly "in 1872 Congress was concerned with finality of title. Permitting a challenge by third parties with no interest in the land would allow the kind of lengthy litigation over rights that a patent was designed to avoid . . . and frustrate the purpose of the 1872 Mining Law." *Id.* at 1185.

CONCLUSION: "Despite the presumption of reviewability, it is fairly discernable here . . . that Congress, . . . intended to preclude judicial review to third parties claiming no property interest in the patented land and . . . [a]s such, we find that the Plaintiffs have no federal right of action against the BLM." *Id.* at 1192.

United States v. Laughrin, 438 F.3d 1245 (10th Cir. 2006)

QUESTION: Whether a district court committed error when it applied § 2K2.1(b)(4) of the United States Sentencing Guidelines, [at that time requiring] a two-level increase in the sentence if the firearm at issue "was stolen, or had an altered or obliterated serial number." *Id.* at 1245.

ANALYSIS: The court followed the 2nd and 9th Circuits in holding that the plain language of the sentencing guideline in question prohibited its application "when the defendant possessed a weapon that had never borne a serial number." *Id.*

CONCLUSION: Since the defendant's shotgun never had a serial number, the court held the weapon was thus impossible to alter or obliterate, and concluded that the district court erred in applying the enhanced sentence to the defendant. *Id.*

***McGraw v. Barnhart*, 450 F.3d 493 (10th Cir. 2006)**

QUESTION: "Whether the Social Security Act ("SSA"), 42 U.S.C. § 406(b)(1), allows the district court to award attorney's fees to claimant's counsel when the court remands a Title II Social Security disability case . . . and the Commissioner ultimately determines that the claimant is entitled to an award of past-due benefits." *Id.* at 495-96.

ANALYSIS: The court observed that "[w]ithout the assistance of counsel in resorting to the court below claimant would have been deprived of the benefits which had been denied repeatedly by the [Commissioner]." *Id.* at 499.

CONCLUSION: The court held that "§ 406(b)(1) allows a district court to award attorneys' fees in conjunction with a remand for further proceedings; it is not required, as a predicate to a § 406(b)(1) fee award, that the district court remand for an award of benefits." *Id.* at 503.

***United States v. Cage*, 451 F.3d 585 (10th Cir. 2006)**

QUESTION: "[W]hether a sentence that is extremely light when compared to the applicable advisory guidelines range [is] reasonable." *Id.* at 591.

ANALYSIS: The court observed that the sentencing guidelines "are an expression of popular political will about sentencing that is entitled to due consideration" when determining reasonableness. *Id.* at 593. The court explained that the greater the divergence from these guidelines, which are "the best estimate of Congress's conception of reasonableness," the more compelling the reasons for departure must be. *Id.* at 594.

CONCLUSION: The court held that an actual sentence should only be treated as reasonable "if the facts of the case are dramatic enough to justify such a divergence from the politically-derived guideline range." *Id.* at 594-95.

***Honeyville Grain v. NLRB*, 444 F.3d 1269 (10th Cir. 2006)**

QUESTION: Whether "the Hearing Officer and Board correctly . . . place[d] the preliminary burden of persuasion on [petitioner] to demonstrate that the religious remarks were inflammatory or the core of the Union's campaign." *Id*. at 1274.

ANALYSIS: The court observed that the appellate courts are in agreement that "a party challenging a representative election [must] . . . demonstrate that . . . religious remarks were inflammatory or formed the core of the campaign. *Id.* at 1275. The court noted that "[i]f this burden is

satisfied, the burden then shifts to the party making the remarks to prove that such comments were 'truthful and germane,' . . . [r]emarks not found to be inflammatory or the core or theme of the campaign are [then] reviewed under standards applied to other types of misrepresentations." *Id*.

CONCLUSION: "The party challenging an election on the basis of pre-election religious comments must initially show that the remarks were either inflammatory or formed the core or theme of the campaign." *Id.* at 1279.

United States v. Heckenliable, 446 F.3d 1048 (10th Cir. 2006)

QUESTION: "[W]hether the domestic relationship component of [18 U.S.C.] § 922(g)(9) need be an element of the predicate misdemeanor offense." *Id.* at 1049.

ANALYSIS: The court observed that nine other circuits have dealt with this precise question, and have found that the domestic relationship component need not be an element of the predicate offense. *Id*. Section 922(g)(a) "makes it unlawful for any person previously convicted of a 'misdemeanor crime of domestic violence' to possess a firearm." *Id.* The court recited the definition of "misdemeanor crime of domestic violence." *Id.*

The court also incorporated the reasoning of the 1st, 8th, and 9th Circuits, who have held that "use of the singular noun 'element' is indicative that the misdemeanor offense only requires one element, namely, the use of force." *Id*. at 1050. The court was further persuaded that to rule otherwise would frustrate Congress's attempt "to remedy the disparate treatment nationwide between those persons convicted of a felony involving domestic assault, who were prohibited from possessing a firearm, and those persons convicted of a misdemeanor involving domestic assault, who were not." *Id*. at 1051.

CONCLUSION: To sustain a conviction under 18 U.S.C. § 922(g)(9), the predicate misdemeanor crime need not have a domestic relationship component as an element of the crime. *Id*. at 1049.

In re Qwest Commc'ns Int'l, 450 F.3d 1179 (10th Cir. 2006)

QUESTION: Whether the corporation waived its rights to attorney-client privilege and work-product doctrine by disclosing privileged materials to federal agencies in the course of an investigation of the corporation. *Id*. at 1181.

ANALYSIS: The 10th Circuit determined that case law in the circuit supports the finding that the disclosure of documents privileged under the attorney-client privilege or the work-product doctrine will result in

the waiver of these doctrines. *Id.* at 1186. The court rejected Qwest's argument and declined to adopt a selective waiver doctrine as an exception to the general waiver rules. *Id.* at 1192. In so holding, the court found that the majority of other circuits that examined the issue of selective waiver had likewise declined to apply it. *Id.* at 1187. Further, the court determined that selective waiver was unwarranted in this case because the agreements under which the privileged documents had been disclosed did little to prevent the government from further disclosures. *Id.* at 1192.

CONCLUSION: Because the court declined to adopt selective waiver in this case, the disclosure of the privileged documents to federal agencies effectively waived the attorney-client privilege and the work-product doctrine. *Id.*

***United States v. Pettigrew*, 455 F.3d 1164 (10th Cir. 2006)**

QUESTION: "Whether a pre-warning confession, not itself a violation of *Miranda*, but obtained subsequent to two violations of *Miranda*, must be suppressed." *Id.* at 1170-71.

ANALYSIS: First, the court addressed the "fruit of the poisonous tree" doctrine and found that, although the doctrine is broad and relatively strict when applied to Fourth Amendment search and seizure cases, it is more forgiving when applied to Fifth Amendment *Miranda* issues. *Id.* at 1171-72. Stressing *Miranda's* dual purposes of assuring trustworthy evidence and deterring improper police conduct, the court relied on the Supreme Court's determination in *Elstad* which requires suppression when confessions are obtained without a warning and in violation of *Miranda*. *Id.* at 1172. The court noted, however, that "it does not necessarily follow that every subsequent voluntary statement . . . must be suppressed as well." *Id.* Once the court concluded that the defendant's statement was not automatically excluded by the "fruits" doctrine, it then determined whether the statement was voluntary, by viewing the totality of the circumstances. *Id.* at 1173-74. The test, supplied in *Lopez*, "is whether the confession is the product of an essentially free and unconstrained choice by its maker." *Id.* at 1174. Using this standard, the court found that there was no coercion by the police to obtain the defendant's statement. *Id.* Thus, the conduct was "unconstrained." *Id.*

CONCLUSION: The court held that a pre-warning confession obtained subsequent to two violations of *Miranda* need not be suppressed. *Id.*

***United States v. Sanders*, 449 F.3d 1087 (10th Cir. 2006)**

QUESTION: Whether "verbal threats, made while the firearms were not in the immediate possession of the [d]efendant, are sufficient to convert the purpose of the firearms to something other than lawful sporting purposes" under the United States Sentencing Guidelines § 2K2.1(b)(2). *Id.* at 1089.

ANALYSIS: The court noted that under § 2K2.1(b)(2), "it is the defendant's burden to show . . . that [he] 'possessed all ammunition and firearms solely for lawful sporting purposes or collection.'" *Id.* at 1090. The court found that defendant "repeatedly stated that he intended to shoot someone with his firearms" and "it would be reasonable to infer that he actually meant to use the rifles for such a purpose, or, if not to fire them, to coerce others by instilling fear that he would fire them." *Id*. The court determined that although defendant had "obtained the rifles for hunting and that had been their sole prior use," that the district court could properly find that "[he] had acquired the new purpose for possessing the firearms of using them to coerce and injure people." *Id.* The court further noted "[o]ne can have a purpose for possessing a firearm before actually using the firearm for that purpose." *Id.*

CONCLUSION: The 10th Circuit rejected defendant's argument and held that "the district court could properly decline to apply the guideline on the ground that [defendant] had threatened to shoot various persons with a firearm, even though he was not carrying a firearm when he made the threats." *Id.* at 1088.

***Dulworth v. Evans*, 442 F.3d 1265 (10th Cir. 2006)**

QUESTION: "Whether 28 U.S.C. § 2244(d)(1)'s one-year limitation period applies to § 2241 habeas petitions contesting administrative decisions." *Id*. at 1267.

ANALYSIS: The 10th Circuit found that although the language of "§ 2244(d)(1)'s one-year limitations period applies to all habeas petitions filed by persons in 'custody pursuant to the judgment of a State court,' . . . [the court extended its scope such that] even if the petition challenges a pertinent administrative decision rather than a state court judgment, the limitation period applies." *Id*. at 1268.

CONCLUSION: The court concluded that where a person in custody "timely and diligently exhausts his administrative remedies, § 2244(d)(1)(D)'s one-year limitation period does not commence until the decision rejecting his administrative appeal becomes final." *Id*. at 1268.

***Jackson v. Volvo Trucks N. Am.*, 462 F.3d 1234 (10th Cir. 2006)**

QUESTION: Whether a principal shareholder of various automobile dealerships' parent company "qualifies as a dealer [under the Automobile Dealers' Day in Court Act, 15 U.S.C. 1221, ("ADDCA")] and is therefore authorized to sue under the statute." *Id.* at 1239.

ANALYSIS: The court first looked to § 1222 of the ADDCA, starting with which provides that "[a]n automobile dealer may bring suit against any automobile manufacturer . . . by reason of the failure of said automobile manufacturer . . . to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer." *Id.* The court looked at the statutory definitions under the ADDCA, and the court then determined that the appellant lacked standing under the ADDCA because he conceded he was not "a party to a franchise agreement" with the manufacturer. *Id.* Appellant asked the court to interpret the ADDCA to "confer standing on shareholder/operators in certain circumstances" and to "carve out an exception . . . because his personal economic interests are 'inextricably woven' into [the companies'] corporate interests." *Id.*

Rejecting appellant's requests, the court distinguished *Kavanaugh v. Ford Motor Co.*, 353 F.2d 710 (7th Cir. 1965) because here the manufacturer did not control appellant's corporations. *Id.* The court also distinguished *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.*, 447 F.2d 786 (5th Cir. 1971) because here, the appellant did not have a unique relationship with the manufacturer. *Id.* at 1240. The court then noted that "most other circuits have expressly refused to carve out exceptions to the ADDCA." *Id.* at 1241. The court then stated, "[w]here a statute is unambiguous on its face, the court need not inquire further." *Id.* Noting that appellant did not argue to pierce the corporate veil, the court observed, "where parties choose the corporate form and receive all the benefits that flow from that structure, we should be hesitant to ignore the consequences." *Id.*

CONCLUSION: The 10th Circuit held that the ADDCA does not confer standing to those who do not qualify as "dealers" under the plain language of the Act. *Id*

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ELEVENTH CIRCUIT

Int'l Stamp Art, Inc. v. U.S. Postal Serv., 456 F.3d 1270 (11th Cir. 2006)

QUESTION: What is "the appropriate legal standard for good faith with respect to a fair-use defense" when the defense is raised in response to allegations of trademark infringement. *Id.* at 1271.

ANALYSIS: The 11th Circuit noted that other circuits found that "the standard for good faith for fair-use is the same as the legal standard for good faith in any other trademark infringement context [which] asks whether the alleged infringer intended to trade on the goodwill of the trademark owner by creating confusion as to the source of the goods or services." *Id.* at 1274. The court found that where the "use of the mark [is] the 'only [symbol] reasonably available' to indicate that the image on the card is meant to be a postage stamp, [its use] does not attempt to capitalize on consumer confusion or to appropriate the cachet' of the mark holder" and the alleged infringer is deemed to have acted in good faith. *Id.* at 1277.

CONCLUSION: The 11th Circuit held that there was "no evidence in the record to support the allegation that the [defendant] . . . intended to benefit from the good will associated with [the] . . . trademark" and concluded that the alleged infringer could raise the fair-use defense since it acted in good faith. *Id.*

United States v. Aguilar-Ortiz, 450 F.3d 1271 (11th Cir. 2006)

QUESTION: "Whether solicitation constitutes a drug trafficking offense for purposes of U.S. Sentencing Guidelines § 2L1.2(b)(1)(B)." *Id.* at 1272.

ANALYSIS: The court stated that a conviction could be based on soliciting a large quantity of narcotics for redistribution or, alternatively, on a very small amount for personal use. *Id.* at 1275. The court could not say "as a categorical matter that all solicitation offenses under Florida law qualify as drug trafficking offenses," but instead provided guidance in stating that a "defendant's prior conviction for solicitation of the delivery of drugs" may constitute a drug trafficking offense when the court finds substantial evidence "that the defendant manufactured, imported, exported, distributed, or dispensed of a controlled (or counterfeit) substance, or possessed a substance with the intent to manufacture, import, export, distribute, or dispense it." *Id.* at 1276.

CONCLUSION: The court held that "whether a solicitation offense under Florida law qualifies as a drug trafficking offense . . . depends on

the facts of the case," looking at factors such as quantity and intent. *Id.* at 1275.

***Martinez v. Att'y Gen.*, 446 F.3d 1219 (11th Cir. 2006)**

QUESTION: "[W]hether 8 U.S.C. § 1252(a)(2)(D) restores [the Court's] ability to review the [Board of Immigration's (the "BIA")] purely discretionary determination that a petitioner failed to satisfy § 1229b(b)(1)(D)'s 'exceptional and extremely unusual hardship' requirement." *Id*. at 1221.

ANALYSIS: The court recalled its earlier ruling that it lacks jurisdiction to review the BIA's § 1229b(b)(1)(D) discretionary determinations whether to cancel the removal of an alien upon a showing of, "exceptional and extremely unusual hardship." *Id*. The court returned to the issue, however, to determine the impact of an amendment to § 1229b(b)(1)(D), which provides that certain provisions related to the same "shall [not] be construed as precluding review of constitutional claims or questions of law raised upon a petition for review." *Id*. The court then adopted the position taken in similar decision on the impact of the amendment, in which the court held that the "BIA's 'discretionary or factual determinations continue to fall outside [the Court's] jurisdiction." *Id*. at 1222. In closing, the court noted that this position paralleled rulings in the 2nd, 7th, 8th and 9th Circuits. *Id*.

CONCLUSION: "Notwithstanding Congress's enactment of § 1252(a)(2)(D), [the court] continue[s] to lack jurisdiction over the BIA's purely discretionary decision that a petitioner did not meet § 1229b(b)(1)(D)'s 'exceptional and extremely unusual hardship' standard." *Id*. at 1222-23.

***United States v. Nix*, 438 F.3d 1284 (11th Cir. 2006)**

QUESTION: Whether a person convicted and sentenced to more than one year for a federal crime violates 18 U.S.C. § 922(g)(1), "which makes it a crime for any person to possess a firearm," if the defendant never lost his rights under state law. *Id.* at 1284-85.

ANALYSIS: The court noted that 18 U.S.C. § 921(a)(20) provides an exception to § 922(g)(1) when "the defendant has had his civil rights restored, unless the restoration expressly restricts the defendant's firearm rights." *Id.* at 1284. Here, the court explained that the prior conviction "[had] not been expunged or set aside, [the defendant] has not been pardoned for it, and the civil rights . . . lost under state law as a result of the conviction have not been restored." *Id.* at 1286. The court held that the provision's "unless" clause "serves only to exclude from the exception pardons, expungements, and restorations that expressly limit a

convicted felon's firearms rights." *Id.* The court noted that it does not apply if the felon was convicted under federal law and "never lost his firearm rights under state law to begin with." *Id.* The court observed that "[t]o accept [the defendant's] argument we would have to transform a clause that limits an exception into one that enlarges the exception." *Id.*

CONCLUSION: The 11th Circuit held that defendants are not protected by the "unless clause" of § 922(a)(20) if they were convicted under federal law and never lost the right to carry a firearm under state law. *Id.*

***United States v. Norris*, 452 F.3d 1275 (11th Cir. 2006)**

QUESTION: Whether the "market value" of an offense under U.S.S.G. § 2Q2.1 should be based on the entire contents of the shipment or only on that portion of the shipment that was undocumented. *Id*. at 1280.

ANALYSIS: Because no case law discusses this issue, the 11th Circuit looked to the "principle of general applicability" for the United States Sentencing Guidelines, § 1B1.3. *Id.* at 1281. Under this provision, the specific offense characteristics may be determined from any acts and omissions committed by the defendant "that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." *Id.* The court found evidence that defendant strategically packaged shipments so that small amounts of undocumented orchids were mixed with large amounts of documented orchids and that the shipments were packaged so that the documented orchids appeared at the top when inspected by customs agents to conceal the undocumented orchids below. *Id.* at 1281-82. Also, the court found that defendant used "false and misleading" customs documentation to smuggle the undocumented orchids. *Id.* at 1282.

CONCLUSION: Because defendant used the legally documented orchids to smuggle the undocumented orchids, the market value of the legally documented orchids is relevant to the commission of the crime and was properly considered in determining the defendant's level of offense. *Id.*

***United States v. Wilk*, 452 F.3d 1208 (11th Cir. 2006)**

QUESTION: Whether defendant was provided sufficient notice of the government's decision to seek the death penalty against him under 18 U.S.C. § 3593(a). *Id*. at 1210.

ANALYSIS: The 11th Circuit stated that § 3593(a) requires that the government provide notice to a defendant of its decision to seek the

death penalty "a reasonable time before the trial." *Id.* at 1221. The court determined that the applicable standard to ascertain what constitutes a "reasonable time" under the statute is objective reasonableness under the totality of the circumstances. *Id.* Applying this standard, the court found that the parties were aware that the case was likely to be a death penalty case and that defendant's counsel began preparing for a death penalty case before the notice was even provided. *Id.* at 1222. Further, there was a span of six months between the issuing of the notice to defendant and the beginning of the trial. *Id.* The court opined that six months was sufficiently "reasonable" under the circumstances of this case. *Id.*

CONCLUSION: The government provided the defendant with objectively reasonable notice under § 3593(a), so defendant's motion to strike the death notice was properly denied. *Id.* at 1225.

United States v. Brehm, 442 F.3d 1291 (11th Cir. 2006)

QUESTION: "[W]hether the Supreme Court's decision in *United States v. Booker* rendered the eligibility requirements for safety-valve relief under 18 U.S.C. 3553(f), U.S.S.G. §§ 5C1.2 & 4A1.1 advisory or otherwise permitted courts discretion as to the imposition of mandatory minimum sentences." *Id.* at 1292.

ANALYSIS: The court noted that the 2nd Circuit has held that "even after Booker, district courts remain obligated to correctly calculate the guideline range pursuant to 18 U.S.C. § 3553(f)(1)." *Id.* at 1300. The court also recognized that "to treat calculation of the safety-valve eligibility criteria as advisory would, in effect, excise 18 U.S.C. § 3553(f)(1)." *Id.*

CONCLUSION: "[T]he district court did not err when it determined that *Booker* did not permit a court to discretion to grant relief from the mandatory minimum sentence." *Id.*

Evans v. Walter Indus., 449 F.3d 1159 (11th Cir. 2006)

QUESTION: Who, under the Class Action Fairness Act ("CAFA"), bears the burden of proving the local controversy exception to federal court jurisdiction. *Id.* at 1164.

ANALYSIS: The court stated that "[u]nder CAFA, federal courts now have original jurisdiction over class actions in which the amount in controversy exceeds $5,000,000 and there is minimal diversity (at least one plaintiff and one defendant are from different states)." *Id.* at 1163. However, the court noted that the statute does carve out "an exception to federal jurisdiction for cases that are truly local in nature." *Id.*. The court found the case to be analogous to three other decisions, one by the Supreme Court, and two by the 11th Circuit, which dealt with similar

situations governed by similar federal statutes containing exception provisions, and which all held that once the prerequisites for removal to federal court had been met, the party objecting to removal to federal court had the burden of proving that the exception should apply. *Id.*

CONCLUSION: The court referenced those decisions, and "h[e]ld that the plaintiffs bear the burden of proving the local controversy exception to the jurisdiction otherwise established." *Id*. at 1165.

***Burlison v. McDonald's Corp.*, 455 F.3d 1242 (11th Cir. 2006)**

QUESTION: What do subsections (i) and (ii) of 29 U.S.C. § 626(f)(1)(H), the Older Workers Benefit Protection Act ("OWBPA"), require of employers who seek "waivers in connection with group terminations." *Id.* at 1245.

ANALYSIS: The court looked to the Equal Employment Opportunities Commission ("EEOC") for guidance on this issue. *Id.* at 1246. The court determined that "reading these clauses separately fails to apply the EEOC's regulation concerning the appropriate *scope* of the program, which . . . is determined by examining the 'decisional unit' at issue." *Id.* The court determined that "[n]othing in the regulations supports parsing the statute to apply a decisional-unit scope to a portion of subsection (ii) while applying a national scope to the other portion of that subsection." *Id.* at 1247.

CONCLUSION: The 11th Circuit found that the OWBPA is ambiguous and held that "the OWBPA's informational requirements are limited to the decisional unit that applies to the discharged employees." *Id.*

***Bracewell v. Kelley*, 454 F.3d 1234 (11th Cir. 2006)**

QUESTION: Whether a crop disaster payment "is property of the bankruptcy estate under [11 U.S.C.] § 541(a)(1)." *Id.* at 1237.

ANALYSIS: The court found that "the plain language of that provision . . . makes the commencement of the bankruptcy case the key date for property definition purposes. That means the property of the debtor's estate is property the debtor had when the bankruptcy case commences, not property he acquires thereafter. *Id.* The court noted that its "most closely analogous decision, as well as the only two courts of appeals decisions that are directly on point, confirm that the clear temporal limitation which is so plain on the face of the statutory language controls." *Id.*

CONCLUSION: The 11th Circuit sided with the 5th and 9th Circuits in finding that there is no interest that can be included at the time of

Bankruptcy if it is a payment that Congress has not yet authorized. *Id.* at 1239.

***De Sandoval v. Att'y Gen.*, 440 F.3d 1276 (11th Cir. 2006)**

QUESTION: Whether "the Attorney General exceeded his authority in promulgating 8 C.F.R. § 241.8, which empowers an immigration officer, rather than an immigration judge, to reinstate the previous removal order of an alien who illegally reenters the United States;" and whether "[section] 1231(a)(5) is impermissibly retroactive as applied to her, even though she illegally reentered the United States after that statute took effect; [and if] she is not subject to § 1231(a)(5) because that section conflicts with and was superseded by § 1255(i) . . . ." *Id.* at 1276.

ANALYSIS: The court found § 1229a(a) and § 1231(a)(5) ambiguous regarding the procedures for reinstating an existing removal order, and joined the 1st and 8th Circuits in holding that the Attorney General's interpretation of these statutes under 8 C.F.R. § 241.8 was permissible, thus denying the petitioner a hearing before an immigration judge. *Id.* at 1285. The court used the fact that the petitioner illegally reentered the United States after the applicable statute's effective date to apply § 1231(a)(5) to the petitioner. *Id.* The court did not find that § 1255(i) either conflicted or superseded § 1231(a)(5); therefore it used § 1231(a)(5) to bar the petitioner from seeking an adjustment of status. *Id.* Finally, Petitioner failed to show that alleged procedural errors caused her substantial prejudice, so her procedural due process challenge to 8 C.F.R. § 241.8 failed. *Id.*

CONCLUSION: The 8th Circuit held that each of the petitioner's claims lacked merit. *Id.* at 1285.

***Esponda v. Att'y Gen.*, 453 F.3d 1319 (11th Cir. 2006)**

QUESTION: "[W]hether the failure to submit a supplementary brief would alone justify summary dismissal even in cases where petitioners adequately set out the basis for their appeal on the Notice of Appeal" on an appeal from an immigration judge's order denying them asylum. *Id.* at 1321.

ANALYSIS: The court found that 8 C.F.R. § 1003.3(b) states that "[a] party taking the appeal must identify the reasons for the appeal in the Notice of Appeal (Form EOIR-26 or Form EOIR-29) or in any attachments thereto, in order to avoid summary dismissal pursuant to § 1003.1(d)(2)(i)." *Id.* at 1322. Accordingly, the court noted that an appeal will not be summarily dismissed if a petitioner complies by identifying the reason for the appeal, even if on the Notice of Appeal itself. *Id.*

CONCLUSION: The court ruled with the 4th and 9th Circuits, and contrary to the 5th Circuit, that summarily dismissing an appeal when the reason for the appeal is included on the Notice of Appeal is an abuse of discretion. *Id.*

***Ugokwe v. Att'y Gen.*, 453 F.3d 1325 (11th Cir. 2006)**

QUESTION: "Whether, under [the Illegal Immigration Reform and Immigrant Responsibility Act] the BIA's [Board of Immigration Appeals] failure to rule on a petitioner's motion to reopen, filed prior to the expiration of her voluntary departure period, authorizes the BIA to decline to rule on the merits of the motion to reopen." *Id.* at 1329.

ANALYSIS: The court sided with the 9th Circuit's analysis of the relevant statute, saying the statute does not "establish a time by which the BIA must make its decision regarding a motion to reopen." *Id.* Accordingly, denying a ruling on the merits based on the timing of the BIA decision would deny the alien a statutory right. *Id.*

CONCLUSION: The 11th Circuit decided to "adopt the rule . . . that the timely filing of a motion to reopen tolls the period of voluntary departure pending the resolution of the motion to reopen." *Id.* at 1331.

***Ctr. for Biological Diversity v. Hamilton*, 453 F.3d 1331 (11th Cir. 2006)**

QUESTION: "[W]hether the failure of the Secretary . . . of the Interior to perform the nondiscretionary duty to designate a critical habitat for a threatened species is a continuing violation that permits a plaintiff to file suit more than six years after the deadline to perform that duty has passed." *Id.* at 1333.

ANALYSIS: The court found that "the continuing violation doctrine permits a plaintiff to sue on an otherwise time-barred claim when additional violations of the law occur within the statutory period." *Id.* at 1334. Further, the court found that the violation committed was the failure to meet the deadline, which occurred at the moment the deadline passed and did not re-occur. *Id.* at 1335. Finally, the court had previously "limited the application of the continuing violation doctrine to situations in which a reasonably prudent plaintiff would have been unable to determine that a violation had occurred." *Id.*

CONCLUSION: The court ruled that the continuing violation doctrine did not apply and the statute of limitations was not tolled. *Id.* at 1336.

***MCI WorldCom Commc'ns., Inc. v. BellSouth Telecomms., Inc.*, 446 F.3d 1164 (11th Cir. 2006)**

QUESTION: Whether the regulations promulgated by the FCC pursuant to the Telecommunications Act allow the use of multiple scenarios in compliance with the Total Element Long-Run Incremental Cost Method ("TELRIC")—the FCC's rate setting methodology. *Id*. at 1172.

ANALYSIS: The court found that TELRIC necessitated the calculation of "the per unit cost of an unbundled network element be calculated by finding the total cost for the element in a hypothetical most efficient network and dividing by the number of units that will be put into use by the incumbent or a competitive local carrier." *Id*. at 1173. The defendants argued, and the court agreed, that "no single scenario for wire loops can be 'most efficient' because different services require different types of wire loops . . . [t]he use of multiple scenarios classifies different types of wire loops as different network elements." *Id*. at 1173.

CONCLUSION: The court concluded that TELRIC allows "an incumbent local carrier to define its unbundled network elements narrowly to separate wire loops with different capabilities and characteristics into different network elements through the use of multiple scenarios." *Id*. at 1174.

***Vuksanovic v. Att'y Gen.*, 439 F.3d 1308 (11th Cir. 2006)**

QUESTION: "Whether second-degree arson involves moral turpitude." *Id.* at 1311.

ANALYSIS: The court recognized that it "has no jurisdiction to review a final order of removal if the alien is inadmissible or removable by reason of having committed a crime involving moral turpitude for which a sentence of one year or longer may be imposed." *Id.* at 1310. The court further noted that "the determination that a crime involves moral turpitude is made categorically based on the statutory definition or nature of the crime, not the specific conduct predicating a particular conviction." *Id.* at 1311.

CONCLUSION: The court found that the proscribed behavior, "willful destruction of a structure by fire or explosion without a lawful, legitimate purpose—evinces a certain baseness in the private and social duties a man owes to society and is 'contrary to the accepted and customary rule of right and duty between man and man.'" *Id.* Therefore, the 11th Circuit held that a conviction for second-degree arson under Florida law was a crime involving moral turpitude, and the court did not have jurisdiction to review the final order of removal. *Id.* at 1312.

***Arrington v. Helms*, 438 F.3d 1336 (11th Cir. 2006)**

QUESTION: Whether section 657 of Title IV-D creates "a private right, enforceable under § 1983, to distribution of . . . payments in strict compliance with § 657." *Id.* at 1342.

ANALYSIS: The court stated that in order to whether Congress meant to confer a benefit on plaintiffs under the statute, it "must weigh three factors: 'whether the statute (1) contains 'rights-creating' language that is individually focused; (2) addresses the needs of individual persons being satisfied instead of having a systemwide or aggregate focus; and (3) lacks an enforcement mechanism through which an aggrieved individual can obtain review.'" *Id.* at 1344.

The court found that "§ 657 does not contain individually focused, rights-creating language under the first *Gonzaga* factor." *Id.* at 1345. Further, the court found that "§ 657 has a systemwide or aggregate, rather than individual, focus under, the second *Gonzaga* factor." *Id.* at 1347. And although "§ 657 lacks a remedial scheme sufficiently comprehensive to demonstrate congressional intent to preclude the remedy of suits under § 1983[,] . . . [t]he other two factors counsel in favor of finding Congress did not '[speak] with a clear voice to unambiguously manifest its intent to create enforceable rights.'" *Id.*

CONCLUSION: The 11th Circuit held that "§ 657 does not confer a private right to distribution of child support payments enforceable under § 1983." *Id.*

***Wachovia Bank, N.A. v. United States*, 455 F.3d 1261 (11th Cir. 2006)**

QUESTION: "[W]hether the statute of limitations period set forth in 26 U.S.C. § 6511(a) applies to claims for refunds made by those who have mistakenly filed a return and paid tax when they were not actually required to file a tax return." *Id.* at 1262.

ANALYSIS: Since the term "the taxpayer" could have more than one meaning in this section of the statute, the court looked at the term in the context of the entire statute. *Id.* The court also found that "[a]nd reading "the taxpayer" as a reference to taxpayers generally makes more sense in light of the rest of the Tax Code, producing a more harmonious result." *Id.* at 1268.

CONCLUSION: "Because Wachovia failed to file its claims for a refund for the 1997 and 1998 tax years within the three-year limitations period set forth in 26 U.S.C. 6511(a), the district court was barred by 26 U.S.C. § 7422(a) from exercising any jurisdiction over those claims." *Id.* at 1269.