First Impressions

The following pages contain brief summaries of issues of first impression identified by federal court of appeals opinions announced between January 31, 2015 and September 2, 2015. This collection, written by the members of the *Seton Hall Circuit Review*, is organized by circuit.

Each summary briefly describes an issue of first impression, and is intended to give only the briefest synopsis of the issue, not a comprehensive analysis. This compilation makes no claim to be exhaustive, but aims to serve the reader well as a referential starting point.

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FIRST CIRCUIT

***United States v. Alphas*, 785 F.3d 775 (1st Cir. 2015)**

QUESTION ONE: Whether the intended loss as defined by the Sentencing Guidelines is "equal to the aggregate face value of the claims submitted" or equal to the "aggregate amount by which the claims are fraudulently inflated" in criminal conviction for insurance fraud. *Id*. at 780.

ANALYSIS: The 1st Circuit began by noting "it is appropriate for the loss-computation method to distinguish between a fraudster who wholly fabricates a non-existent claim and a fraudster who artificially inflates a legitimate claim." *Id*. at 781. The court reasoned that, pursuant to the sentencing guidelines, loss generally does not include the amount that would have been paid if the defendant had not committed fraud. *Id*. The court further noted that, when the conduct supports a criminal conviction, courts have consistently refused to calculate loss as the amount that would be recoverable through civil forfeiture. *Id*.

CONCLUSION: The 1st Circuit held that the calculation for intended loss should be the amount by which the claim was inflated. *Id* at 784.

QUESTION TWO: Whether "void-for-fraud clauses in . . . insurance policies converts the entire amount paid in response to the appellant's claims into an actual 'loss" for purposes of restitution. *Id*. at 786.

ANALYSIS: The court noted that the Mandatory Victims Restitution Act (MVRA) allows "restitution only in the amount of the victim's actual loss." *Id*. The court further noted that it has held in prior cases that restitution is not appropriate if the loss would have occurred irrespective of the defendant's misconduct. *Id*. The court explained that there must be a but-for relationship between the defendant's conduct and the victim's loss. *Id*. Applying the MVRA and case law, the court reasoned that, where a void-for-fraud clause exists, the recoverable loss is limited to "the amount the insurer would not have paid but for fraud." *Id*.

CONCLUSION: The 1st Circuit held that restitution should be calculated based on claims that encompass legitimate losses. *Id*.

***United States v. Davila-Ruiz*, 790 F.3d 249 (1st Cir. 2015)**

QUESTION: Whether a defendant may no longer withdraw his guilty plea after a magistrate judge recommends that the defendant's plea be accepted. *Id.* at 249–50.

ANALYSIS: The court first noted that while Federal Rule of Civil Procedure 11 is clear that a court cannot deny a plea-withdrawal motion made before the plea is accepted, the rule does not specify how a plea is to be accepted. *Id.* at 252. Next, the court distinguished between a magistrate judge merely recommending the district court accept the plea,

and the district court actually accepting the plea. *Id*. The court held that further action was needed by the district court for acceptance to be final. *Id*. In addition, the court maintained that a defendant's failure to object to the magistrate judge's recommendation that the plea be accepted does not outweigh the district court's failure to act. *Id.* at 253.

CONCLUSION: The 1st Circuit held that a magistrate judge's recommendation that a defendant's plea be accepted does not rise to acceptance; rather a defendant may withdraw his plea until it is accepted by a district court. *Id.* at 250.

***United States v. Encarnación-Ruiz*, 787 F.3d 581 (1st Cir. 2015)**

QUESTION: Whether the "Supreme Court's decision in *Rosemond v. United States*, 134 S. Ct. 1240 (2014), applies to appellant's claim that the government has to prove beyond a reasonable doubt that an aider and abettor to a production of child pornography charge knew that the victim was a minor." *Id*. at 583.

ANALYSIS: The 1st Circuit began by examining 18 U.S.C. § 2251(a) and 18 U.S.C. § 2, which makes it illegal to aid or abet another in the production of child pornography. *Id*. at 588. The court noted that the Supreme Court has stated, "to establish the mens rea required to aid and abet a crime, the government must prove that the defendant participated with advance knowledge of the elements that constitute the charged offense." *Id*. The court emphasized that "if an individual charged as an aider and abettor is unaware that the victim was underage, he cannot wish to bring about such criminal conduct and seek . . . to make it succeed." *Id*. The court found that "under *Rosemond*, an aider and abettor of such an offense must have known the victim was a minor when it was still possible to decline to participate in the conduct." *Id*.

CONCLUSION: The court held "that *Rosemond* requires the government in a prosecution for aiding and abetting a violation of 18 U.S.C. § 2251(a) to prove the aider and abettor's knowledge that the victim was a minor." *Id.* at 583.

***United States v. Serrano-Mercado*, 784 F.3d 838 (1st Cir. 2015)**

QUESTION: Whether under United States Sentencing Guideline § 2K2.1(b)(4)(B) a "four-point serial number enhancement may apply" when the firearm involved has "an obliterated serial number on the frame and an unaltered serial number on the slide." *Id*. at 849.

ANALYSIS: The court reasoned that the guideline's text requires an obliterated or an altered serial number, but that the "text does not require that all of the gun's serial numbers be so affected." *Id*. at 850. The court then noted that "here, the complete defacement of the serial number on the

frame of the firearm resulted in the required obliteration." *Id*. The court further reasoned that "[a]pplying an enhancement for firearms that have a single totally obscured serial number may serve as a deterrent to tampering, even when incomplete," and that consequently a plain reading of the guideline accords with the guideline's intent, which is to prevent the use of untraceable weapons. *Id*. Additionally, the court noted that it previously held that "the mere alteration of a serial number violates . . . a related criminal statute." *Id*.

CONCLUSION: The 1st Circuit held that the enhancement is triggered when the firearm has a single obliterated serial number, even if the firearm's other serial numbers are left intact. *Id*.

***United States v. Zhang*, 789 F.3d 214 (1st Cir. 2015)**

QUESTION ONE: "Whether, given the language of the Mandatory Victim Restitution Act ("MVRA"), the United States (through one of its agencies) is a 'victim' for purposes of the MVRA." *Id*.

ANALYSIS: The Court noted the argument that the ordinary meaning of the word "person" does not include the government "has been rejected by every court to have considered it." *Id.* at 216. The Court determined that "the context [in this case] indicates unequivocally that the word 'person,' as used in the MVRA, includes the government." *Id.*

CONCLUSION: The 1st Circuit held that the "United States is a 'victim' within the meaning of" the MVRA. *Id.* at 214.

QUESTION TWO: "Whether the amount of restitution imposed under the MVRA should be offset by the value of property forfeited to the Attorney General." *Id.* at 214.

ANALYSIS: The Court noted that "at least five other circuits have reached the same conclusion" as the 11th Circuit in holding that "under the plain language of the MVRA, the district court had no authority to order such an offset." *Id.* at 217. The court further noted that "the MVRA requires a district court to order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant." *Id.* (internal quotation marks omitted). Moreover, the court found that "a restitution order is required 'in addition to . . . any other penalty authorized by law,' such as an order of forfeiture under 18 U.S.C. § 982." *Id.* (internal citations omitted). Finally, the Court agreed with the other circuits that "the MVRA requires a district court to order restitution to each victim in the full amount of each victim's losses." *Id. "*No offset is appropriate, at least where, as here, the victim has not received any of the forfeiture proceeds." *Id.* at 218.

CONCLUSION: The 1st Circuit held that "[a] restitution award may not be offset by the value of property forfeited to the Attorney General." *Id.* at 214.

***Wheeling & Lake Erie Ry. Co. v. Keach (In re Montreal, Me. & Atl. Ry.)*, 2015 U.S. App. LEXIS 14569 (1st Cir. Aug. 19, 2015)**

QUESTION: Whether "Article 9 of the Uniform Commercial Code (UCC), as enacted in Maine, govern[s] the taking and perfection of a security interest in a right to payment arising under an insurance policy." *Id*. at *1.

ANALYSIS: The court began by applying state law in its review of the bankruptcy court's decision. *Id*. at *5. The court noted that"[t]he insurance exclusion is broadly worded[]" and that "[i]t was inserted in Article 9 to ensure that financing arrangements involving the use of insurance policies as collateral would remain matters of state insurance law." *Id.* at *7. The court reasoned that the law was enacted to place the insurance policyholder's right to be paid beyond the scope of Article 9. *Id*. at *9. The court explained that "[u]nder the Bankruptcy Code, a security interest that is properly perfected before the initiation of bankruptcy proceedings does not extend to property rights acquired by either the debtor or the bankruptcy estate after the filing of the bankruptcy petition." *Id*. at *12. The exclusion plainly states that "attempts to create a security interest under 'a claim under a policy of insurance' is foreclosed." *Id*. at *24.

CONCLUSION: The Court concluded that the petitioner under Article 9 of the UCC is allowed to propose a settlement free and clear of defendant's security interest. *Id.*

SECOND CIRCUIT

***16 Casa Duse, LLC, v. Merkin*, 791 F.3d 247 (2d Cir. 2015)**

QUESTION: Whether "a contributor to a creative work whose contributions are inseparable from, and integrated into, the work maintains a copyright interest in his or her contributions alone?" *Id.* at 254.

ANALYSIS: The court pointed out that under the Copyright Act, "[m]otion pictures, like, pantomimes, . . . and dramatic works, are works that may be expected to contain contributions from multiple individuals." *Id*. at 257 (internal citations omitted). The court also noted that in order for a copyright to "subsist in contributions to a collective work [they must] constitute separate and independent works." *Id*. (internal citations

omitted). The separate and independent works requirement "indicates that inseparable contributions integrated into a single work cannot separately obtain such protection." *Id*. Additionally, the court noted that a contrary decision would give directors "greater rights enabling them to hamstring authors' use of copyrighted works." *Id*. at 259.

CONCLUSION: The 2nd Circuit held that "a director's contribution to an integrated "work of authorship" such as a film is not itself a "work of authorship" subject to its own copyright protections." *Id*.

***Florez v. Holder*, 779 F.3d 207 (2d Cir. 2015)**

QUESTION: Whether the Board of Immigration Appeals' (BIA) interpretation of the statutory phrase a "crime of child abuse" is so broad as to be unreasonable. *Id*. at 210.

ANALYSIS: The court relied on the steps presented in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842 (1984), to analyze whether the statute was ambiguous and whether the agency's interpretation was based on a permissible construction of the statute. *Id*. at 210–11. First, the court concluded that the statutory provision is ambiguous and that it does not precisely define the term "crime of child abuse." *Id.* at 211. The court then concluded that the BIA's interpretation of "crime of child abuse," which does not require injury to a child, is based on a permissible construction of the statute. *Id.* Finally, the court noted that this interpretation of the statute is expansive, but reasonable because it limits high risk of harm to a child. *Id*. at 212.

CONCLUSION: The 2nd Circuit held that the BIA's broad interpretation of the statutory phrase is consistent with the legislative purpose and is a reasonable construction of the term "crime of child abuse." *Id.* at 213–14.

***Glatt v. Fox Searchlight Pictures, Inc.*, 791 F.3d 376 (2d Cir. 2015).**

QUESTION: "[W]hen is an unpaid intern entitled to compensation as an employee under the FLSA" (Fair Labor Standards Act)? *Id.* at 382.

ANALYSIS: The Court noted the appropriate way to examine this question is to determine "whether the intern or the employer is the primary beneficiary of the relationship." *Id*. at 383. The Court found this analysis to be appropriate because it allows a court to examine what benefit the intern derives, as well as distill the "economic reality" between the parties. *Id.* at 383–84. Further, to add depth to this "flexible analysis", the Court proposed a "non-exhaustive" list of seven considerations to weigh in its analysis. *Id.* These factors include the extent to which: (1) the intern understands there is to be no pay; (2) the internship provides education comparable to that in an "educational environment"; (3) the internship is

integrated with the intern's schoolwork; (4) the internship "accommodates the intern's academic commitments by corresponding to the academic calendar"; (5) the internship is confined to a timeframe that provides "beneficial" learning; (6) the intern's work supplements but does not displace a compensated employee; and that (7) there is an understanding that a job is not guaranteed at the end of the internship. *Id*. at 384.

CONCLUSION: The 2nd Circuit held that the proper method of analysis in determining whether or not an intern is an employee involves discovering which party is the primary beneficiary of the relationship. *Id.* at 385.

***New York v. Actavis PLC,* 787 F.3d 638 (2d Cir. 2015)**

QUESTION: Whether "conduct by a monopolist to perpetuate patent exclusivity through successive products, commonly known as 'product hopping,' violates the Sherman Act, 15 U.S.C. §§ 1 and 2." *Id.* at 643.

ANALYSIS: The 2nd Circuit began by examining Sections 1 and 2 of the Sherman Act and the Donnelly Act. *Id*. at 651, 660. The court noted that the Supreme Court has stated that "patent and antitrust policies are both relevant in determining the scope of the patent monopoly—and consequently antitrust law immunity—that is conferred by a patent." *Id*. at 659. The court emphasized that "the market can determine whether one product is superior to another only so long as the free choice of consumers is preserved." *Id.* at 654–55. The court affirmed "when a monopolist *combines* product withdrawal with some other conduct, the overall effect of which is to coerce consumers rather than persuade them on the merits, and to impede competition; actions are anticompetitive under the Sherman Act." *Id*. at 654.

CONCLUSION: The court held "that the combination of withdrawing a successful drug from the market and introducing a reformulated version of that drug, which has the dual effect of forcing patients to switch to the new version and impeding generic competition, without a legitimate business justification, violates § 2 of the Sherman Act." *Id*. at 659.

***United States v. Allen*, 788 F.3d 61 (2d Cir. 2015)**

QUESTION ONE: Whether "a violation of 18 U.S.C. § 1855 (2006) requires that the defendant know the land is federal land." *Id.* at 66.

ANALYSIS: The Court reasoned that the first step in its analysis is to look to the direct language of the statute to assist in its interpretation, but the court found that "the record is silent as to Congress's precise intent." *Id.* at 67. The Court then looked to other cases involving timber crimes to assist in its determination. *Id.* The Court found guidance from a three-prong test, which asked if the defendant burned land owned by the United

States, did the defendant have the authority to set the fire and whether the fire was set willfully. *Id.* at 68. Lastly, the Court looked to the Supreme Court for guidance on the presence of a scienter requirement in Federal Statutes. *Id*. at 69.

CONCLUSION: The 2nd Circuit held that 18 U.S.C. § 1855 requires only that the defendant set the fire willfully and did not require that the defendant set fire to land knowing it was federal land. *Id.*

QUESTION TWO: Whether a defendant must willfully enter into an agreement to burn federal lands" to be found guilty of conspiracy pursuant to 18 U.S.C. § 371 (1994)? *Id.* at 70.

ANALYSIS: The Court reviewed other cases concerning the required mens rea of the defendant in engaging in a conspiracy. *Id.* The Court noted that a conspiracy cannot exist "without at least the degree of criminal intent necessary for the substantive offense itself." *Id.*

CONCLUSION: The 2nd Circuit held that a conviction pursuant to 18 U.S.C. § 371 does not require that the defendant have had the intent to specifically burn federal lands. *Id.*

***Burgis v. New York City Dep't of Sanitation*, 798 F.3d 63 (2d Cir. 2015)**

QUESTION: Whether statistics alone are "sufficient to warrant a plausible inference of discriminatory intent if they show a pattern or practice that cannot be explained except on the basis of intentional discrimination . . . in the context of a putative class action alleging employment discrimination under 42 U.S.C.S. § 1981 and/or the Equal Protection Clause." *Id*. at *10.

ANALYSIS: The court noted that its previous Title VII cases have suggested that statistics alone may be sufficient under certain circumstances. *Id*. The court explained that to demonstrate discriminatory intent pursuant to § 1981 or the Equal Protection Clause based on statistics only, the statistics must not only be mathematically significant but must also render other plausible non-discriminatory explanations highly unlikely. *Id*. at *11. The court further noted that the statistics must show gross statistical disparities or that the "probability that chance [is] the cause [is] sufficiently low." *Id*. (internal citations omitted).

CONCLUSION: The 2nd Circuit held that raw percentages of each employment level based on race without information on the number of individuals at each level, the qualifications of applicants, the individuals hired for each position, and the number of open positions is insufficient. *Id*. at *12–13.

***United States v. Cramer,* 777 F.3d 597 (2d Cir. 2015)**

QUESTION: Whether the "computer-use enhancement under [United States Sentencing Guidelines Manual § 2G.1.3(b)(3)(A)] [applies] to a defendant who begins communicating and establishing a relationship with a minor by computer, but then entices the victim through other modes of communication." *Id.* at 600.

ANALYSIS: The court reasoned that "when a defendant uses a computer to communicate with a minor and establish a relationship that is the eventual basis for enticing that minor to engage in prohibited sexual conduct, even if the enticement itself does not take place using the computer," it is an offense under § 2G.1.3(b)(3)(A). *Id.* at 602. This is a violation because the solicitation would not have been possible without the initial contact by computer. *Id.* The court further noted "to allow a predator to use a computer to develop a relationship with minor victims, so long as the ultimate consummation is first proposed through offline communication, would not serve the purpose of the enhancement." *Id.* (internal citations omitted).

CONCLUSION: The 2nd Circuit held that an "offense 'involves the use of a computer . . . to . . . persuade, induce, entice, [or] coerce . . . [a] minor to engage in prohibited sexual conduct' under Guidelines section 2G.1.3(b)(3)(A) when a defendant uses a computer to communicate with a minor and establish a relationship that is the eventual basis for enticing that minor to engage in prohibited sexual conduct, even if the enticement itself does not take place using a computer." *Id.* (internal citations omitted).

***United States v. McCrimon*, 788 F.3d 75 (2d Cir. 2015)**

QUESTION: Whether Application Note 5 to United States Sentencing Guideline ("U.S.S.G") § 3C1.2, which establishes when a reckless endangerment during flight sentencing enhancement is available, creates an exception to the general sentencing rule described in U.S.S.G. § 1B1.3(a)(1)(B). *Id*. at 77.

ANALYSIS: The 2nd Circuit ruled that Application Note 5 of U.S.S.G. § 3C1.2, creates an exception to the general rule. *Id*. U.S.S.G. § 1B1.3(a)(1)(B) governs sentencing in federal cases, and states that "[u]nless otherwise specified, . . . [sentencing] adjustments . . . shall be determined on the basis of[,] . . . in the case of a jointly undertaken criminal activity . . . , all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity[.]" *Id*. at 78. The court found that the statute's language allows for exceptions and limitations to the general rule. *Id*. The court held that Application Note 5 to U.S.S.G. § 3C1.2 is an exception because it plainly limits reckless

endangerment during flight sentencing enhancements to situations where "the defendant himself recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer[,] or that he aided[,] abetted, or otherwise contributed to the creation of such a risk in one of the [statutorily] enumerated ways[.]" *Id.*

CONCLUSION: The 2nd Circuit ruled that Application Note 5 to U.S.S.G. § 3C1.2 creates an exception to U.S.S.G. § 1B1.3(a)(1)(B), preventing the reckless endangerment during flight sentencing enhancement from applying merely because the defendant "could have reasonably foreseen that his co-defendant would recklessly endanger others while fleeing from the police in furtherance of the crime." *Id.* at 79.

***United States v. Morrison*, 778 F.3d 396 (2d Cir. 2008)**

QUESTION: Whether "a district court is permitted to consider confidential information provided to it by pretrial services when sentencing a defendant." *Id.* at 399.

ANALYSIS: The court noted that the language of the statute in question is that "information obtained in the course of performing pretrial services functions in relation to a particular accused shall be used only for the purposes of a bail determination and shall otherwise be confidential." *Id.* The court reasoned that this portion of the statute "ensures the maintenance of strong confidentiality with respect to third party requests for a defendant's pretrial services materials" and does not concern the "withholding of information from the district judge." *Id.* Furthermore, the court noted that the statute contains a number of exceptions to allow access to this information, including: "by probation officers for the purpose of compiling presentence reports." *Id.* at 400. The court reasoned that "implicit in the . . . exception affording probation officers access to § 3153(c)(1) information . . . is the expectation that district judges will receive and use that information in determining a defendant's sentence. *Id.*

CONCLUSION: "[A] district judge's use of otherwise confidential pretrial services information in determining a sentence is not barred by § 3153(c)(1) because the judge's receipt and use of such information for sentencing purposes is contemplated by the § 3153(c)(2)(C) exception." *Id.*

***United States v. Pierce*, 785 F.3d 832 (2d Cir. 2015)**

QUESTION: Whether "the rule of lenity applies to the district court's sequencing of sentences on multiple firearms convictions under 18 U.S.C. § 924(c)." *Id.* at 836.

ANALYSIS: A second conviction may arise out of multiple violations of 18 U.S.C. § 924(c) in the same indictment or the same proceedings. *Id.* at 846. 18 U.S.C. § 924(c) does not give any guidance on how to order the convictions for sentencing purposes. *Id.* The 2nd Circuit reasoned that "[b]ecause . . . § 924(c)(1)(C) is ambiguous as to how convictions should be ordered for sentencing when a defendant is convicted on multiple counts . . . that arise from the same indictment and proceedings, we are bound by [the principle of lenity]." *Id*. An ambiguity in "criminal statutes should be resolved in favor of lenity." *Id.* at 846–47 (internal citations omitted).

CONCLUSION: The 2nd Circuit held that because 18 U.S.C. § 924(c) is silent with regards to sequencing, it is ambiguous and the rule of lenity applies to the district court's sequencing of sentences on multiple firearms convictions under 18 U.S.C. § 924(c). *Id.* at 846.

***United States v. Roy*, 783 F.3d 418 (2d Cir. 2015)**

QUESTION: Whether a conspiracy conviction under 18 U.S.C. § 1349 requires proof of an overt act. *Id.* at 419.

ANALYSIS: The court looked at the Supreme Court case, *Whitfield v. United States*, 543 U.S. 209, (2005), in which the Supreme Court held that an overt act was not required to convict a defendant of conspiracy to commit money laundering. *Id.* at 420. In addition, the court listed multiple sister circuits and district courts that have concluded that a conviction under the statute does not require proof of an overt act. *Id.*

CONCLUSION: The 2nd Circuit held that a conspiracy conviction under 18 U.S.C. § 1349 does not require proof of an overt act. *Id*.

***United States v. Veliz*, 800 F.3d 63 (2d Cir. 2015)**

QUESTION: Whether "solicitation to murder constitutes 'corrupt persuasion.'" under § 1512(b). *Id*. at *19.

ANALYSIS: The 1st Circuit began by examining Section 1512(b)(3) which penalizes "[w]hoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to . . . hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense." *Id* at *11. The Court noted that the Supreme Court has stated, "the 'corruptly' qualifier is particularly important in the context of § 1512(b), "where the act underlying the conviction—'persua[sion]'—is by itself innocuous." *Id*. at *18 n. 6. (internal citations omitted). The Court emphasized that "the [3rd] Circuit has addressed the question, and reached the same conclusion we do, on

highly similar facts." *Id*. at *19. The Court found that appellant's "conduct might also violate a separate prohibition under § 1512 therefore is not dispositive." *Id*. at *21.

CONCLUSION: The 2nd Circuit held "the text of subsection (b)(3) encompasses solicitation of a third party to murder a potential witness." *Id*. at *24.

***Yale-New Haven Hosp. v. Nicholls*, 788 F.3d 79 (2d Cir. 2015)**

QUESTION: Whether *nunc pro tunc* domestic orders are valid when they are entered after the death of the other party to the order. *Id.* at 86.

ANALYSIS: The Court first looked to the legislative history of 29 U.S.C. § 1056(d) (1982). *Id.* The Court then reviewed other decisions from the 3rd, 8th, 9th, and 10th Circuits, which have discussed the issue in depth. *Id*. Lastly, the Court reviewed the Department of Labor's intent in its review of a domestic order regulation. *Id.*

CONCLUSION: The 2nd Circuit held that by passing 29 U.S.C. § 1056(d), Congress intended the time of filing of domestic orders not to affect their validity or enforcement. *Id.*

THIRD CIRCUIT

***Am. Farm Bureau Fed'n v. United States EPA*, 792 F.3d 281 (3d Cir. 2015)**

QUESTION: Whether a total maximum daily load ("TMDL") could include more than the daily quantity of a pollutant for the purpose of fulfilling the Environmental Protection Agency's (EPA) responsibility under the Clean Water Act ("CWA"). *Id*. at 295.

ANALYSIS: The Court noted that "many circuit and district courts have defined TMDLs to accord with the EPA's regulations (implying they did not present a problem)." *Id*. The Court postulated that "courts have recognized the EPA's authority to fill the Clean Water Act's considerable gaps on how to promulgate a total maximum daily load." *Id.* at 296.

CONCLUSION: The 3rd Circuit held that the EPA is authorized to regulate more than just the daily amount of pollutants in furtherance of the aims of the CWA. *Id*.

***Siluk v. Merwin*, 783 F.3d 421 (3d Cir. 2015)**

QUESTION: Whether a deductions of an inmate's trust account for filing fees should be deduced by twenty or forty percent when the inmate files multiple actions. *Id.* at 423.

ANALYSIS: The Circuit Court stated that the "scheme is relatively clear when an inmate only owes one filing fee. However, it is not clear how the deductions should be made when a prisoner owes more than one filing fee arising from multiple lawsuits or appeals of a single lawsuit." *Id.* at 425–26. In this case, Plaintiff filed a case with the district court and appealed the district court's decision. *Id* at 426. Plaintiff then filed petition requesting that the Court order a deduction of twenty percent instead of the forty percent he was being deducted. *Id.*

CONCLUSION: The 3rd Circuit held that 28 U.S.C. § 1915 "permits the recoupment of only 20 percent of a prisoner's monthly income for filing fees, regardless of how many civil actions or appeals the prisoner [pursues]." *Id.* at 436.

***Evankavitch v. Green Tree Servicing, LLC.*, 793 F.3d 355 (3d Cir. 2015)**

QUESTION: "Whether the burden in such a case [where a debt collector's third-party contact was under reasonable belief that the 'earlier response of such person [wa]s erroneous or incomplete . . . '] is on the debt collector to prove or the consumer to disprove that the challenged third-party communications fit within § 1692b's exception for acquisition of location information." *Id.* at 358.

ANALYSIS: The 3rd Circuit noted that the default rule states that the burden of proof rests with a plaintiff to prove her claim. *Id.* at 361. However, the court cited Supreme Court precedent that "the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits." *Id.* at 362 (internal citations omitted). Furthermore, the court noted the "general rule of statutory construction, that where the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue." *Id.* at 365.

CONCLUSION: The 3rd Circuit held that the burden of proof regarding a debt collector's repeated contact with a third party was on the debt collector and not the consumer. *Id.* at 368.

***United States SEC v. Bocchino (In re Bocchino)*, 794 F.3d 376 (3d Cir. 2015)**

QUESTION: Whether gross recklessness is substantial enough to meet the scienter requirement of § 523(a)(2)(A) of the Bankruptcy Code. *Id.* at 380.

ANALYSIS: The Court first looked at 3rd Circuit precedent on the issue. *Id.* The court pointed to a district court's analysis, later affirmed on appeal, which interpreted § 523(a)(2)(A), in part, to require that "*the debtor, at the time, knew the representation was false or made with gross recklessness as to its truth*." *Id.* Next, the Court looked at the Restatement (Second) of Torts to guide in its interpretation of § 523(a)(2)(A). *Id.* at 381. The Court found that "[a]bsent statutory restrictions, we have maintained that acting with a reckless disregard for the truth establishes scienter for securities fraud." *Id.* Finally, the Court concluded that "allowing gross recklessness to satisfy the scienter requirement would also accord with other circuits who have considered the issue." *Id.*

CONCLUSION: The 3rd Circuit held that gross recklessness satisfied the scienter requirement of §523(a)(2)(A) of the Bankruptcy Code. *Id.* at 382.

***United States v. Chabot,* 793 F.3d 338 (3d. Cir. 2015)**

QUESTION: Whether foreign bank account records fall within the required records exception to Fifth Amendment privilege pursuant to 31 C.F.R. § 1010.420. *Id.* at 342.

ANALYSIS: The court relied on the Supreme Court decision, *Grosso v. United States*, 390 U.S. 62 (1968), in which the High Court set forth a three-part test for determining when the required records exception should be applied to the Fifth Amendment Privilege. *Id.* at 342–43. This test states that "first, the purposes of the United States' inquiry must be essentially regulatory; second, information is to be obtained by requiring the preservation of records of a kind which the regulated party has customarily kept; and third, the records themselves must have assumed 'public aspects' which render them at least analogous to public documents." *Id.*

CONCLUSION: The 3rd Circuit held that it would apply the required records exception to enforce summonses for the records that 31 C.F.R. § 1010.420 requires accountholders to keep, joining the decision by the 2nd, 4th, 5th, 7th, 9th, and 11th Circuits that have already heard this issue. *Id.* at 344.

***United States v. Warner*, 2015 U.S. App. LEXIS 9241 (3d. Cir. Jun. 3, 2015)**

QUESTION: Whether pursuant to 18 U.S.C. § 2251(a)(2012) the "Government must prove that [a defendant] knew that the materials he used to produce child pornography traveled in interstate commerce." *Id.* at *3.

ANALYSIS: The court noted that its "sister circuits have unanimously rejected this requirement." *Id*. The 3rd Circuit found the 11th Circuit's interpretation of the statute persuasive, requiring that such materials were: "(1) produced with the intent that it eventually would travel in interstate commerce; (2) produced with materials that have traveled in interstate commerce; or (3) that traveled in interstate commerce." *Id*. (internal quotation marks omitted). The 3rd Circuit applied the 11th Circuit's test and found that the defendant did not need to know that these materials traveled in interstate commerce to satisfy the statute. *Id*.

CONCLUSION: The 3rd Circuit joined its sister circuits in holding that a defendant does not have to know that the materials he used to produce child pornography traveled in interstate commerce, only that the materials actually did travel in interstate commerce. *Id.*

FOURTH CIRCUIT

***Certain Underwriters at Lloyd's v. Cohen*, 785 F.3d 886 (4th Cir. 2015)**

QUESTION: Whether a consent order rendered by the Maryland State Board of Physicians (the Board) is admissible in a case alleging misrepresentation in an insurance policy application. *Id.* at 892.

ANALYSIS: The 4th Circuit began by looking at the wording of the controlling statute, Maryland Code Annotated, Health Occupations § 14-410. *Id.* at 892–93. There was nothing in the statute's wording to indicate that a Board's order was admissible in an insurance coverage matter. *Id.* at 893. Further, the legislative history indicated the intention of the provision was to be a "bar to the admission of all Board orders, except with the express consent of the parties . . . " *Id.*

CONCLUSION: The 4th Circuit held that a Board's order is not admissible in a criminal or civil action unless the parties consent to its admission or if the action is "brought by a party aggrieved by a Board decision." *Id.* at 894.

***United States v. Flores-Granados*, 783 F.3d 487 (4th Cir. 2015)**

QUESTION: What are the necessary elements of a generic definition of "kidnapping[.]" *Id.* at 493.

ANALYSIS: The 4th Circuit "drew upon commonalities amongst the MPC, the laws of the states, [and] examples [from their] sister circuits" to come up with a generic definition. *Id.* The court stated that "[n]early every state kidnapping statute and the Model Penal Code includes a requirement of [(1)] restraint or confinement of the victim and [(2)] the employment of unlawful means, often defined as by force, threat or deception, or in the case of [a minor or incompetent individual] without the consent of a parent [or] guardian." *Id*. The 4th Circuit stated that "[a]ny generic definition must include these two elements." *Id*.

CONCLUSION: The 4th Circuit determined "the best characterization of generic kidnapping is (1) unlawful restraint or confinement of the victim, (2) by force, threat or deception, or in the case of a minor or incompetent individual without the consent of a parent or guardian, (3) either for a specific nefarious purpose or with a similar element of heightened intent, or (4) in a manner that constitutes a substantial interference with the victim's liberty." *Id.* at 493–94.

***United States v. Shell*, 789 F.3d 335 (4th Cir. 2015)**

QUESTION: "Whether North Carolina second-degree rape categorically qualifies as a crime of violence . . . " under United States Sentencing Guidelines. *Id.* at 338.

ANALYSIS: The Court held that "offense[s] that may be committed without physical force and predicated instead on the absence of legally valid consent—as under the North Carolina second-degree rape statute—are not categorically crimes of violence" under United States sentencing guidelines. *Id.* at 341. The Court noted that it is clear North Carolina's second-degree rape statute, "which does not require the state to prove force at all and may instead be violated if there is legally insufficient consent, does not meet [the] 'violent force' standard." *Id.*

CONCLUSION: The Court found that North Carolina's second-degree rape "is not categorically a crime of violence." *Id.* at 346.

FIFTH CIRCUIT

***Aviles v. Merit Sys. Prot. Bd.*, 2015 U.S. App. LEXIS 14905 (5th Cir. Aug. 24, 2015)**

QUESTION: Whether "Congress' recent amendment of the Whistleblower Protection Act ("WPA") expanded the scope of protected disclosures to include disclosures of purely private wrongdoing." *Id*. at *14.

ANALYSIS: The 5th Circuit began by examining 5 U.S.C. § 2302(b)(8) and the way Congress amended the statute in 1994 to align with Congress' "concern[] that the Federal Circuit and the [Merit Systems Protection Board (MSPB)] had interpreted the WPA's definition of protected disclosures too narrowly." *Id.* at *3. The court noted that the Supreme Court has stated that "a change of phraseology in a revision will not be regarded as altering the law where it had been settled by plain language in the statutes, or by judicial construction thereof, unless it is clear that such was the intent." *Id.* at *18. (internal citations omitted). The court emphasized that "applying traditional principles of statutory interpretation" forced the Court to reject appellant's "interpretation of the statute to include purely private wrongdoing." *Id*. at *16. The court found that "the text indicates that the focus of the statute is government wrongdoing." *Id*.

CONCLUSION: The court held "that Congress did not intend to protect disclosures of purely private wrongdoing when it enacted the WPA." *Id*. at *11.

***Calix v. Lynch*, 784 F.3d 1000 (5th Cir. 2015)**

QUESTION: "Whether a lawful permanent-resident alien who is not seeking admission is barred from cancellation of removal for having been rendered inadmissible to the United States for purposes of the stop-time rule." *Id.* at 1004 (internal quotation marks omitted).

ANALYSIS: When interpreting the stop-time rule, the Court considers whether Congress has directly spoken to the precise question at issue. *Id.* at 1005. The Court noted that, if Congress spoke on the precise question at issue, the Court must give effect to the intent of Congress. *Id.* The Court further stated that when "the statute is silent or ambiguous with respect to the specific issue, [the court must decide] whether agency's answer is based on a permissible construction of the statute." *Id.* The Court reasoned that the stop-time rule was ambiguous, and therefore, the Court deferred to an agency's reasonable interpretation. *Id.* at 1007. The Court further stated that "the stop-time rule . . . applies only when an alien

commits an offense under Section 1182(a)(2), which are the offenses that make an alien inadmissible." *Id.* at 1011.

CONCLUSION: The Court held that Petitioner's offense, possession of marijuana, initiated the stop-time rule and once Petitioner was convicted of that offense, he was rendered inadmissible to the United States. *Id.* at 1012.

***De La Paz v. Coy*, 786 F.3d 367 (5th Cir. 2015)**

QUESTION: Whether illegal aliens can pursue a *Bivens* claims against Customs and Border Patrol (CBP) agents for illegally stopping and arresting them. *Id.* at 369.

ANALYSIS: The Supreme Court established in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) that, in certain circumstances, "the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right." *Id.* at 372. *(* internal citations omitted). In analyzing this issue, the 5th Circuit made reference to its sister circuits that have been presented with similar issues. *Id.* at 367. The 5th Circuit referenced the 2nd Circuit, which found that deportation proceedings and extraordinary rendition under the immigration law constitute new contexts under *Bivens* and have declined to impose judicially created remedies in those situations. *Id.* at 375. Similarly the court noted that the 9th Circuit recently held that *Bivens* claims are unavailable to immigrants in removal proceedings. *Id.* The court concluded that there is both an alternative process for protecting the Fourth Amendment rights of illegal aliens subjected to unconstitutional traffic stops and arrests, and special factors require denying a *Bivens* remedy for their claims arising out of civil immigration enforcement proceedings. *Id*. at 375.

CONCLUSION: The 5th Circuit held that *Bivens* actions are not available for claims that can be addressed in civil immigration removal proceedings. *Id*. at 369.

***Ferraro v. Liberty Mut. Fire Ins. Co.*, 796 F.3d 529 (5th Cir. 2015)**

QUESTION: Whether under a standard flood insurance policy, an insured must provide additional proof of loss in order to recover additional compensation on a pre-existing claim. *Id.* at 533.

ANALYSIS: The 5th Circuit rejected the argument that simply providing an insurance company with notice of a claim is enough to satisfy the strict compliance with the proof of loss requirement of Article VII of the standard flood insurance policy ("SFIP"). *Id.* The court reasoned that mere notice, such as a note that states "will provide supplement later" does

not circumvent the SFIP's proof of loss requirement. *Id.* Similarly, the statements that an adjuster provides are not proof of loss. *Id.* The court posited that these statements only serve as a courtesy to the insured. *Id.* The court determined that under the terms of the SFIP, the insured must provide a signed and sworn final statement by the insured as to how much damage is claimed, and as such, a failure to do so is a bar to recovery. *Id.*

CONCLUSION: The 5th Circuit held that an additional claim cannot serve as proof of loss under the plain terms of the SFIP because it was neither signed nor sworn. *Id.* at 534.

***Lee v. Verizon Communs. Inc.*, 2015 U.S. App. LEXIS 14588 (5th Cir. Aug. 17, 2015)**

QUESTION: Whether "[t]he degree to which the impact of fiduciary misconduct must be realized on this causal chain in order to establish standing is a matter of first impression for this court." *Id*. at *39.

ANALYSIS: The 1st Circuit began by examining "Employee Retirement Income Security Act ("ERISA") § 502(a)(2), 29 U.S.C. §§ 1132(a)(2) and (a)(3), in addition to [appellant's] claim for relief under ERISA § 409(a), 29 U.S.C. § 1109." *Id* at *34. The Court noted that "considering similar circumstances, our sister circuits have concluded that constitutional standing for defined-benefit plan participants requires imminent risk of default by the plan, such that the participant's benefits are adversely affected; in turn, those courts have held that fiduciary misconduct, standing alone without allegations of impact on individual benefits, is too removed to establish the requisite injury." *Id.* at *39. The Court emphasized that the "[4th] Circuit found such risk-based theories of standing unpersuasive, not least because they rest on a highly speculative foundation lacking any discernible limiting principle." *Id*. (internal quotation marks omitted). The court found that appellant's "allegations do not further allege the realization of risks which would create a likelihood of direct injury to participants' benefits." *Id*. at *40.

CONCLUSION: The Court held that "regardless of whether the plan is allegedly under- or over-funded, the direct injury to a participants' benefits is dependent on the realization of several additional risks, which collectively render the injury too speculative to support standing." *Id.*

***Powers v. United States*, 83 F.3d 570 (5th Cir. 2015)**

QUESTION: Whether the New Orleans Civil Service Commission ("CSC") or the City have exclusive jurisdiction over the pay rates and hourly wage schedules of civil service employees. *Id.* at 581.

ANALYSIS: The United States and the City of New Orleans approved a Consent Decree as a result of an investigation into the New Orleans

Police Department ("NOPD"), which "revealed longstanding patterns of unconstitutional conduct and bad practices and policies within the department." *Id* at 574. The United States Department of Justice found issues specifically within the payment system, which helped facilitate the bad conduct. *Id.* The Consent Decree directed changes to the system, so the New Orleans Council established the Office of Police Secondary Employment ("OPSE") and set new hourly rates for detailed work performed by NOPD officers to remedy the problem. *Id.* However, the Louisiana Constitution mandates that cities of over four hundred thousand people are to create a civil service commission that is "vested with broad and general rulemaking . . . powers for administration and regulation of the classified service . . . [including] the power to 'adopt rules for regulating employment' and to adopt a uniform pay and classification plan." *Id.* (internal quotation marks omitted).

CONCLUSION: The 5th Circuit agreed with the district court's holding that moving administration and supervision of paid detail work from the NOPD to the OPSE does not transform paid detail work into a position of trust or employment with the City. *Id.* The 5th Circuit held that the City, not the CSC, has the exclusive jurisdiction to set wage rates for NOPD paid details. *Id.* at 582.

***United States v. Rashid*, No. 14-20307, 2015 U.S. App. LEXIS 10802 (5th Cir. Aug. 26, 2015)**

QUESTION: Whether generalized safety concerns associated with counterfeit drugs are sufficient to support a two level sentencing increase for Criminal Infringement of Copyright or Trademark. *Id*. at *6.

ANALYSIS: The court began by observing that the sentencing for Criminal Infringement of Copyright or Trademark increases by two levels if the offense involves the conscious or reckless risk of death or serious bodily injury. *Id.* The court refused to impose a bright-line rule that all counterfeited drugs pose an inherent risk of serious bodily injury or death. *Id*. at *7. The court further noted that general statements about the potential health concerns of a drug and its counterfeited counterpart do not rise to specific warnings of risk of death or serious bodily injury. *Id*. at *8.

CONCLUSION: The 5th Circuit held that the government must provide evidence that a particular drug or counterfeit version of the drug poses a threat of serious bodily injury or death. *Id.* at *10.

***United States v. Richardson*, 781 F.3d 237 (5th Cir. 2015)**

QUESTION: Whether "the admission of [a witness'] prior testimony in a second trial violated the Sixth Amendment right to confront adverse witnesses because the denial of [the] right of self-representation at a first trial deprived [the Defendant] an adequate opportunity to cross-examine [the witness]." *Id.* at 243.

ANALYSIS: The court pointed out that the Confrontation Clause of the Sixth Amendment "requires only an adequate opportunity for cross-examination." *Id*. When "the jury ha[s] sufficient information to appraise the bias and motives of the witness," the standard is met. *Id.* at 244. (internal quotation marks omitted). The court had previously held that "adequate opportunity for cross-examination by competent counsel is sufficient." *Id*. Although, the Defendant was denied the right to self-representation, his previous counsel met the Confrontation Clause standard by "effectively and thoroughly questioning [the witness]." *Id*. at 245.

CONCLUSION: The 5th Circuit held that "the opportunity to cross-examine [the witness], while admittedly not exactly as the defendant wishes it had been, was adequate and meaningful under the law." *Id*. (internal quotation marks omitted).

***United States v. Sealed Juvenile*, 781 F.3d 747 (5th Cir. 2015)**

QUESTION: Whether special conditions such as: a contact condition, occupation condition, loitering condition and computer and internet condition imposed for juvenile delinquent supervision are valid. *Id.* at 749.

ANALYSIS: The court recognized that district courts have broad discretion in imposing conditions of supervised release, subject to statutory requirements. *Id.* at 750–51. The court reasoned that the conditions needed to be reasonably related and reasonably necessary to achieving the statutory provisions. *Id.*

CONCLUSION: The 5th Circuit held that the contact, occupation and loitering conditions were reasonably related to, and necessary for achieving statutory ends, but that when a condition such as the computer and internet condition, is overburdening for achieving its purpose a juvenile may seek modification of the conditions. *Id.* at 758.

***United States v. Tavarez-Levario*, 788 F.3d 433 (5th Cir. 2015)**

QUESTION: "Whether [under 18 U.S.C. § 1546(a) the] use of an immigration document, knowing it to be forged, counterfeited, altered, or

falsely made or procured by fraud or unlawfully obtained, constitutes a continuing offense for statute of limitations purposes." *Id.* at 435.

ANALYSIS: The doctrine of continuing offenses holds that the statute of limitations does not begin to run until a crime completely ceases. *Id*. at 437. The court noted that the statute of limitations conflicts with the doctrine of continuing offenses. *Id.* The court noted that to resolve this tension, that the Supreme Court ruled that a crime will only be construed as a continuing offense where: (1) the relevant statute explicitly compels such a conclusion, and (2) the nature of the crime is such that it is certain that Congress intended for it to be considered continuing. *Id*. The 5th Circuit applied this rule to decide whether the knowing use of false, counterfeit, or altered document constitutes a continuing offense. *Id*.

CONCLUSION: The 5th Circuit ruled that the knowing use of a false or unlawfully obtained immigration document does not constitute a continuing offense (1) because the explicit language of 18 U.S.C. § 1546(a) does not mandate that it be considered a continuing offense, and (2) because Congress did not clearly intend for it to constitute a continuing offense since the aforementioned fraudulent use does not "produce[] an ongoing threat of harm." *Id*. at 437–41.

SIXTH CIRCUIT

Sierra Club v. United States EPA, 781 F.3d 299 (6th Cir. 2015)

QUESTION: Whether a petitioner can satisfy the standing requirement on direct review by a "production similar to that required at summary judgment." *Id.* at 305.

ANALYSIS: The 6th Circuit reasoned that it "see[s] no reason why a petitioner should not be able to establish, by affidavit or other evidence, specific facts supporting each element of standing." *Id.* at 305–06. The Court further noted that "this requirement [is] the most fair and orderly means to adjudicate standing because petitioners are often best situated to produce evidence of their injuries." *Id.* at 305 (internal citations omitted).

CONCLUSION: The 6th Circuit held that a petitioner can satisfy the standing requirement on direct review by a production similar to the burden required at summary judgment. *Id.*

***Sierra Club v. United States EPA*, 793 F.3d 656 (6th Cir. 2015).**

QUESTION: Whether a petition for direct appellate review carries a burden of proof similar to that of a motion for summary judgment or to that of a motion to dismiss. *Id*. at 659.

ANALYSIS: The Court relied on the standards other circuits have imposed for petitions for direct appellate review to guide their analysis. *Id*. at 662. The D.C. Circuit, as well as the 7th, 8th, and 10th Circuits have all held that petitions for direct appellate review are analogous to motions for summary judgment because the petition "'does not ask the Court merely to assess the sufficiency of its legal theory,' but instead seeks a final judgment on the merits, based upon the application of its legal theory to facts established by evidence in the record." *Id*. (internal quotation marks omitted).

CONCLUSION: The 6th Circuit held that a petition for direct appellate review is similar to a motion for summary judgment in that a petitioner should establish "specific facts supporting each element of standing." *Id*.

***State Auto Property & Casualty Ins. Co. v. Hargis*, 785 F.3d 189 (6th Cir. 2015)**

QUESTION: Whether it was error for a district court to dismiss a claim asserted by an insurance company against its insured for "reverse bad faith" without certifying the question to the state Supreme Court when such a claim had "not [before] been recognized in Kentucky (or any other jurisdiction)." *Id*. at 192.

ANALYSIS: The court noted that the underlying substantive state law implied a covenant of good faith into its contracts. *Id*. at 196. The court then posited that an independent tort claim for bad faith "is only permitted where there is a special relationship between the parties and where distinct elements are present," noting the example of "an insurer and an insured, where distinct elements are present such as unequal bargaining power, vulnerability and trust among the parties. *Id*. at 196–97. The court also noted a state Supreme Court rejection of an insurance company's challenge of a state statute that "afford[ed] rights and remedies to an insured but provide[ed] no reciprocal rights or remedies to insurers" as indicating "a willingness to conclude in a related context that insureds are in need of protection that insurers are not." *Id*. at 198. The court next considered that a "common law tort claim for reverse bad faith has not been recognized in any jurisdiction," noting that, even when some commenters in another state had begun to discuss possible adoption of a reverse bad faith cause of action, the state Supreme Court still declined to adopt the tort of reverse bad faith. *Id*. In addition, the court responded to "claims that the threat of punitive damages is necessary to deter such

fraudulent conduct," by reasoning that it is "hard to imagine that a possible claim for reverse bad faith would be a deterrent if the threat of criminal prosecution was not." *Id*. at 200.

CONCLUSION: The 6th Circuit held that, considering "the standards for proving a claim of bad faith," the "availability of other remedies for the damages incurred as a result of an insured's fraud under state law," and "the absence of support in other jurisdictions" for reverse bad faith, "[the court] predict[ed] that the Kentucky Supreme Court would reject" to "adopt a common law tort claim for reverse bad faith by an insured[,]" thereby rejecting the notion. *Id*.

***Sutherland v. DCC Litig. Facility, Inc. (In re Dow Corning Corp.)*, 778 F.3d 545 (6th Cir. 2015)**

QUESTION: Whether "a change of venue under [28 U.S.C. § 157(b)(5) alters] which state's law governs or, as in diversity, should a change of venue have no impact on which state law applies" in "personal injury and wrongful death cases originally brought in diversity but transferred via § 157(b)(5) after the defendant filed for bankruptcy[.]" *Id.* at 549–50.

ANALYSIS: The court relied on *Van Dusen v. Barrack*, 376 U.S. 612 (1964), and *Ferens v. John Deere Co.*, 494 U.S. 516 (1990), reasoning that "principles of practicality and fairness that animate the rule of *Van Dusen* and *Ferens* are equally applicable to personal injury and wrongful death cases originally brought in diversity but transferred via § 157(b)(5) after the defendant filed for bankruptcy." *Id*. at 550. The court further reasoned that a change of venue "should not deprive parties of state-law advantages that exist absent diversity jurisdiction," and it "should not create or multiply opportunities for forum shopping" because "[i]f a change of venue meant a change of law, the transferee forum might have a shorter statute of limitations or might refuse to adjudicate a claim which would have been actionable in the transferor state" and "[i]n such cases a defendant's motion to transfer could be tantamount to a motion to dismiss." *Id.* (internal quotation marks and citations omitted). Lastly, the court reasoned that a transfer of venue "should turn on considerations of convenience and the interest of justice rather than on the possible prejudice resulting from a change of law." *Id.* (internal citations omitted).

CONCLUSION: The 6th Circuit held that a change of venue does not change the applicable state law in personal injury and wrongful death cases that were originally brought in diversity and transferred pursuant to § 157(b)(5). *Id.*

SEVENTH CIRCUIT

***Webster v. Daniels*, 784 F.3d 1123 (7th Cir. 2015)**

QUESTION: Whether under the savings clause, 28 U.S.C. § 2255(e), a convicted defendant "who proposes to show that he is categorically ineligible for the death penalty, based on newly discovered evidence, may not be barred from doing so by section 2255" and may resort to a petition under § 2241, when that discovered evidence existed before the trial, but "was found much later, despite diligence on the part of the defense, and where those records bear directly on the constitutionality of the death sentence." *Id*. at 1141.

ANALYSIS: The court reasoned that "ordinary principles of statutory interpretation lead directly to the result that the savings clause applies" in such an instance. *Id*. at 1139. The court also noted that the "core purpose of habeas corpus is to prevent a custodian from inflicting an unconstitutional sentence." *Id*.

CONCLUSION: The 7th Circuit held that in cases where novel evidence would reveal that a certain penalty is categorically prohibited by the Constitution, there exists no categorical bar against resorting to § 2241 for relief. *Id*.

EIGHTH CIRCUIT

***Beauford v. ActionLink, LLC*, 781 F.3d 396 (8th Cir. 2015)**

QUESTION: Whether employees waive their right to sue under the Fair Labor Standards Act "by cashing . . . . proposed settlement checks." *Id.* at 406.

ANALYSIS: The 8th Circuit reasoned that "[s]imply tendering a check and having the employee cash that check does not constitute an 'agreement' to waive claims; an agreement must exist independently of payment." *Id.* The Court further noted that "an employee may waive his rights to sue even if he does not cash a settlement check, provided that he signs a waiver of any legal claims and receives a valid check from the employer." *Id.*

CONCLUSION: The 8th Circuit held that to constitute a valid settlement and waiver of claims cognizable under the Fair Labor Standards Act, an employee must be aware of and agree to waive such claims, receive a settlement check from the employer, and have the process supervised by the Department of Labor. *Id.* at 406–08.

***Debough v. Shulman*, 799 F.3d 1210 (8th Cir. 2015)**

QUESTION: Whether a taxpayer who acquires her primary residence and does not resell that property within one year is permitted to take advantage of the 26 U.S.C. § 1038(b) exception for calculating taxable gain. *Id.* at *3.

ANALYSIS: The Court reasoned that the first step in its analysis is to look to the direct language of the statute in order to gather Congress's intent through the plain meaning of the statutory language. *Id.* The Court stated that it was clear the statute should apply when an individual acquires her home when attempting to compute taxable gain of the individual. *Id*. at *5. The Court then examined other sections of 26 U.S.C. § 1038 to gain guidance as to Congress's intent when it enacted the statute. *Id.* at *9. Lastly, the Court looked to the legislative history of the statute's passage for further insight. *Id*. at *10.

CONCLUSION: The 8th Circuit held that 26 U.S.C. § 1038(b) requires an individual to resell their primary residence within one year of requisition in order to permit the individual to use the exception pursuant to the statute. *Id.* at *11.

***Ideker v. PPG Indus.*, 788 F.3d 849 (8th Cir. 2015)**

QUESTION: Whether the district court was correct in concluding that "collateral estoppel precluded [plaintiff] from reasserting her occupational disease claim." *Id*. at 853.

ANALYSIS: The court reasoned, "[e]ven if we assume, without deciding, the district court's state-law prediction was 'incorrect, [plaintiff] fails to show reversible error." *Id*. at 854 (internal quotation marks omitted). Although, plaintiff argued the correctness of the district court's conclusion, the 8th Circuit reasoned that, "[u]nder Missouri law, whether a prior judgment is legally correct is not at issue in applying the doctrine of collateral estoppel." *Id*. The court further noted that, "[a]ny purported 'mistake' the district court made in predicting Missouri law does not enable [plaintiff] to circumvent the dismissal in the first case by refilling the same injury claim based on the same historical facts in a second case." *Id*.

CONCLUSION: The 8th Circuit held that the district court correctly found that collateral estoppel precluded plaintiff from reasserting her occupational disease claim stating, "[t]he district court correctly decided it was not inequitable to bar [plaintiff] from relitigating the district court's decision that it lacked statutory authority to hear the claim." *Id*. at 855.

***PW Enters., Inc. v. North Dakota (In re Racing Servs.)*, 779 F.3d 498 (8th Cir. 2015)**

QUESTION: Whether North Dakota law implicitly authorizes the state to collect taxes on account wagering prior to the 2007 amendment of North Dakota Century Code § 53-06.2-10.11, which authorized taxes on account wagering. *Id.* at 502–03.

ANALYSIS: The court reasoned that "[t]he power to impose taxes should not be extended beyond the clear meaning of the statutes," and "if the language [of the statute] is clear and unambiguous, the legislative intent is presumed to be clear from the face of the statute." *Id.* at 503 (internal quotation marks and citations omitted). The court stated that the language of § 53-06.2-11, prior to its amendment in 2007, is clear and unambiguous, and the language clearly shows the legislature's intent. *Id.* at 503, 505. The court noted the legislative history of the 2001 amendment does not reveal any reason to doubt the plain meaning of the statute's text. *Id.* at 506. The court further reasoned that a tax should not be implied in § 53-06.2-11 because the absence of the tax does not violate Article XI, section 25 of the North Dakota Constitution, and Article X, section 3 of the North Dakota Constitution bars the implication of a tax in § 53-06.2-11. *Id.* at 506–07.

CONCLUSION: The 8th Circuit held that North Dakota law does not implicitly authorize the state to collect taxes on account wagering prior to the 2007 amendment of § 53-06.2-11. *Id.* at 507.

***Tri-Nat'l, Inc. v. Yelder*, 781 F.3d 408 (8th Cir. 2015)**

QUESTION: "Whether the federally mandated Motor Carrier Act ("MCA") of 1980 MCS-90 endorsement for motor carriers requires a tortfeasor's insurer to compensate an injured party when the injured party has already been compensated by its own insurer." *Id.* at 410.

ANALYSIS: The court looked at the intent of Congress in enacting the MCA, which was to address a public safety concern, "where motor carriers attempted to avoid financial responsibility for accidents that occurred while goods were being transported in interstate commerce." *Id.* at 414 (internal quotation marks omitted). The court then went on to show how making the "[injured party] wait to receive payment on its claim with [its own insurer] . . . would defeat the purpose of the regulations adopted to implement the [MCA], which is to assure that injured members of the public would be able to obtain judgments collectible against negligent authorized carriers." *Id*. at 415 (internal quotation marks omitted).

CONCLUSION: The 8th Circuit held that "the circumstance of [an injured party] carrying its own insurance . . . does not absolve [the

tortfeasor's insurance] of its obligations under the MCS-90 endorsement." *Id.* at 416.

***United States v. Omar*, 786 F.3d 1104 (8th Cir. 2015)**

QUESTION: What standard of review should be applied when reviewing a district court's decision, pursuant to 50 U.S.C. § 1806(f), not to disclose Foreign Intelligence Surveillance Act (FISA) materials to the defendant pursuant to 50 U.S.C. § 1806(f). *Id.* at 1111.

ANALYSIS: The Court first looked to a previous decision within the Circuit regarding the disclosure of FISA materials to a defendant. *Id.* The Court then reviewed decisions from the 5th, 6th, 9th and 11th Circuits, which have discussed the issue in depth in determining whether abuse of discretion or de novo review is appropriate under the circumstances. *Id.* Lastly, the Court discussed the effect the abuse of discretion standard would have on a trial court in hearing such a matter, as such a determination is a discovery related ruling, which is generally reviewed for under an abuse of discretion standard. *Id.*

CONCLUSION: The 8th Circuit held that abuse of discretion was the proper standard of review for reviewing a District Court's refusal, pursuant to 50 U.S.C. § 1806(f), to disclose the FISA material to the defendant. *Id.*

NINTH CIRCUIT

***Association of Irritated Residents v. United States EPA*, 790 F.3d 934 (9th Cir. 2015)**

QUESTION: Whether § 110(k)(6) of the Clean Air Act (CAA) grants the United States Environmental Protection Agency (EPA) authority to retroactively revise the scope of an earlier approval of a state's New Source Review Rules. *Id.* at 937.

ANALYSIS: The court reasoned that the "broad provision of § 110(k)(6) was enacted to provide the EPA with an avenue to correct its own erroneous actions and grant the EPA the discretion to decide when to act pursuant to the provision." *Id.* at 948. The court interpreted the statutory language, "in the same manner" and "appropriate" under the framework of *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842 (1984). *Id.* The court determined that the EPA reasonably interpreted "in the same manner" as a procedural requirement, and thus, "the EPA acted through a notice-and-comment rulemaking. Therefore, the EPA did not exceed its authority under the CAA." *Id.* at 949. The court further found that the EPA's understanding of "appropriate" was

permissible. *Id.* at 950. The court held this because this interpretation: "contemplated the goals and purposes of the CAA as a whole," "respected state law," and was "the only method that would fix the unusual problem at issue." *Id.* The court believed it was "reasonable that Congress, by amending the CAA to add § 110(k)(6), was providing the EPA with the authority to act in ways other than those enumerated in § 110(k)." *Id.* at 951.

CONCLUSION: The court held that the EPA reasonably interpreted § 110(k)(6)'s requirement that the EPA revise erroneous action, as appropriate to encompass a retroactive limitation of its previous approval. *Id.* at 937.

***Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753 (9th Cir. 2015)**

QUESTION: Whether "federal preemption . . . prevents the district court from deciding when a 'natural' label on cosmetic products is false or misleading." *Id.* at 756.

ANALYSIS: The court relied on both the statutory language and other recent decisions when determining whether the plaintiff's claim was preempted. *Id*. at 757. The court interpreted the Food, Drug, and Cosmetic Act as not addressing a state's right to "provide remedies for violations of federal law." *Id*.

CONCLUSION: The 9th Circuit held that since the Food, Drug, and Cosmetic Act does not expressly address the issue, the claim is not preempted. *Id*. at 759.

***Cnty. of Orange v. United States Dist. Ct.*, 784 F.3d 520 (9th Cir. 2015)**

QUESTION: Whether "federal courts sitting in diversity [should] apply [state law or federal law] to determine the validity of a jury trial waiver clause" contained in a contract governed by California Law, "when state law is more protective than federal law of the right to a jury trial." *Id.* at 527.

ANALYSIS: The 9th Circuit reasoned that "[b]ecause no Federal Rule of Civil Procedure or federal law governs pre-dispute jury trial waivers, [the court] appl[ies] the . . . *Erie* analysis to answer the vertical choice of law question presented." *Id.* at 524. In applying *Erie*, "several . . . sister circuits have . . . [held] that federal courts sitting in diversity look to federal law to determine the enforceability of a jury trial waiver clause such as the one at issue here." *Id.* However, unlike state law in many of the circuits, "California law . . . is more protective than federal law of the right to trial by jury." *Id.* at 528–29. Since *Erie* ensures that "a federal court

adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose . . . [of] only another court of the State . . . . [F]ederal courts should adjudicate state-created rights in a manner that closely resembles the way in which a state court would adjudicate that same right." *Id.* at 531 (internal citations omitted).

CONCLUSION: The 9th Circuit held that "district courts sitting in diversity must apply [the state] rule on pre-dispute jury trial waivers to contracts governed by [state] law." *Id.* at 532.

***Fidelity Nat'l Fin., Inc. v. Friedman*, 2015 U.S. App. LEXIS 14430 (9th Cir. Aug. 17 2015)**

QUESTION: Whether "a registered judgment itself can be registered in yet another district?" *Id*. at *1.

ANALYSIS: The 5th Circuit began by examining "the federal registration statute, 28 U.S.C. § 1963." *Id*. at *1. The court noted that "we previously addressed § 1963 in *Hilao v. Estate* of Marcos, 536 F.3d 980, 988 (9th Cir. 2008). In that case, we held that the registering state's statute of limitations, as opposed to the statute of limitations of the original judgment's state, applied to registered judgments, because registering a judgment under §1963 is the functional equivalent of obtaining a new judgment of the registration court." *Id.* at *6. The court emphasized the "fact that successive registration potentially allows plaintiffs to register a judgment that has previously expired under a state's statute of limitations is irrelevant in view of the plain language of §1963." *Id*. at *8. The court found that "the plain language of § 1963, however, persuades us that the [5th] Circuit's analysis and holding are correct: a registered judgment is a district court judgment like any other, so it also may be registered." *Id*. at *6.

CONCLUSION: The court held "a registered judgment is a judgment in an action for the recovery of money or property entered in any . . . district court, and itself may be registered." *Id.* at *2 (internal quotation marks omitted).

***Int'l Bhd. Of Teamsters, Local Union No 1224 v. Allegiant Air, LLC*, 788 F.3d 1080 (9th Cir. 2015)**

QUESTION: Whether under the Railway Labor Act ("RLA"), the status of a past advocate differs from the status of a present dispute about what party represents labor, and therefore whether the district court properly exercised jurisdiction. *Id*. at 1088.

ANALYSIS: The 9th Circuit first noted that federal courts have jurisdiction to enjoin changes to the status quo while parties complete mediation. *Id*. The court then looked at whether 45 U.S.C. § 152, Ninth, precludes that determination. *Id*. The court did not believe that it does

because Section 152, Ninth, gives the National Mediation Board (the Board) jurisdiction when "any dispute shall arise among a carrier's employees as to who are the representatives of such employees." *Id*. Furthermore, Section 152, Ninth, provides that once the Board determines the bargaining representative, it must issue a certification, and the carrier must "treat with the representative so certified. *Id*. at 1089. Here, no competing unions vied for the right to bargain, and no employees sought to remain or become unaffiliated. *Id*.

CONCLUSION: The 9th Circuit held that there is no representation dispute, and therefore the district court correctly exercised jurisdiction. *Id.*

Mollett v. Netflix, Inc.*, 795 F.3d 1062 (9th Cir. Cal. 2015*)

QUESTION: Whether "permitting certain disclosures about" an online video streaming service subscriber's viewing history "to third parties–specifically, subscribers' family, friends, and guests" violates the Video Privacy Protection Act ("VPPA"). *Id*. at 1065.

ANALYSIS: The Court noted that Congress's purpose when enacting the VPPA was to "preserve personal privacy with respect to the rental, purchase or delivery of video tapes or similar audio visual materials." *Id.* Consistent with that purpose, the language of the VPPA is broad in prohibiting a "video tape service provider from knowingly disclosing personally identifiable information about one of its consumers *to any person*[.]" *Id*. at 1066. (internal quotation marks omitted, emphasis in original). The Court postulated, however, that the VPPA "provides several exceptions to the disclosure prohibition, allowing disclosure of a consumer's video rental history to the consumer himself[.]" *Id*. The Court posited that "[t]here is nothing to suggest that the VPPA prohibits disclosures to the consumer when they are incidentally also received by third parties as the subscriber may independently permit." *Id*. at 1066–67 (internal quotation marks omitted). The Court then asserted that requiring an online video streaming service to "undertake certain technical fixes to prevent incidental disclosures to third parties" would effectively convert the VPPA, from a preventive measure guarding against the disclosure of private information, into a "requirement of secure disclosure–an outcome plainly not supported by the VPPA's text." *Id*. at 1067.

CONCLUSION: The 9th Circuit held that disclosures of personal information made to a video streaming service's "own subscribers" are "not actionable under the VPPA." *Id*. at 1064.

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***MTB Enters.v. ADC Venture 2011-2, LLC*, 780 F.3d 1256 (9th Cir. 2015)**

QUESTION: Whether the Financial Institutions Reform, Recovery, and Enforcement Act's (FIRREA) provision stating that parties are required to sue either in the district in "which the depository institution's principal place of business is located or the United States District Court for the District of Columbia (and such court shall have jurisdiction to hear such claim)" establishes jurisdiction or is merely a waivable venue provision. *Id.* at 1257.

ANALYSIS: The court noted that in order to examine whether the FIRREA contained a jurisdictional mandate, they had to examine whether Congress provided a "clear" indication of their desire to include such a mandate. *Id*. at 1258. The court reasoned that Congress used the "magic words" to establish jurisdiction because 12 U.S.C. § 1821 makes explicit reference to the court's ability to hear the claim. *Id*. at 1259. Further, Section 1821(d)(13)(D) vests jurisdiction for this suit within two specific federal courts. *Id*.

CONCLUSION: The 9th Circuit held that the venue provision in the FIRREA "is a jurisdictional limitation on federal court review" and thus the provision cannot be waived. *Id*.

***Navarro v. Encino Motorcars*, *LLC*, 780 F.3d 1267 (9th Cir. 2015)**

QUESTION: Whether "service advisors" who work at car dealerships are excluded from overtime pay requirements under 29 U.S.C. § 213(b)(10)(A) of the Fair Labor Standards Act (FLSA), which exempts "any salesman, parts-man, or mechanic primarily engaged in selling or servicing automobiles." *Id*. at 1269.

ANALYSIS: The Court invoked a two-part review because the case involved a challenge to the United States Department of Labor's definition of salesman. *Id*. at 1270. The court initially examined the statutory text, which under the FLSA, involves construing the text in a deferential manner towards employees. *Id*. at 1271. However, the court noted the statutory text was unclear because it was ambiguous as to whether Congress sought to exempt every salesman who engaged in servicing cars, or salesman who actually sold the cars themselves. *Id*. at 1272. Being that the statute was ambiguous; the Court noted that it needed to determine what standard of reasonableness applied. *Id*. The court concluded that because the regulation challenged was passed after a notice and comment period, the relaxed reasonableness standard as articulated in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc*., 467 U.S. 837, 842 (1984) applied. *Id*. The court then noted that applying this reasonableness standard, the Department of Labor's interpretation was reasonable because

its interpretation read the statute's sentence structure to suggest the words "mechanic" and "servicing" were to be read in tandem. *Id*. at 1276. The court further reasoned that this was a reasonable reading because it did not "render any term meaningless or superfluous." *Id.* at 1275.

CONCLUSION: The 9th circuit held that service advisors were not exempt from the FLSA overtime requirements under 29 U.S.C. § 213(b)(10)(A). *Id*. at 1277.

***Newman v. Wengler*, 790 F.3d 876 (9th Cir. 2015)**

QUESTION: "Whether the doctrine of [*Stone v. Powell*, 428 U.S. 465 (1976)] survives the passage of [the Antiterrorism Effective Death Penalty Act, ("AEDPA")]." *Id.* at 878.

ANALYSIS: The court reasoned that the language of 28 U.S.C. § 2254(d) does not imply a negative pregnant, and the court further states that "[t]here is no implication in § 2554(d) that because the statute commands [the court] not to grant a petition unless certain conditions are met, those are the only conditions under which [the court] could deny a petition." *Id.* at 879 (alteration in the original). The court noted that the Supreme Court has held that the language of § 2254 establishes a precondition for a court to grant a habeas petition, and § 2254 does not establish an entitlement to a habeas petition. *Id.* The court further reasoned that the AEDPA survives *Stone* because the court "[does] not engage in anticipatory overruling of Supreme Court precedent. The Supreme Court has made clear that it retains the prerogative of overruling its own decisions." *Id.* at 880 (internal quotation marks and citations omitted).

CONCLUSION: The 9th Circuit held that the doctrine of *Stone v. Powell* survives the passage of the AEDPA. *Id.* at 878.

***Schroeder ex Rel. United States v. United States*, 793 F.3d 1080 (9th Cir. 2015)**

QUESTION: Whether "31 U.S.C.§ 3730(d)(3*)* of the False Claims Act ("FCA") requires the dismissal of all relators convicted of criminal conduct arising from the fraudulent conduct at issue in the qui tam suit, particularly minor participants who neither planned nor initiated the fraudulent scheme." *Id*. at 1081.

ANALYSIS: The Court relied on the statutory language to determine whether or not there was an exception for those who play a minor role in a fraudulent scheme. *Id*. at 1084. The Court interpreted the plain language of the statute as having no such exception, prompting the Court to then decipher alternative constructions of the statute. *Id*. The Court reasoned that there may be an alternative construction of the statute that would lend

some leniency to a person who is involved in an employer's fraudulent scheme if their involvement is slight. *Id*. at 1085. As a result, the Court turned to the legislative history, and determined that this lenient interpretation of the statute is not aligned with Congress' intent when drafting the statute. *Id*. at 1086.

CONCLUSION: The 9th Circuit held that the FCA requires the dismissal of all relators convicted of criminal conduct in a qui tam action, even if the relators' conduct is minor. *Id*..

***United States v. Tamman*, 782 F.3d 543 (9th Cir. 2015)**

QUESTION: Whether the Broker-Dealer and Special Skill sentencing enhancement can be simultaneously applied to an attorney found guilty as an accessory after the fact to the principal in a securities fraud conviction. *Id.* at 547.

ANALYSIS: The court noted that the sentencing guidelines instruct against applying both the Broker-Dealer and the Special Skills enhancements. *Id.* at 549. However, the court reasoned that this is merely to avoid "double counting." *Id.* The court then stated that multiple enhancements could be applied to sentencing where each one "serves a unique purpose under the Guidelines." *Id.* The court also noted that a 2003 amendment by the Sentencing Commission covered associate persons of an investment advisor, barring them from Special Skill enhancement as well. *Id.* at 549–50.

CONCLUSION: The 9th Circuit determined that because the case dealt with a broker-dealer enhancement applied to the behavior of the principal, and the special skill enhancement applied to a separate behavior of the defendant-accessory, then application of both enhancements is not considered "double counting." *Id.* at 550.

***United States v. United States Dist. Court for the Dist. of Nev. (In re United States)*, 791 F.3d 945 (9th Cir. 2015)**

QUESTION: Whether a district court needs "a valid reason for denying pro hac vice admission in a civil case." *Id.* at 956.

ANALYSIS: The Court recognized that the 5th Circuit requires "a showing that in any legal matter, whether before the particular district court or in another jurisdiction, [the lawyer] has been guilty of unethical conduct of such a nature as to justify disbarment of a lawyer admitted generally to the bar of the court." *Id.* The 11th Circuit agrees that absent unethical conduct that would be grounds for disbarment, the attorney must be admitted. *Id.* The 6th Circuit has held that pro hac vice "admission may be revoked where conflicts of interest exist, or where "some evidence of ethical violations was present." *Id.* The 4th Circuit has applied a less

stringent standard holding "a district court may deny an attorney permission to appear pro hac vice based on the attorney's unlawyerlike conduct in connection with the case in which he wished to appear." *Id.* (internal citations omitted).

CONCLUSION: The 9th Circuit reasoned "we need not announce specific factors that should inform a district court's exercise of its discretion to deny pro hac vice admission . . . . we need only define the outer limits of that discretion. At minimum, a court's decision to deny pro hac vice admission must be based on criteria reasonably related to promoting the orderly administration of justice or some other legitimate policy of the courts." *Id.* at 957.

***United States v. Willis*, 2015 U.S. App. LEXIS 13200 (9th Cir. July 29, 2015)**

QUESTION: "[H]ow to determine whether uncharged conduct that comprises a criminal offense constitutes a 'crime of violence' for purposes of a supervised release revocation." *Id.* at *11.

ANALYSIS: The Court began by looking at the procedure used to determine "whether a prior conviction constitutes a crime of violence for purposes of the Armed Career Criminal Act (ACCA)." *Id*. Next, the Court recognized that the framework differs under the ACCA context verses the "supervised release" context. *Id*. at *12. In the latter, there does not have to be a prior conviction. *Id*. A "court may revoke the defendant's supervised release if the defendant's conduct constituted 'another federal, state or local crime' while on supervised released, whether or not the defendant has been the subject of a separate federal, state or local prosecution for such conduct." *Id*. at *12–13 (internal quotation marks omitted).

CONCLUSION: The 9th Circuit held that the categorical approach used in the ACCA context also applies in the context of supervised release. *Id*. at *13.

***Voss v. Comm'r*, 796 F.3d 1051 (9th Cir. 2015)**

QUESTION: "When multiple unmarried taxpayers co-own a qualifying residence, do the debt limit provisions found in 26 U.S.C. §163(h)(3)(B)(ii) and C(ii) apply per taxpayer or per residence?" *Id.* at 1057.

ANALYSIS: The court noted that section 163 does not allow taxpayers to deduct interest payments on an unlimited amount of acquisition and home equity indebtedness. Instead, the statute limits "[t]he aggregate amount treated as acquisition indebtedness for any period" to $1,000,000 and "[t]he aggregate amount treated as home equity

indebtedness for any period" to $100,000. *Id*. at 1054 (citing § 163(h)(3)(B)(ii), (C)(ii)). Furthermore, the court found that the statute is silent on whether the $1 million and $100,000 debt limits apply per taxpayer or per residence. *Id.* at 1057. However, the court was able to look to another situation of co-ownership: married individuals filing a separate return for guidance. *Id*. at 1058. The court explained that Congress' intent in deciding to provide married individuals filing separate returns to deduct interest on up to $550,000 of home debt each was to permit unmarried co-owners filing separate returns to separately deduct interest on up to $1.1 million of home debt. *Id*. at 1068.

The court was also guided by the statute's repeated references to a single "taxable year." *Id*. at 1063. Residences do not have taxable years; only taxpayers do. *Id*. And, importantly, taxpayers can have different taxable years. *Id.* Yet §163(h) speaks in terms of a *single* taxable year, thus implying that the debt limits apply per taxpayer. *Id*.

CONCLUSION: The 9th Circuit concluded that, based on the language of the statute, Congress intended the debt limits provided in §163(h) to apply per taxpayer; rather than per residence. *Id*. at 1068.

TENTH CIRCUIT

***Barnes v. Jones*, 783 F.3d 1185 (10th Cir. 2015)**

QUESTION: Whether the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") applies in a suit for breach of fiduciary duty that is brought against a holding company's officers after a subsidiary bank has gone into Federal Deposit Insurance Corporation ("FDIC") receivership. *Id.* at 1192.

ANALYSIS: The court looked at the 4th, 7th, and 11th Circuits for guidance. *Id.* at 1192–95. The 4th Circuit found FIRREA to apply in a case with similar facts. *Id.* at 1192. Although the 4th Circuit recognized that the officers owed fiduciary duties to the holding company independent of those owed to the bank, it held that most of the plaintiffs' claims belonged to the FDIC under FIRREA because the complaint alleged claims for liability derived from the asserted failures at the bank level. *Id*. Similarly, the 7th Circuit held in a case with similar claims that once the subsidiary goes into FDIC receivership, FIRREA states that any claims investors might assert derivatively on behalf of the closed banks belongs to the FDIC. *Id.* The court also considered an 11th Circuit case in which the Circuit concluded that FIRREA grants the FDIC ownership over all shareholder derivative claims against a bank's officers. *Id.* at 1193.

CONCLUSION: The 10th Circuit held that the FDIC owns any claim against the defendant officers resulting out of the choices the defendant officers made as directors or employees of the banks. *Id.* at 1195.

***Luna-Garcia v. Holder*, 777 F.3d 1182 (10th Cir. 2015)**

QUESTION: Whether an alien's reinstated removal order is final "for purposes of calculating the time to petition for review." *Id.* at 1185.

ANALYSIS: The court noted that an order of removal is an "administrative order concluding that an alien is removable or ordering removal." *Id.* at 1184. The 10th Circuit has held that "a reinstated removal order is a final order of removal for purposes of judicial review." *Id.* at 1185. However, the court notes that "[w]hen an alien pursues reasonable fear proceedings, the reinstated removal order is not final in the usual legal sense because it cannot be executed until further agency proceedings are complete." *Id.*

CONCLUSION: The 10th Circuit held that "where an alien pursues reasonable fear proceedings following the reinstatement of a prior order of removal, the reinstated removal order is not final until the reasonable fear proceedings are complete." *Id.* at 1186.

***United States v. Castro-Gomez,* 792 F.3d 1216 (10th Cir. 2015)**

QUESTION: Where a state's "statutory definition of an enumerated crime of violence is broader than its uniform generic counterpart, may a state conviction for an *attempt* to commit that crime nevertheless constitute a crime of violence for purposes of United States Sentencing Guideline (U.S.S.G.) § 2L1.2(b)(1)(A)(ii)." *Id*. at 1218.

ANALYSIS: The 10th Circuit first noted that Illinois' definition of 'attempt' required a defendant to commit a "substantive offense." *Id*. at 1217. The Court relied on *United States v. Gomez-Hernandez*, 680 F.3d 1171 (9th Cir. 2012), which viewed the state's definition of attempt "in tandem" with the state's definition of aggravated assault, as being "persuasive and applicable" because it excluded convictions based only on "ordinary recklessness." *Id.* at 1218. Further, the Court noted the proper assessment in determining whether a crime is a crime of violence under U.S.S.G. § 2L1.2(b)(1)(A)(ii) involves a court inquiring into whether the defendant's "actual crime of conviction . . . correspond with elements of its generic counterpart." *Id*. at 1220.

CONCLUSION: The 10th Circuit held that to determine whether a crime could be considered one of violence under U.S.S.G. § 2L1.2(b)(1)(A)(ii), a court must first determine whether the defendant's actual crime of conviction mirrored the elements of its generic state counterpart. *Id.*

***United States v. Castro-Gomez*, 792 F.3d 1216 (10th Cir. 2015)**

QUESTION: Whether, when charging a defendant with an attempt to commit a crime, may a state conviction for an attempt to commit that crime nevertheless constitute a crime of violence for purposes of the United States Sentencing Guidelines (USSG) § 2L1.2(b)(1)(A)(ii). *Id*. at 1218.

ANALYSIS: The Court analyzed the 9th Circuit's finding in a similar case, that held a defendant charged with attempted aggravated assault would not trigger the enhanced sentencing guidelines under the USSG, because committing the actual crime of aggravated assault would not trigger such guidelines. *Id*. The Court articulated that an attempt requires intent to commit a specific offense and the elements of the broader generic crime would not hide the conviction from heightened sentencing under the USSG. *Id.* at 1219.

CONCLUSION: The 10th Circuit held that when charging a defendant, the attempt statute and the generic statute must be read together to determine whether a crime constitutes one of violence under USSG § 2L1.2(b)(1)(A)(ii). *Id*.

***United States v. Spaulding*, 2015 U.S. App. LEXIS 15544 (10th Cir. 2015)**

QUESTION: Whether Federal Rule of Criminal Procedure 11(e), which implements the statutory directive contained in 18 U.S.C.S. § 3582, is jurisdictional. *Id.* at *1.

ANALYSIS: The Court first looked at the legislative history of Rule 11(e) to see whether Congress intended for jurisdictional power to limit the court's power. *Id*. at *23. Next, the court reviewed the language of Rule 11(e) and found that the language restricts a court's authority as to when they may withdraw a defendant's guilty plea. *Id.* at *31. Lastly, the Court focused on the historical context of the rule, and found that Congress intended to limit use of the rule by courts for limited circumstances. *Id*. at *34.

CONCLUSION: The 10th Circuit held that Fed. R. Crim. P. 11(e) is jurisdictional in nature due to the restrictions and limitations in place on a court's authority to act. *Id.* at *43.

***AIG Centennial Ins. Co. v. O'Neill*, 782 F.3d 1296 (11th Cir. 2015)**

QUESTION: Whether a mortgage company maintains any rights under a marine insurance policy voided because the insured made material misrepresentations to the insurer. *Id.* at 1308.

ANALYSIS: The court reasoned that the mortgagee is at risk anytime money is lent for an item that needs to be insured. *Id*. at 1309. Normally, the mortgagee is protected by the insurance policy's standard mortgage clause. *Id*. at 1306. However, the mortgagee did not ensure that the insured and the mortgagor are the same person, which violates the standard mortgage clause. *Id*. As a result, the mortgagee is not protected by contract as a mortgagee would be in normal circumstances. *Id*.

CONCLUSION: The 11th Circuit held that because the mortgagor and the insured are not the same person, the mortgagee is not protected when a marine insurance policy is voided. *Id*. at 1310.

***Black Warrior Riverkeeper, Inc. v. United States Army Corps of Eng'rs*, 781 F.3d 1271 (11th Cir. 2015)**

QUESTION: "Whether a court may remand a matter to an agency without vacating the agency's action." *Id*. at 1289.

ANALYSIS: "In deciding whether an agency's action should be remanded without vacatur, a court must balance the equities." *Id*. at 1290. The court used "public interest, along with the magnitude of the agency's errors and likelihood that they can be cured," to inform their decision. *Id*. However, in this case, where the court could not "discern the effects" they would not "determine whether the equities weigh in favor or vact[ur]." *Id*. at 1291. Therefore, the court reasoned that "[i]t is the district court . . . that is best-suited to make these fine-grained and fact-intensive determinations[.]" *Id*.

CONCLUSION: The 11th Circuit held that they would not "decid[e] that difficult question on an incomplete record, [and left] it to the sound discretion of the district court in the first instance." *Id*.

***Colbert v. United States*, 785 F.3d 1384 (11th Cir. 2015)**

QUESTION: Whether § 314 of the Self-Determination Act should be interpreted in its plain meaning. *Id.* at 1390.

ANALYSIS: Section 314 provides Federal Tort Claims Act ("FTCA") coverage to "an Indian tribe, tribal organization or Indian contractor . . . and its employees who are engaged in 'carrying out' functions authorized through a self-determination contract." *Id.* at 1391. The court first noted that all terms not defined by the statute are given their

ordinary meaning. *Id*. The court defined the statutes terms "carrying out" and "employee" through the use of case law. *Id*. at 1391. The court followed the 9th Circuits approach of using dictionary definitions to determine the ordinary meaning of terms. *Id*. The 11th Circuit concluded that the terms "carrying out" means to act or perform under contract. *Id*. The court further noted that where a claim is brought under the Federal Torts Claim Act, as in this case, the term "employee" is defined based on the definition provided by federal law. *Id*. The court established that the definition provided by the FTCA is applied. *Id.* at 1393.

CONCLUSION: The 11th Circuit held that the statutory language of Section 314 of the Self-Determination Act is unambiguous and should be interpreted in its plain meaning. *Id.* at 1396.

***Duty Free Ams., Inc. v. Estee Lauder Cos*., 2015 U.S. App. LEXIS 13837 (11th Cir. 2015)**

QUESTION: Whether a claim for false advertising based on contributory liability is within the scope of § 43 of the Lanham Act. *Id.* at *47.

ANALYSIS: The court noted that contributory liability under the Lanham Act is judicially constructed and developed. *Id.* at *51. Furthermore, section 43(a) of the Lanham Act contains a prohibition on trademark infringement and a prohibition on false advertising. *Id.* at *52. The prohibitions share the same introductory clause and appear in the same statutory provision. *Id.* at *53. The court reasoned that because the two prohibitions are in the same statutory provision and share the same introductory clause, the prohibitions should have the same scope. *Id.* at *54. The court found that these causes of action were motivated for the same purpose, which was to provide a federal cause of action for an unfair competition claim. *Id.* The 11th Circuit found that the shared purpose further promotes the view that the two clauses should be read the same way. *Id.* As a result, the court held that section 43(a) of the Lanham act encompasses liability that goes further than the liability imposed on direct violators of the trademark provision of § 43(a). *Id*. at *56.

CONCLUSION: The 11th Circuit held that a plaintiff can bring a claim for contributory false advertising under § 43(a) of the Lanham Act. *Id.* at *63.

***DVI Receivables XIV, LLC v. Rosenberg (In re Rosenberg)*, 779 F.3d 1254 (11th Cir. 2015)**

QUESTION: Whether an alleged debtor may recover attorney's fees and costs incurred to prosecute bad-faith claims for damages under 11 U.S.C. § 303(i)(2). *Id.* at 1266.

ANALYSIS: The court explained that in order to resolve this matter of first impression it first must determine whether § 303(i)(1) and § 303(i)(2) should be read exclusive of each other or whether they should be read together. *Id.* The court first considered an exclusive reading of the two subsections, reasoning that the "award of attorney's fees in § 303(i)(1) applies to only the dismissal phase of the case (at trial and on appeal), and the award of damages in § 303(i)(2) applies only to the phase of prosecuting the bad-faith-filing claims." *Id.* at 1267. Next, the court considered reading the subsections together, reasoning that "the § 303(i)(1) award of attorney's fees applies to all phases of the § 303 action in which the involuntary bankruptcy petition was dismissed and § 303(i)(2) provides for recovery of damages if the petition was filed in bad faith." *Id.* Lastly, the 11th Circuit considered the reasoning of other courts that have addressed this issue and was persuaded by the findings of a District Court in Kansas which held that § 303 should be read as a whole and not in exclusive subsections. *Id.* The district court in Kansas reasoned that attorney's fees and costs were recoverable under § 303(i) without drawing a distinction between the subsections. *Id.*

CONCLUSION: The 11th Circuit held that under § 303(i)(1), a bankruptcy court has the discretion to grant attorney's fees and costs incurred to prosecute bad-faith claims for damages under § 303(i)(2). *Id.*

***Green Point Credit, LLC v. McLean (In re McLean)*, 794 F.3d 1313 (11th Cir. 2015)**

QUESTION: "Whether a violation of the discharge injunction under 11 U.S.C. § 524(a)(2) occurs when a creditor files a proof of claim in a bankruptcy proceeding for a debt discharged in an earlier proceeding." *Id.* at 1320.

ANALYSIS: The Court found the statutory text of § 524(a)(2) ambiguous and relied instead on its legislative history. *Id.* The court declared that it would join "other circuits in concluding that § 524(a)(2) is an expansive provision designed to prevent any action that has the effect of pressuring a debtor to repay a discharged debt, even if the means of pressuring the debtor are indirect." *Id.* The court further explained that "[a]lthough other provisions in the Bankruptcy Code protect against the actual enforcement of an unenforceable proof of claim, the discharge injunction has the additional and distinct aim of preventing any form of harassment of a debtor in the first place." *Id.*

CONCLUSION: The 11th Circuit held that §524(a)(2) prohibits filing of a proof of claim for a discharged debt where the objective effect of the claim is to pressure the debtor to repay the debt. *Id.*

***McFarland v. Wallace (In re McFarland)*, 790 F.3d 1182 (11th Cir. 2015)**

QUESTION: Whether states are authorized by statute and permitted by the United States Constitution to distinguish between bankruptcy and non-bankruptcy debtors when crafting bankruptcy exemptions. *Id.* at 1193.

ANALYSIS: The court reasoned that "with 11 U.S.C § 522 Congress has permitted states to create, define, and implement bankruptcy exemptions and to restrict bankruptcy debtors to those exemptions[,]" and "[a]bsent specific federal guidance to the contrary, states are obviously the sole authorities in determining whether state law is applicable to a class of debtors." *Id.* (alteration in the original). The court stated that "§ 522 contains no explicit restrictions indicating states must treat all debtors alike." *Id.* at 1194. The court noted that the statutory scheme of § 522 is valid, and the court "[does] not believe the Constitution's call for bankruptcy uniformity somehow requires states to treat bankruptcy and non-bankruptcy debtors exactly alike." *Id.* The court further reasoned that binding precedent counseled its decision because the "Bankruptcy Clause is not a straightjacket that forbids Congress to distinguish among classes of debtors[,]" but instead "the Clause only require[s] that bankruptcy laws apply uniformly among classes of debtors." *Id.* (internal quotation marks and citations omitted).

CONCLUSION: The court held that "states are authorized by statue and permitted by the Constitution to distinguish between bankruptcy and non-bankruptcy debtors in crafting exemptions." *Id.* at 1193.

***Miljkovic v. Shafitz & Dinkin, P.A.*, 791 F.3d 1291 (11th Cir. 2015)**

QUESTION: "Whether representations made by an attorney in court filings during the course of debt-collection litigation are actionable under the Fair Debt Collection Practices Act [(FDCPA)]." *Id*. at 1295.

ANALYSIS: The court was "[g]uided by Supreme Court precedent and the plain language of the FDCPA [to] find that the Act applies to the litigating activities of lawyers and law firms engaged in consumer debt collections." *Id*. at 1304. Next, the court looked at Congress' intent noting that "[h]ad Congress intended to restrict application of the FDCPA to conduct directed only to the consumer or to exempt certain procedural filings from its provisos, it presumably would have done so expressly." *Id*.

CONCLUSION: The 11th Circuit held that "the FDCPA applies to attorneys . . . who regularly engage in debt collection activity, even when that activity includes litigation and even when the attorneys' direct conduct is directed at someone other than the consumer." *Id*. at 1295.

***Seminole Tribe of Fla. v. Stranburg*, 2015 U.S. App. LEXIS 15061 (11th Cir. June 3, 2015)**

QUESTION: Whether "the district court correctly interpreted 25 U.S.C. § 465 to preclude Florida from collecting its Rental Tax on the rent payments made by non-Indian lessees of protected Indian reservation land." *Id*. at *1–2.

ANALYSIS: The court reasoned that the Tribe's interpretation of the statute as one nullifying the tax "best comports with the statutory text and purpose, the relevant Supreme Court case law, and the general canon that statutes be construed in Indians' favor" and affirmed the district court's decision on that basis. *Id*. at *9. The court noted that along with the correct statutory exemption, the federal law preempts Florida's state tax law, barring it from relief no matter what the outcome of the statutory interpretation. *Id*. at *10.

CONCLUSION: The 11th Circuit held that the Federal Indian Law provides an exemption to the Florida Utility tax. *Id.* at *7.

***United States v. Cunningham*, No. 14-14993, 2015 U.S. App. LEXIS 15563 (11th Cir. Sept. 2, 2015)**

QUESTION: Whether 18 U.S.C. § 3583(h) directly places an aggregate limit on the imprisonment term that may be imposed, under 18 U.S.C. § 3583(e)(3), when a supervised release is revoked. *Id.* at *3–4.

ANALYSIS: The 11th Circuit observed that § 3583(h) limits the duration of a prisoner's supervised release, but found that a plain reading of the statute reveals no aggregate limit on the length of a imprisonment term that follows the revocation of a supervised release. *Id*. The 11th Circuit also stated that the statute's legislative history supports its' reading; noting that amendments to the statute "demonstrate Congress's intent that (1) subsequent revocations not be dependent on the term of supervised release initially imposed; (2) statutory caps are per-revocation limits not subject to aggregation; and (3) another term of supervised release may be imposed after release following revocation and reimprisonment subject to credit for prior revocation." *Id.* at *7.

CONCLUSION: The 11th Circuit concluded that § 3583(h) does not directly limit § 3583(e)(3), so "upon each revocation of supervised release[,] a defendant may be sentenced to the felony class limits contained within § 3583(e)(3) without regard to imprisonment previously served for revocation of supervised release." *Id.* at *7–8.

***United States v. Figueroa-Labrada*, 780 F.3d 1294 (11th Cir. 2015)**

QUESTION: Whether the "safety-valve" provision of 18 U.S.C. § 3553(f) applies to a defendant who did not make the necessary disclosures to support a reduced sentence prior to his first sentencing hearing. *Id*. at 1296.

ANALYSIS: The court reasoned that the contested phrase which "requires a defendant to make necessary disclosures no later than the time of the sentencing hearing" unambiguously applied to sentencing hearings, and found no reason to interpret the phrase other than how it was plainly stated. *Id*. at 1299. The court noted that there is no support from the text of the statute to read into the phrase "the original sentencing hearing," as the dissent suggested. *Id.* The court further suggested that the limited circumstances of the case before them augmented their narrow interpretation. *Id*. at 1300.

CONCLUSION: The 11th Circuit held that the plain language of 18 U.S.C. § 3553(f) dictates that a defendant may provide "safety-valve disclosures for the first time on remand before a resentencing hearing." *Id*.

***United States v. Keelan*, 786 F.3d 865 (11th Cir. 2015)**

QUESTION: Whether "18 U.S.C. § 2442(b) constitutes a 'crime of violence' under 18 U.S.C. § 16(b)." *Id.* at 870.

ANALYSIS: The 11th Circuit applied the categorical approach to determine if a conviction qualifies as a crime of violence under § 16(b). *Id.* Under such an approach, the court considers the "elements and the nature of the offense of [a] conviction rather than the particular facts." *Id*. Furthermore, in analyzing these factors, the court must determine whether only the ordinary violation of the statute at issue must present such a risk of injury or whether all violations of the statute must present such a risk of injury. *Id.* at 871. The 11th Circuit ultimately determined that the "proper inquiry under §16(b) is whether the conduct encompassed by the elements of the offense raises a substantial risk the defendant may use physical force in the "ordinary case" . . . , even though . . . some violations of the statute may not raise such a risk." *Id*.

CONCLUSION: The 11th Circuit held that 18 U.S.C. § 2442(b) qualified as a crime of violence under 18 U.S.C. § 16(b) because the elements of 18 U.S.C. § 2442(b) involve a sex crime against a minor and there is always a substantial risk that physical force will be used in cases involving sex crimes against minors. *Id.*

***Wiersum v. U.S. Bank, N.A.*, 785 F.3d 483 (11th Cir. 2015)**

QUESTION: Whether in pre-emption cases "the at-pleasure provision of the National Banking Act preempts a state-law claim for wrongful discharge." *Id.* at 489.

ANALYSIS: The court recognized that when a conflict exists between federal statute and state law, the federal courts have unequivocally concluded that a congressional act that governs all national banks preempts any state law in conflict. *Id.* at 490–91. Federal-circuit courts have consistently found that when a federal statute and state law are in conflict, the discretionary power given to the national bank by statute allows the bank to "dismiss its officers at-pleasure." *Id.* at 498 n.7.

CONCLUSION: Consistent with the 4th, 6th and 9th Circuits' positions on this issue, the 11th Circuit held that the at-pleasure provision of the National Banking Act preempts a state-law claim for wrongful discharge. *Id.* at 491.

FEDERAL CIRCUIT

***Amgen Inc. v. Sandoz Inc.*, 794 F.3d 1347 (Fed. Cir. 2015)**

QUESTION ONE: Whether, under the Biologics Price Competition and Innovation Act of 2009 ("BPCIA"), a subsection (k) applicant's failure to disclose its aBLA and manufacturing information to a product sponsor is a violation of the BPCIA. *Id*. at 1350.

ANALYSIS: The Court noted that the provision in dispute stated, "[a] subsection (k) applicant *shall provide* to the reference product sponsor a copy of the application." *Id*. at 1354. The Federal Circuit then determined the word "shall" did not translate to "must" because further provisions provided enumerated remedies for the product sponsor if an applicant fails to disclose the information. *Id*. at 1355–56.

CONCLUSION: The Federal Circuit determined that a subsection (k) applicant's failure to disclose its aBLA and manufacturing information to a product sponsor is not a violation of the BPCIA because it is not a requirement that an applicant do so. *Id*. at 1356–57.

QUESTION TWO: Whether "a subsection (k) applicant may satisfy its obligation to give notice of commercial marketing . . . by doing so before the [Federal Drug Administration (FDA)] licenses its product." *Id*. at 1357.

ANALYSIS: The Court noted that the relevant provision of the BPCIA provides: "[a] subsection (k) applicant *shall* provide notice to the reference

product sponsor not later than 180 days before the date of the first commercial marketing of the [licensed] product." *Id*. The Federal Circuit, reading the language of the text, stated for notice to be effective, the product must be already licensed by the FDA. *Id*. at 1358. While other provisions provide for simply the "biological product that is the subject of the application," the court stated that this provision refers only to the "licensed product." *Id*. at 1358–59. The Federal Circuit also noted that the "shall provision" signaled a statutory requirement and was therefore mandatory. *Id*. at 1360.

CONCLUSION: The Federal Circuit concluded "a subsection (k) applicant may only give effective notice of commercial marketing after the FDA has licensed its product." *Id*. at 1361.

***Colonial Press Int'l, Inc. v. United States,* 788 F.3d 1350 (Fed. Cir. 2015)**

QUESTION: Whether the Government Printing Office ("GPO"), before declining to award a contract to a small business concern, "must, as part of its bid-evaluation process, refer the responsibility determination to the Small Business Administration (SBA)." *Id*. at 1352.

ANALYSIS: The court reasoned, that "[a]lthough we have not previously examined the issue, we agree with our sister circuit that 'Congress' in § 551(1) refers to legislative agencies and departments generally." *Id*. at 1357. The court went on to state that, "we agree with both parties that the GPO, as a legislative agency, is excluded from the definition of 'agency' in 5 U.S.C. § 551(1)." *Id*.

CONCLUSION: The Federal Circuit held that "[b]ecause we decide that the GPO is not required to refer such determinations to the SBA, and because we decide that the GPO's actions in awarding the contract at issue in this case were not arbitrary or capricious, we affirm the judgment of the United States Court of Federal Claims." *Id*. at 1352.

***In re POSCO*, 794 F.3d 1372 (Fed. Cir. 2015)**

QUESTION: Whether the *Intel* factors, particularly whether 28 U.S.C.S. § 1782 applies in the context of the request to modify a protective order. *Id.* at 1375.

ANALYSIS: The court looked at three difference district court opinions. *Id.* at 1376. The D.C. District Court applied § 1782, "'which governs discovery for foreign tribunals,' and found that the *Intel* factors supported the modification of the protective order to allow foreign cross-use." *Id.* Similarly, the Del. District Court applied the *Intel* factors in assessing whether to modify a protective order to allow the plaintiff to use documents in a foreign proceeding. The Del. District Court, in a different

decision, "denied a request to use documents subject to a protective order in a German proceeding, noting that § 1782 'provide[s] other, appropriate mechanisms for plaintiff to seek the relief it is requesting.'" *Id.*

CONCLUSION: The Fed. Circuit held that the considerations expressed under § 1782 and *Intel* are significant to instances in which a party seeks to amend a protective order to allow use of discovered materials in a foreign proceeding and must be considered together with other considerations important under Fed. R. Civ. P. 26. *Id.* at 1377.

***Intellectual Ventures II LLC v. JPMorgan Chase & Co.*, 781 F.3d 1372 (Fed. Cir. 2015)**

QUESTION: Whether the America Invents Act ("AIA") of 2011 gives the Federal Circuit Court of Appeals jurisdiction over an interlocutory appeal of a denial of a request for a stay where the disputed patents have pending covered business method review ("CBMR") petitions that have yet to be decided by the Patent Trial and Appeal Board ("PTAB"). *Id.* at 1375.

ANALYSIS: The Federal Circuit noted that the AIA gives the Federal Circuit jurisdiction over appeals relating to a CBMR "proceeding." *Id.* The AIA refers to a "petition for a CBMR proceeding," which lead the court to conclude that the "petition" is an event different from and prior to the proceeding. *Id.* at 1376. The court further noted that the AIA also allows the director to institute a CBMR proceeding in response to a CBMR petition, indicating to the court that the petition and the proceeding are separate events. *Id.* The court found that the congressional record for the passing of the AIA also indicates that the petition and proceeding are separate events. *Id.*

CONCLUSION: The Federal Circuit held that it does not have jurisdiction over an interlocutory appeal of a denial of a request for a stay where the disputed patents have pending CBMR petitions that have yet to be decided by the PTAB. *Id.* at 1375.