First Impressions

The following pages contain brief summaries of issues of first impression identified by federal court of appeals opinions announced between August 18, 2017 and December 31, 2017. 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. Blodgett*, 872 F.3d 66 (1st Cir. 2017)**

QUESTION: Whether the mandatory minimum sentence for accessing child pornography applicable to any individual who has a prior state conviction for abusive sexual conduct involving a minor under 18 U.S.C. § 2252A(b)(2) violates the Due Process Clause of the Fifth Amendment. *Id.* at 68.

ANALYSIS: The court reasoned that "[o]nce a person has been convicted . . . any punishment prescribed is consistent with the Due Process Clause as long as Congress had a rational basis for its choice of penalties and the particular penalty imposed is not based on an arbitrary distinction." *Id.* at 69 (internal citations and quotation marks omitted). Consequently, the court explained, "[i]t follows that a statute requiring a mandatory minimum sentence is presumptively valid and will be upheld unless it is not rationally related to legitimate government interests." *Id.* The court further reasoned that "Congress's insistence on a ten-year mandatory minimum . . . has a rational basis," given that recidivists in the child pornography area are "especially dangerous and need[] to be punished more severely." *Id.* at 70. The court further stated, "to the extent the defendant is arguing that the Due Process Clause entitles him to a wholly individualized sentence," the Constitution confers no such right in non-capital cases. *Id.*

CONCLUSION: The 1st Circuit held that section 2252A(b)(2) is part of a rational sentencing scheme and, "therefore, consistent with the Due Process Clause." *Id.* at 71.

***United States v. Catala*, 870 F.3d 6 (1st Cir. 2017)**

QUESTION: "[T]he relative priority, as between the government and a general creditor, with respect to claims relating to assets forfeited as the proceeds of criminal activity." *Id.* at 8.

ANALYSIS: The 1st Circuit reviewed de novo the district court's dismissal of a general creditor's claim to money seized from a debtor/arrestee to determine the sub-issue of whether "enough facts to state a claim to relief that is plausible on its face." *Id.* 8–9. The appeal concerned the district court's application of 21 U.S.C. § 853(n), whereby a third party, after asserting a legal interest in property to acquire standing, can challenge a preliminary order of forfeiture. *Id.* at 9. To succeed on the merits, § 853(n)(6)(A) provides that "a third party must prove . . . at the time the acts giving rise to the forfeiture were committed [that] the right to the property to be forfeited was either vested in him rather than the defendant or that his interest in it was superior to the defendant's interest." *Id.* at 10. The court insisted that the provision cannot be read in a vacuum

but must be supplemented with 21 U.S.C. § 853(c), which "embodies the relation-back doctrine, specifies that the right to all property used in committing, and any proceeds derived from, a criminal offense vests in the United States upon the commission of the act giving rise to [the] forfeiture." *Id.*

CONCLUSION: "[A] third party asserting an interest in forfeited property must establish that his interest in that specific property existed before the commission of the crime that led to the forfeiture." *Id.*

***United States v. Gordon*, 875 F.3d 26 (1st Cir. 2017)**

QUESTION: Whether the appropriate unit of prosecution under 18 U.S.C. § 1958(a)—a murder-for-hire statute barring the use of interstate commerce facilities in the commission of the murder—constitutes "each separate use of the facilities of interstate commerce," or rather, "each plot to hire someone to commit a murder." *Id.* at 31–32.

ANALYSIS: The 1st Circuit evaluated the statute's legislative history and intent to properly interpret the unit of prosecution. *Id.* at 33. The court noted that if the unit of prosecution was construed as each use of facilities of interstate commerce, this interpretation would "frustrate the congressional aim" of the statute's sentencing scheme by making it possible for a person who did not cause a substantial injury to receive a much longer maximum sentence than a person who did cause a substantial injury. *Id.* The court also emphasized that "the focal point of the newly added offense was a murder plot that had a federal nexus, not the federal nexus itself." *Id.* at 34. The court observed that defining the unit of prosecution to include each separate use of the facilities of interstate commerce would, in contrast, make the federal nexus the substantive offense. *Id.* Therefore, the 1st Circuit found that **"**Congress did not intend to punish separately each use of the facilities of interstate commerce" under 18 U.S.C. § 1958(a). *Id.* at 37.

CONCLUSION: The 1st Circuit held that **"**the proper unit of prosecution under the murder-for-hire statute is a single plot to murder a single individual." *Id.* at 37.

***United States v. Goris*, 876 F.3d 40 (1st Cir. 2017)**

QUESTION: The appropriate standard by which a district court must review the "materiality" of a defendant's discovery request pursuant to Federal Rule of Criminal Procedure 16. *Id.* at 44.

ANALYSIS: The 1st Circuit noted that the other courts of appeals have uniformly concluded that "it is not enough that what is sought bears some abstract logical relationship to the issues in the case." *Id.* at 44–45. The court further noted that, rather, "a showing of materiality requires some

indication that pretrial disclosure of the information sought would have enabled the defendant significantly to alter the quantum of proof in his favor." *Id.* at 45 (internal quotation marks omitted). The court explained that the significant alteration may include "uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal." *Id.* (internal quotation marks omitted).

CONCLUSION: The 1st Circuit held that "[i]n order to uphold a district court's denial of a request for additional discovery, we do not demand epistemological certainty that no discoverable information was withheld from the defendant," and that " [i]f . . . a defendant's discovery request is grounded in a speculative theory, a district court's decision to deny that request is not an abuse of discretion." *Id.*

***United States v. Scott*, 877 F.3d 42 (1st Cir. 2017)**

QUESTION: "Whether the government and a defendant may negotiate and submit a new plea agreement after one is rejected by the court." *Id.* at 47.

ANALYSIS: The 1st Circuit noted that, pursuant to Federal Rule of Criminal Procedure 11(c)(5), when rejecting a plea agreement made pursuant to Rule 11(c)(1)(A) or (C), a district court must notify both parties of the plea rejection and "advise the defendant that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated." *Id.* The court further noted that the 7th, 8th, and 9th Circuits permit parties to renegotiate "in the face of a rejected plea." *Id.* Finally, the court stated that Rule 11 does not stipulate that the government and defendants have one chance at negotiating and submitting a plea agreement. *Id.*

CONCLUSION: The 1st Circuit held that "nothing in Rule 11 requires . . . that a defendant only get one bite at the negotiation apple," and concluded that "renegotiation is permissible in the face of a rejected plea." *Id.*

SECOND CIRCUIT

***Bascuñán v. Elsaca*, 874 F.3d 806 (2d Cir. 2017)**

QUESTION: Whether alleged injuries to property located within the United States, by a citizen of a foreign country, is considered domestic injury within the meaning of Section 1964(c) of the Racketeer Influenced and Corrupt Organization Act ("RICO"). *Id.* at 806.

ANALYSIS: The court noted that the United States Supreme Court held that RICO applies to select foreign racketeering activities and that foreign citizens may sue for domestic injuries under the RICO statute. *Id.* at 816–17. The court noted, however, that the Supreme Court did not

explain how to recognize such an injury. *Id.* The 11th Circuit noted that no court of appeals has examined how to establish "whether a civil RICO injury is domestic or foreign." *Id.* at 814. The court further noted that when examining a foreign resident's civil RICO injuries a court must analyze each injury separately. *Id.* Additionally, the court noted the importance of avoiding "international friction" and protecting citizens of foreign countries possessing tangible property in the United Sates. *Id.* at 821.

CONCLUSION: The 11th Circuit held that "the misappropriation of tangible property located in the United States . . . causes a domestic injury for purposes of civil RICO claims, even if the owner of the property resides abroad." *Id.* at 824 (internal quotation marks omitted).

THIRD CIRCUIT

United States ex rel. Spay v. CVS Caremark Corp., 875 F.3d 746 (3d Cir. 2017)

QUESTION: Whether "the government's knowledge of the facts underlying an allegedly false record or statement can negate the scienter required for a [False Claims Act (FCA)] violation." *Id.* at 755.

ANALYSIS: The 3rd Circuit noted that six other circuit courts to consider the issue recognized a "government knowledge inference defense." *Id.* The 3rd Circuit reasoned that it would be more appropriate to call the defense the "government acquiescence inference," as knowledge alone on the part of the government is insufficient to establish an FCA defense. *Id.* at 757. This is the case "because the elements of the FCA claim focus on the defendant's state of mind." *Id.*

CONCLUSION: The 3rd Circuit held that "there are two prongs to [the] defense: (1) the government knew about the alleged false statement(s), and (2) the defendant knew that the government knew." *Id.*

United States v. Poulson, 871 F.3d 261 (3d Cir. 2017)

QUESTION: Whether the district court has significant discretion to determine when to apply U.S.S.G. § 2B.1.1(b)(2)(A)–(C), which "provides for increased offense levels for economic crimes that 'result[] in substantial financial hardship' to victims." *Id.* at 267.

ANALYSIS: The court noted that the recent addition advises sentencing courts to consider the extent of the harm rather than strictly focusing on the total number of victims. *Id.* The court noted the relevant case law scarcity, and looked to Application Note 4(F) for instruction regarding what sentencing courts are required to consider when applying § 2B1.1. *Id.* After listing the factors for consideration, the court agreed with the 7th and 8th Circuits that the determination of "substantial

financial hardship" is subject to the degree of significant, subjective discretion typically permitted to a district court during sentencing. *Id.* at 268.

CONCLUSION: After examining the hardship to each of the victims, the court determined that the district court did not commit plain error by using the number of victims to determine whether a "substantial financial hardship" occurred. *Id.* at 272.

FOURTH CIRCUIT

***United States v. Banker*, 875 F.3d 530 (4th Cir. 2017)**

QUESTION: Whether 18 U.S.C. § 2422(b)—which criminalizes inducing a minor to engage in prostitution or criminal sexual activity—requires a defendant to have "knowledge" that the victim is a minor. *Id.* at 537.

ANALYSIS: The 4th Circuit noted that it previously considered a similar statute relating to the transport in interstate commerce of minors for prostitution purposes. *Id.* The court noted that under that statute, Congress intended the age element to be an aggravating factor rather than an additional element to which the "knowledge" *mens rea* was to be applied. *Id.* The court reasoned that to interpret the statute otherwise would increase the difficulty of prosecuting under the statute as compared to the related statute applicable to non-minors. *Id.*

CONCLUSION: The 4th Circuit held that a defendant does not have to have "knowledge" of the victim's age to be prosecuted under the statute, and that it is sufficient that the defendant knew or recklessly disregarded the fact that the victim was a minor. *Id.* 539–40.

FIFTH CIRCUIT

***United States v. Am. Commer. Lines, L.L.C.*, 875 F.3d 170 (5th Cir. 2017)**

QUESTION: The extent to which "the meaning of [33 U.S.C. § 2703(a)(3)]'s 'in connection with' language" entitles a defendant to a complete liability defense when a third party's "acts and omissions were the sole cause of the [injury]," and the defendant and third party had a contractual relationship. *Id.* at 175.

ANALYSIS: The court interpreted the language "in connection with" by discerning its ordinary meaning. *Id.* Incorporating a dictionary definition, the court determined that "the conduct must be causally or logically related to the contractual relationship," meaning that "the third party's acts and omissions would not have occurred but for that contractual relationship." *Id.*

CONCLUSION: The 5th Circuit held that "the third-party defense should not be available where a[n] [injury] is caused by third-party acts or omissions that would not have occurred but for the contractual relationship between the third party and the responsible party." *Id.* at 176.

***In re DePuy Orthopaedics, Inc.*, 870 F.3d 345 (5th Cir. 2017)**

QUESTION: Whether a Lexecon waiver must be "clear and unambiguous." *Id.* at 351.

ANALYSIS: The 5th Circuit found that language in a multidistrict litigation ("MDL") statute creates a strong presumption in favor of remand for transferred actions which cannot easily be overcome. *Id.* at 351. The court further noted that "there is a statutory right to remand following an MDL proceeding, analogous to the statutory right to removal." *Id.* Thus, the 5th Circuit reasoned that a party cannot waive its removal rights through a forum-selection clause unless the waiver is "clear and unambiguous." *Id.* The court also noted that the 7th Circuit "held that a strong showing is needed to effect a Lexecon waiver." *Id.* at 351 n.47.

CONCLUSION: The 5th Circuit held that a Lexecon waiver must be "clear and unambiguous." *Id.* at 351.

SIXTH CIRCUIT

***Doe v. Etihad Airways, P.J.S.C.*, 870 F.3d 406 (6th Cir. 2017)**

QUESTION: Whether, under Article 17(1) of the Montreal Convention of 1999, an airline passenger can recover mental anguish damages regardless of whether the emotional injuries were caused directly by her bodily injury or more generally by the accident that caused the bodily injury. *Id.* at 409, 411.

ANALYSIS: The court reasoned that although the plain language of the Article does not require that the physical injury cause the emotional injury, it does prevent a passenger from recovering "damages for mental anguish if there is no requisite accident or if the accident does not cause a bodily injury." *Id.* at 413–14, 417–18. Stated differently, a passenger may only recover mental anguish damages under Article 17(1) when he or she suffers a physical injury as a result of the accident. *Id.* at 418.

CONCLUSION: The 11th Circuit held that an airline passenger may recover mental anguish damages under the Montreal Convention of 1999 regardless of whether the anguish was directly caused by the physical injury or caused by the accident that caused the physical injury. *Id.* at 434.

***Penney v. United States*, 870 F.3d 459 (6th Cir. 2017).**

QUESTION: Whether the miscarriage of justice exception would allow a court to consider a prisoner's federal constitutional claim's merits, despite the existence of untimely Rule 60(b)(1) motions and motions to amend. *Id.* at 462–63.

ANALYSIS: The 6th Circuit began by noting that the United States Supreme Court recognized that the miscarriage of justice exception is "rooted in the equitable discretion of habeas courts," mainly to ensure that innocent persons are not incarcerated on the basis of constitutional errors. *Id.* at 463. The court then explained that the upon a proper showing of "actual innocence," the Supreme Court has applied the exception to several types of procedural defaults, such as "successive petitions asserting previously rejected claims, abusive petitions asserting in a second petition claims that could have been raised in a first petition, failure to develop facts in state court, and failure to observe state procedural rules, including filing deadlines." *Id.* at 463 (internal quotations omitted). The court further emphasized that if that the exception was sufficient to overcome the filing deadline of the Antiterrorism and Effective Death Penalty Act, there was "no reason" why the exception would not apply to untimely Rule 60(b) motions and motions to amend. *Id.* at 462.

CONCLUSION: The 6th Circuit held that under the miscarriage of justice exception, "an actual innocence claim may be considered on the merits even though it would otherwise be barred by an untimely Rule 60(b) motion" and an untimely motion to amend. *Id.* at 463.

***Signature Mgmt. Team, LLC v. DOE,* 876 F.3d 831 (6th Cir. 2017)**

QUESTION: Whether, like the general presumption of open judicial records, there is also a presumption in favor of unmasking anonymous defendants when judgment has been entered for a plaintiff. *Id*. at 837.

ANALYSIS: The court noted that when deciding whether to unmask an anonymous defendant, the court considers "both the public interest in open records and the plaintiff's need to learn the anonymous defendant's identity in order to enforce the its remedy." *Id.* at 837. The court explained that the stronger the public interest toward unmasking the defendant's identity, "the more difficult it will be for the Doe defendant to overcome the presumption and remain anonymous." *Id.* The court noted that infringing speech is not given First Amendment protection. *Id.* at 839. The court also noted, however, because the speech transpired during anonymous blogging activities, an "order unmasking Doe would therefore unmask him in connection with both protected and unprotected speech and might hinder his ability to engage in anonymous speech in the future." *Id.*

CONCLUSION: The court held, "like the general presumption of open judicial records, there is also a presumption in favor of unmasking

anonymous defendants when judgment has been entered for a plaintiff." *Id.* at 837.

***United States v. 31,000.00 in United States Currency*, 872 F.3d 342 (6th Cir. 2017)**

QUESTION: Whether Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions Rule G requires claimants to do "more than identify themselves and state their interest in the property subject to forfeiture" to satisfy standing requirements. *Id.* at 350.

ANALYSIS: The court found that Rule G's text did not support the Government's position that claimants must provide additional information to gain standing. *Id.* The court noted that United States Supreme Court case law already sets forth minimum standing requirements. *Id.* The court also noted that "statutory standing" under Rule G "is satisfied through mere compliance with the rule," and there is "no persuasive reason to import a heightened pleading standard that has no basis in the text." *Id.* at 350–51. The court additionally noted that "Rule G's verification requirement is a built-in preventative measure that limits the danger of false claims." *Id.* at 351. In further support, the court noted the 7th Circuit's position that Rule G requires only a "bald assertion" of ownership in the *res*. *Id.*

CONCLUSION: The 6th Circuit held that "strict compliance with Rule G does not require a claimant to state the additional facts that the government requests, where, as here, the claimants make a verified claim of ownership and not mere possession." *Id.* at 355.

***United States v. Greer*, 872 F.3d 790 (6th Cir. 2017)**

QUESTION: Whether commentary to U.S.S.G. § 2J1.2 prohibits cross reference and subsequent application of U.S.S.G. § 2X3.1 concerning accessories after the fact. *Id.* at 793, 797.

ANALYSIS: The court began by noting that "the Guideline's Commentary is neither purely advisory (non-binding) nor 'binding in all instances.'" *Id.* at 798. With this in mind, the 6th Circuit reasoned that the Guidelines unlikely intended for a defendant to "avoid or minimize punishment for obstruction of a criminal investigation" simply because the successful obstruction "prevented a conviction on the underlying crime, or because the obstruction was of an investigation for which, as it might turn out, there actually was no underlying crime." *Id.* The court further reasoned that every other circuit that has considered this issue has similarly "held that the State need not prove that the defendant committed the underlying crime." *Id.*

CONCLUSION: The 6th Circuit found the district court did not commit error when it applied USSG § 2X3.1 to set defendant's sentence. *Id.*

***Watford v. Jefferson Cnty. Pub. Sch.*, 870 F.3d 448 (6th Cir. 2017)**

QUESTION: Whether an objective or subjective standard should be applied when defining "good faith" in the Stored Communications Act ("SCA"). *Id.* at 251–52.

ANALYSIS: The 6th Circuit examined precedent from the 7th and 10th Circuits, which have applied an objective approach. *Id.* at 252. Specifically, the 7th and 10th Circuits determined that the reliance "must have been objectively reasonable." *Id.* The 9th Circuit, however, required "both an objective and subjective element." *Id.* The 9th Circuit reasoned that a defendant must be able to prove "(1) that he had a subjective good faith belief that he acted legally pursuant to a court order; and (2) that this belief was reasonable." *Id.*

CONCLUSION: The 6th Circuit—agreeing with the 7th and 10th Circuits—held that "an objective standard should be used in determining 'good faith' under § 2702(c)(4) and § 2707(e) of the SCA." *Id.* at 253.

SEVENTH CIRCUIT

***Xitrans Fin. Ltd. v. Adelson (In re Accent Delight Int'l Ltd*), 869 F.3d 121 (2d Cir. 2017)**

QUESTION: Whether discovery lawfully obtained under 28 U.S.C. § 1782 in one foreign proceeding may be used in other foreign proceedings. *Id.* at 124.

ANALYSIS: The 2nd Circuit first examined § 1782's text, and determined that nothing in the statute's language limits "an applicant's ability to use the discovery obtained under the statute *after* it lawfully has been obtained for use in a particular forum." *Id.* at 134. The court also noted that although the legislative history failed to speak directly to the issue, § 1782 aims to provide "efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts." *Id.* Furthermore, the court reasoned that the broad availability of § 1782 discovery, especially in light of successive amendments to the statute, corresponds with Congress's intent to "leave[ ] the issuance of an appropriate [discovery] order to the discretion of the court[.]" *Id.* As such, the court found no reason to place outside a district court's discretion under § 1782 "the number or identity of the foreign proceedings in which a successful applicant may use discovery." *Id.*

CONCLUSION: The 2nd Circuit held that § 1782 "does not prevent an applicant who lawfully has obtained discovery under the statute with respect to one foreign proceeding from using the discovery elsewhere unless the district court orders otherwise." *Id.* at 135.

NINTH CIRCUIT

***Berezovsky v. Moniz,* 869 F.3d 923 (9th Cir. 2017)**

QUESTION: Whether the Federal Foreclosure Bar—"which prohibits nonconsensual foreclosure of Federal Housing Finance Agency ('Agency') assets"—applies to private foreclosures. *Id.* at 925–27.

ANALYSIS: The court turned to the statute's structure and plain language. *Id.* The court determined that, "[o]n its face, the Federal Foreclosure Bar applies to any property for which the Agency serves as conservator and immunizes such property from any foreclosure without Agency consent." *Id.* at 928. The court distinguished 5th Circuit's framework regarding the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), under which the 5th Circuit declined to extend to private disclosures. *Id.* at 928. The court rejected the notion that the Agency's "inaction in this context conveys consent, implicit or otherwise." *Id.* at 929.

CONCLUSION: The 9th Circuit held that "[t]he Federal Foreclosure Bar applies generally to private association foreclosures . . . ." *Id.* at 929.

***Disney Enters. v. VidAngel, Inc*., 869 F.3d 848 (9th Cir. 2017)**

QUESTION ONE: Whether the Family Movie Act of 2005 ("FMA") exempts online movie providers from copyright infringement. *Id.* at 852.

ANALYSIS ONE: The court explained that the FMA "authorizes the creation or distribution of the technology" used to filter portions of audio or video content of a motion picture during transmission to private households "from an authorized copy," so long as "no fixed copy of the altered version of the motion picture is created." *Id.* at 857. The court further explained that because the FMA requires the transmission to be from an authorized copy, it only exempts compliant filtered performances, "rather than the processes that make such performances possible." *Id.* at 858. The court noted that if the FMA allowed filtered movies to be copied onto discs and resold, it would "create a giant loophole in copyright law" and effectively sanction "infringement so long as it filters out some content and a copy of the work was lawfully purchased at some point." *Id.* at 859.

CONCLUSION ONE: The 9th Circuit held that the FMA does not exempt defendants from liability because they "stream[] from the 'master file' copy by 'ripping' the movies from discs after circumventing their [technological protections]." *Id.* at 860.

QUESTION TWO: "[W]hether the anti-circumvention provision of the Digital Millennium Copyright Act (DMCA) covers the plaintiffs' technological protection measures, which control both access to and use of copyrighted works." *Id.* at 852.

ANALYSIS TWO: The court noted that the DMCA provides that "no person shall circumvent a technological measure that effectively controls access to a [copyrighted] work." *Id.* at 863. The court explained that circumvention means "to decrypt an encrypted work . . . without the authority of the copyright owner." *Id.* The court stated that, here, there is no evidence that defendants had either explicit or implicit authorization from the studios to access the digital contents of their discs. *Id.*

CONCLUSION TWO: The 9th Circuit held "when a defendant decrypts the [Technological Protection Mechanisms] and then also reproduces that work, it is liable for both circumvention . . . and copyright infringement." *Id.* at 864.

***Douglas v. Xerox Bus. Servs., Ltd. Liab. Co.,* 875 F.3d 884 (9th Cir. 2017)**

QUESTION: Whether "the relevant unit for determining minimum-wage compliance [under the Fair Labor Standards Act ('FLSA')] is the workweek as a whole or each individual hour within the workweek." *Id.* at 885.

ANALYSIS: The 9th Circuit joined the 2nd, 4th, 8th, and D.C. Circuits in embracing the FLSA's per-workweek construction. *Id.* at 888. The court first noted that courts have overwhelmingly followed the Department of Labor's guidance, and "the agency's choice of the workweek was permissible and appropriate." *Id.* The court noted that uniformity among the circuits in labor-related issues is essential, and agreed with the 2nd Circuit that "[c]ongressional purpose is accomplished so long as the total weekly wave paid by an employer meets the minimum weekly requirements of the statute." *Id.* Moreover, the court agreed with the 2nd Circuit that "the workweek standard generally represents an entirely reasonable reading of the statute" and "no circuit has taken a contrary position." *Id.* The court determined that "[a]doption of the per-workweek approach is also reinforced by the fact that Congress has done nothing to overturn or disapprove of this clearly articulated position, though it has amended the minimum-wage provision since the agency proclamations and court rulings." *Id.* at 888–89.

CONCLUSION: The 9th Circuit held that "the relevant unit for determining minimum-wage compliance is the workweek as a whole," based on the "powerful history of administrative and judicial decisions that

have adopted the per-workweek approach since the passage of the FLSA in 1938." *Id.* at 885.

***Entler v. Gregoire*, 872 F.3d 1031 (9th Cir. 2017)**

QUESTION ONE: Whether a threat to file, and the consequent filing of, a criminal complaint are protected under the First Amendment. *Id.* at 1043.

ANALYSIS: The 9th Circuit noted that the 5th and 10th Circuits held that the First Amendment generally protects criminal complaints. *Id.* The 9th Circuit emphasized that the parties to the complaint is irrelevant to the issue's resolution, and therefore, "there is no constitutional distinction to be drawn between the filing of a criminal complaint against a private individual . . . and the filing of a criminal complaint against a public official . . . [n]or does it matter that a prisoner files the criminal complaint." *Id.* at 1044. The 9th Circuit also pointed to several district court cases which followed this rule for complaints against law enforcement. *Id.*

CONCLUSION: The 9th Circuit held that "both the filing of a criminal complaint by a prisoner, as well as the threat to do so, are protected by the First Amendment, provided they are not baseless." *Id.* at 1043.

QUESTION TWO: Whether qualified immunity attaches to retaliation against the threat to file a criminal complaint by a prisoner against prison officials. *Id.* at 1044.

ANALYSIS: The 9th Circuit noted that qualified immunity only fails when a constitutionally protected right is "beyond debate." *Id.* (citation omitted). The 9th Circuit noted that to place the protection of a right beyond debate, a "robust consensus" of authority must be shown. *Id.* at 1044–45. The 9th Circuit failed to find any authority addressing whether such threats are protected in any circuit. *Id.*

CONCLUSION: The 9th Circuit held that qualified immunity attaches to retaliation against a threat to file a criminal complaint by a prisoner against prison officials. *Id.* at 1045.

***First Amendment Coal. v. United States DOJ*, 869 F.3d 868 (9th Cir. 2017)**

QUESTION: Whether "under the catalyst theory, there still must be a casual nexus between the litigation and the voluntary disclosure or change in position by the Government." *Id.* at 876.

ANALYSIS: The court rejected the notion that a 2007 amendment to the Freedom of Information Act's ("FOIA")—which now "ensure[s] that FOIA complainants who relied on the catalyst theory to obtain an award of attorney fees would not be subject to [a United States Supreme Court

case's] proscription"—"eliminated the need to establish causation once a lawsuit has been initiated." *Id.* at 875–76. The court noted that the 2nd, 4th, 5th, 7th, 8th, the D.C. Circuits determined that the 2007 FOIA Amendment "simply reinstated the pre-Buckhannon catalyst theory of recovery." *Id.* The 9th Circuit, accordingly, joined the 2nd, 4th, 5th, 7th, 8th, the D.C. Circuits in holding that "[the amended provision] should be construed literally to allow for the recovery of attorney's fees without the need to establish causation once there is a voluntary disclosure or change in position subsequent to the initiation of the FOIA litigation." *Id.* Thus, the 9th Circuit determined that a plaintiff must "present 'convincing evidence' that the filing of the action 'had a substantial causative effect on the delivery of the information.'" *Id.*

CONCLUSION: The 9th Circuit held that the 2007 Amendment to FOIA did not eliminate the need for a plaintiff to "establish causation once a lawsuit has been initiated." *Id.*

***Flores v. City of Westminster*, 873 F.3d 739 (9th Cir. 2017)**

QUESTION: Whether California law bars a public employee from bringing a claim under 42 U.S.C. § 1981. *Id.* at 752.

ANALYSIS: The court first explained that 42 U.S.C. § 1981 prohibits discrimination in the making and enforcement of contracts by reason of race, including color or national origin differences. *Id.* The court looked to a prior decision that distilled the analytical framework for determining whether a public employee of Washington State can recover under the statute. *Id.* The court stated that since "the language of section 1981 provides no specific guidance, we applied the [United States] Supreme Court's three-step process, based on 42 U.S.C. § 1988, for borrowing an appropriate rule." *Id.* First, the court noted, courts turn to United States laws "so far as such laws are suitable to carry [the civil and criminal civil rights statutes] into effect." *Id.* (internal citations and quotations omitted). Second, if no suitable federal rule exists, courts consider whether state law can be applied. *Id.* Third, as long as that state law is consistent with the Constitution and the federal laws of the United States, the courts will apply state law. *Id.* The 9th Circuit indicate it had not occasioned this analysis since before the 1991 amendments to 42 U.S.C. § 1981, which broadened the reach of the statute's "make and enforce contracts" clause. *Id.* at 753. Having found no suitable federal statute, the court stated that "California law weighs in favor of allowing Plaintiffs' section 1981 claims to proceed." *Id.* Under the third step, "reading California law to bar all public employees from bringing section 1981 claims hinders a preeminent federal interest: preventing discrimination on the basis of race in the 'enjoyment of all benefits,

privileges, terms, and conditions of the contractual relationship.'" *Id.* at 739 (quoting 42 U.S.C. § 1981(b) (2012)).

CONCLUSION: The 9th Circuit concluded California state law is consistent with the Constitution and federal statutes and, therefore, the plaintiff could properly bring discrimination and retaliatory claims under 42 U.S.C. § 1981. *Id.* at 753.

***Hernandez-Gutierrez v. U.S. Dist. Court (In re Zermeno-Gomez)*, 868 F.3d 1048 (9th Cir. 2017)**

QUESTION: "[W]hether a published decision of this court is binding on lower courts within the circuit, notwithstanding a stay of the mandate." *Id.* at 1051.

ANALYSIS: The court noted that the "law of the circuit doctrine" provides that a published decision of a circuit court is considered binding authority unless it is overruled by a competent body. *Id.* The court added that a stay of the mandate does not have an impact on the finality of the circuit court's judgment, and that a published decision is final unless withdrawn by the court. *Id.* at 1052. The court further reasoned that if lower courts continued to disregard published circuit court opinions, their actions would qualify as clear error. *Id.* at 1053.

CONCLUSION: The 9th Circuit held that district courts must comply with circuit court decisions even though the mandate has been stayed. *Id.*

***Lambert v. Nutraceutical Corp.*, 870 F.3d 1170 (9th Cir. 2017)**

QUESTION ONE: Whether Federal Rule of Civil Procedure 23(f)'s fourteen-day deadline for filing an interlocutory appeal from an order granting or denying class certification is jurisdictional. *Id.* at 1176.

ANALYSIS: The 9th Circuit first referenced a United States Supreme Court decision, holding that a Federal Rule of Criminal Procedure deadline could not be jurisdictional "because it was a procedural claim-processing rule." *Id.* at 1076. The court then noted another Supreme Court decision, holding that deadlines found in statutes are jurisdictional while "non-statutory deadlines, such as those in the Federal Rules of Civil or Criminal Procedure" may be regarded as "procedural, 'claims-processing' rules." *Id.* Additionally, the court cited its own precedent, holding that an immigration regulation containing a deadline to file an appeal was not jurisdictional because it was regulatory, did not contain the word "jurisdiction," and Supreme Court precedent "narrowly defined jurisdictional rules as those . . . remov[ing] a court's authority to hear a case." *Id.* 1176–77. The court also referenced cases from the 2nd, 3rd, and 10th Circuits, all of which held that Rule 23(f) is not jurisdictional. *Id.* at 1177 (citations omitted).

CONCLUSION: The 9th Circuit held that Federal Rule of Civil Procedure 23(f)'s deadline is not jurisdictional. *Id.*

QUESTION TWO: Whether a motion for reconsideration filed within Federal Rule of Civil Procedure 23(f)'s deadline tolls the deadline to appeal a denial of a motion for reconsideration and an order granting a motion class decertification. *Id.* at 1175–77.

ANALYSIS: The 9th Circuit noted that every circuit to have considered the issue—the 2nd, 3rd, 4th, 5th, 7th, 11th and D.C. Circuits—have held that a motion for reconsideration tolls the Rule 23(f) deadline. *Id.* at 1177–78 n.4. The court was persuaded by the circuits' reasoning that "federal courts long have held that a motion for reconsideration tolls the time for appeal, provided that the motion is made within the time for appeal." *Id.* at 1177–78. (internal citation and quotations omitted).

CONCLUSION: The 9th Circuit held that a motion for reconsideration filed within Federal Rule of Civil Procedure 23(f)'s deadline tolls the deadline to appeal a denial of a motion for reconsideration and an order granting a motion class decertification. *Id.* at 1178.

***Mendia v. Garcia*, 874 F.3d 1118 (9th Cir. 2017)**

QUESTION: "[W]hether a limited remand [under Federal Rule of Appellate Procedure 12.1] is permissible without first moving in the district court under [Federal Rule of Civil Procedure] 62.1 for a targeted 'indicative ruling.'" *Id.* at 1120.

ANALYSIS: The 9th Circuit first noted that "advisory committee notes to FRAP 12.1 explain that the rule is intended to work in conjunction with FRCP 62.1." *Id.* at 1121. The court then noted that the 1st, 5th, and 7th Circuits "have not treated a FRCP 62.1 motion as a prerequisite for ordering a limited remand," and have instead "been willing to construe district court actions as indicative rulings even when no FRCP 62.1 motion . . . was filed." *Id.* The court explained that this position "serve[s] FRAP 12.1's purpose of promoting judicial efficiency." *Id.* at 1122.

CONCLUSION: The 9th Circuit held that a FRCP 62.1 motion is not a prerequisite for a limited remand under FRAP 12.1(b) because the procedures of the two rules are meant to work in tandem, rather than being mutually exclusive. *Id.*

***Midbrook Flowerbulbs Holland B.V. v. Holland Am. Bulb Farms, Inc.*, 874 F.3d 604 (9th Cir. 2017)**

QUESTION: What legal standard is imposed by the language "compatible with the requirements of due process of law" in subsection

4(c)(8) of the Uniform Foreign-Country Money Judgments Recognition Act ("UFCMJRA")? *Id.* at 612.

ANALYSIS: The 9th Circuit first examined the commentary to Section 4, and noted that the forum court may "deny recognition to the foreign-country judgment if the court finds that the specific proceeding in the foreign court was not compatible with the requirements of fundamental fairness." *Id.* at 614 (citing UFCMJRA § 4 cmt. 12). The 9th Circuit noted that, although the comment provides examples of actions not compatible with fundamental fairness, such as judgments against a party for political reasons or evidence of corruption, the comment does not reference the United States Constitution or the Due Process Clause. *Id.* 614–15. The court then examined the prefatory note to the UFCMJRA, and determined that the Act's purpose was to "make it more likely that money judgments rendered in that state would be recognized in other countries." *Id.* at 616. The court reasoned that enforcing only foreign money judgments which comport with notions of constitutional due process would frustrate this purpose by "encourag[ing] foreign powers to condition the enforcement of *our* judgments on the satisfaction of *their* procedural requirements." *Id.* Therefore, the 9th Circuit declined to apply constitutional due process under subsection 4(c)(8). *Id.*

CONCLUSION: The 9th Circuit held that subsection 4(c)(8) of the UFCMJRA requires plaintiffs to establish more than "procedural differences," but a "deprivation of basic procedural fairness by, for example, proffering evidence of corruption or that the foreign judgment was entered for political reasons." *Id.* (internal quotation marks omitted).

***Roberts v. AT&T Mobility LLC*, 877 F.3d 833 (9th Cir. 2017)**

QUESTION: Whether *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996), allows plaintiffs to bypass the "encouragement" test for determining whether state action exists for a constitutional challenge. *Roberts*, 877 F.3d at 837.

ANALYSIS: The 9th Circuit acknowledged that to proceed with a constitutional challenge, the defendant's actions must be "fairly attributable" to the state under existing United States Supreme Court precedent. *Id.* at 837–38. The 9th Circuit rejected the plaintiffs' claim that their challenge was directly against the statute that allegedly encouraged the action and again pointed to Supreme Court precedent on state action determinations. *Id.* at 838. The 9th Circuit noted that *Denver Area*'s majority holding did not conflict with either case, and the plaintiffs' application was based on non-binding opinions. *Id.* at 839.

CONCLUSION: The 9th Circuit refused to hold that *Denver Area* allows plaintiffs to bypass the "encouragement" test because it did not

overrule, nor was it overruled by, existing Supreme Court precedent defining the test. *Id.*

***United States v. Biotonik, Inc.*, 876 F.3d 1011 (9th Cir. 2017)**

QUESTION ONE: Whether 31 U.S.C. § 3730(e)(3) bars a relator from bringing a *qui tam* suit where the allegations are "substantially the same" as those brought by the government in a previously settled and dismissed suit because the government "is already a party." *Id.* 1014–16.

ANALYSIS: The court opined that resolving the issue depended on the definition of "is already a party" as used in § 3730(e)(3). The court noted that individuals remain parties to disputes after litigation concludes, and cited to Federal Rule of Civil Procedure 60 as an example of individuals retaining rights from their party status after litigation is complete. *Id.* at 1016–17. The court further noted that § 3730(e)(4) precludes relators from bringing suits "based upon information which has been publicly disclosed in a different proceeding," thereby making it "clear that the Government remains a 'party'" to actions that have already concluded. *Id.* at 1017. The court reasoned that because Congress used the phrase "pending" in § 3730(b)(5), it would have done so in § 3730(e)(3) had it intended for that provision to "lose effect once [a] prior action" in which the Government was a party was dismissed. *Id.* at 1018. The court addressed the argument that its interpretation leads to § 3730(e)(3) serving only to "bar actions also barred under § 3730(e)(4)." *Id.* (internal citation and quotations omitted). The court rejected the argument as "overstat[ing] the nature . . . of the statutory overlap" because there are many times where § 3730(e)(4)'s bar would not lead to a bar under § 3730(e)(3). *Id.* at 1019.

CONCLUSION: The 9th Circuit held that 31 U.S.C. § 3730(e)(3)'s bar to *qui tam* suits "applies even when the Government is no longer an active participant in an ongoing *qui tam* lawsuit." *Id.* at 1016.

QUESTION TWO: Whether § 3730(e)(3)'s bar applies when a relator brings claims identical to those in the prior case that "the Government did not settle, and which were dismissed without prejudice." *Id.* at 1019–20.

ANALYSIS: The 9th Circuit began its analysis by noting that the False Claims Act ("FCA"), 31 U.S.C. § 3729, *et seq.*, does not suggest that the Government is not a party with respect to claims that it did not settle. *Id.* at 1020. The court pointed to § 3730(b)(2), which provides that the Government can intervene in a relator's actions rather than simply intervening in certain "parts [or] . . . claims." *Id.* The court also cited a United States Supreme Court's decision, establishing that, for purposes of the FCA, the Government is a party to an action where it decides to intervene. *Id.* The court noted that the Supreme Court decision dismissed

the notion that "party-status is contingent on anything other than whether it 'intervenes.'" *Id.* (internal citation omitted). The court also addressed the argument that, in light of another Supreme Court decision, reading § 3730(e)(4) as precluding a party from bringing a qui tam suit on claims the Government did not specifically join would "clash with statutory context." *Id.* at 1020–21 (internal quotation and citation omitted). The court dismissed this argument because that Supreme Court decision "has no bearing on Government's relation to the entire action." *Id.* at 1021.

CONCLUSION: The 9th Circuit held that the Government is a party to a lawsuit "as a whole when it intervenes." *Id.*

***United States v. Bonnett*, 872 F.3d 1045 (9th Cir. 2017)**

QUESTION: "Whether a[] [two-level] obstruction of justice [sentencing] enhancement [pursuant to U.S.S.G. § 3C1.1] may be founded upon a finding of malingering." *Id.* at 1046.

ANALYSIS: The court explained that the district court found malingering occurred when a defendant refused medical evaluations designed to examine his competency; and as such, the district court applied a two-level obstruction of justice sentencing enhancement. *Id.* The court noted the defendant's argument that "permitting an obstruction of justice enhancement on the basis of his performance in a competency evaluation chills his exercise of the right to obtain a competency hearing." *Id.* The 9th Circuit, however, rejected this argument based on the 3rd, 5th, 7th, and 11th Circuits' decisions to reject the same argument. The court recognized the United States Supreme Court's mandate that a defendant's own conduct may justify an obstruction enhancement, regardless of any argument that such an enhancement would have a chilling effect. *Id.* at 1046–47.

CONCLUSION: The 9th Circuit held that "malingering may support an obstruction of justice enhancement pursuant to U.S.S.G. §3C1.1." *Id.* at 1047.

***United States v. Mercado-Moreno*, 869 F.3d 942 (9th Cir. 2017)**

QUESTION: "[W]hether a district court deciding a § 3582(c)(2) motion may supplement the original sentencing court's drug quantity findings." *Id.* at 953.

ANALYSIS: In the 9th Circuit's de novo review of the issue, the court applied the two-step analysis set forth in a United States Supreme Court case. *Id.* at 957. The first step requires courts to "determine a defendant's eligibility for a sentence reduction by evaluating whether the defendant's applicable guideline range would have been lower if the relevant guidelines amendment were in effect at the time he was sentenced." *Id.*

The second step is discretionary and need only be applied if the court determines that applying a retroactive amendment would lower the defendant's guideline range. *Id.* The court noted that courts are permitted to approximate the drug quantities if the precise amount is unclear or "cannot be easily determined" and should err on the side of caution. *Id.* at 958.

CONCLUSION: The court held that a district court can supplement, but may not be inconsistent with, original drug quantity findings determined by a sentencing court only when such supplemental findings are required to determine a defendant's eligibility for a sentence reduction under a retroactive Sentencing Guidelines amendment. *Id.* at 948.

TENTH CIRCUIT

***United States v. Ailon-Ailon*, 875 F.3d 1334 (10th Cir. 2017) (per curiam)**

QUESTION: Whether the word "flee" in 18 U.S.C. § 3142(f)(2) encompasses a noncitizen's involuntary removal from the country, and requires detention of a noncitizen when he is subject to criminal proceedings for re-entering the country. *Id.* at 1335–37.

ANALYSIS: The 10th Circuit first looked to § 3142(f)(2)'s text to determine that the meaning of "flee" suggests volitional conduct. *Id.* at 1337. For additional support, the court examined the Bail Reform Act's ("Act") structure. *Id.* at 1338. The court first noted that § 3142(d)(2) of the Act "demonstrates that a [noncitizen] 'is not barred from release'" because of his noncitizen status. *Id.* at 1338 (internal quotations omitted). The court then noted that § 3142(e)(3) lists "certain defendants" who are presumed detainable, and that "removable [noncitizens]" were not included on the list. *Id.* The court further opined that an affirmative defense contained in § 3146(c) implies the Act's its "concern[] with 'the risk that . . . [a noncitizen] would fail to appear [in proceedings] by virtue of his own volition.'" *Id.* at 1339 (internal quotation omitted). The court rejected the argument that any convenience posed to the Bureau of Immigration Customs and Enforcement ("ICE") by the "pretrial detention" of such noncitizens justifies interpreting "flee" to include involuntary removals. *Id.* Additionally, the court noted potential conflicts between its interpretation and "regulations regarding voluntary departure." *Id.* The court, however, explained that if conflicts do exist, the Executive Branch should resolve them, not the Judiciary. *Id.*

CONCLUSION: The 10th Circuit concluded that the risk of a noncitizen's involuntarily removal from the country "does not establish a 'serious risk that [the defendant] will flee,'" and therefore, pretrial

detention of such a noncitizen under 18 U.S.C. § 3142(f)(2)(A) is not warranted. *Id.* at 1337 (alterations in original).

ELEVENTH CIRCUIT

***Arevalo v. United States A.G.*, 872 F.3d 1184 (11th Cir. 2017)**

QUESTION: "The proper scope of the [8 U.S.C. § 1182(h)] waiver in the context of [§ 1229b(b)(2)(A)]"—"a 'special rule' whereby an otherwise inadmissible immigrant who has been the victim of domestic violence may cancel his removal from the United States if he meets specified criteria." *Id.* at 1185–90.

ANALYSIS: The court noted that the plain language of § 1182(h) was "simply not clear . . . [on] whether it covers only one or both variants of status-adjustment" because it may be referring "only to adjustment of status under § 1255, or it may also contemplate the sort of adjustment of status that follows automatically from cancellation of removal." *Id* at 1194. Although the two statutes may generate similar outcomes, "they entail separate and distinct requirements for relief." *Id.* at 1195. The court did not find it unreasonable to "conclude that the phrase 'adjustment of status' carries distinct meanings in distinct sections of the INA." *Id.* The court found that "where § 1182(h) says it applies to aliens 'applying or reapplying' for adjustment of status, it does not implicitly intend to cover aliens 'applying or reapplying' for cancellation of removal *and* the adjustment of status that follows as a matter of course." *Id* at 1196.

CONCLUSION: The 11th Circuit held that that it was reasonable to "conclude[] that § 1182(h) is unavailable to applicants under the [§ 1229b(b)(2)(A)]." *Id.* at 1197.

***Ela v. Destefano*, 869 F.3d 1198 (11th Cir. 2017)**

QUESTION: Whether the damages list in 18 U.S.C. § 2724(b) applies to each instance that a person "knowingly obtains, discloses or uses personal information" from a motor vehicle record with an improper purpose in violation of § 2724(a). *Id.* at 1201. Stated differently, whether the minimal damages recoverable are "$2,500 *per violation*." *Id.* (emphasis in original).

ANALYSIS: The court reasoned that "[w]hile the statute's plain language neither requires nor prohibits an award of liquidated damages per violation, the remedy provision does use plainly permissive language." *Id.* The court further reasoned that Congress required cumulative damages in the criminal section of the Driver's Privacy Protection Act. *Id.* As such, the court presumed that "Congress knew how to include language that permits cumulative damages in the civil section, but chose not to." *Id.* at 1202. Based on the notion that "[w]here Congress knows how to say

something but chooses not to, its silence is controlling," the court found Congress' exclusion of cumulative language in § 2724 persuasive. *Id.* at 1202–03.

CONCLUSION: The 11th Circuit held that the damages list in 18 U.S.C. § 2724(b) does not allow for a cumulative award. *Id.* at 1203.

***Mantiply v. Horne (In re Horne)*, 876 F.3d 1076 (11th Cir. 2017)**

QUESTION: "[W]hether the Bankruptcy Code authorizes payment of attorneys' fees and costs incurred by debtors in successfully pursuing an action for damages resulting from the violation of the automatic stay and in defending the damages award on appeal." *Id.* at 1078.

ANALYSIS: The 11th Circuit first looked to the language of the statute governing attorneys' fees for willful violations of an automatic stay during a Chapter 7 bankruptcy. *Id.* at 1080. The court interpreted the phrase "including costs and attorneys' fees" to be "broadening the notion of actual damages beyond the immediate injury incurred in ending the violation of a stay." *Id.* at 1081. Additionally, the court found no indication within the statute that Congress intended attorneys' fees only to apply to ending the stay violation. *Id.* The court found this interpretation similar to the 9th Circuit's interpretation, which is the only other circuit court to have addressed this issue. *Id.* Finally, the court found that this reasoning "ma[de] sense in the context of bankruptcy litigation," as "[m]ost debtors are not in the financial position to afford an action to prosecute damages and, even if they could, limiting fees to those incurred in ending the stay violation would be too small to justify the expensive litigation that may follow." *Id.* at 1082.

CONCLUSION: The 11th Circuit held "that Section 362(K)(1)'s award of attorneys' fees apply to prosecuting damages actions," and so "defending that judgment on appeal is also within the statute's fee-shifting authorization." *Id.*

***United States v. Focia*, 869 F.3d 1269 (11th Cir. 2017)**

QUESTION: Whether 18 U.S.C. § 922(a)(1)(A) is "an impermissible prior restraint in violation of the Second Amendment because it criminalizes dealing in firearms without a license." *Id.* at 1283.

ANALYSIS: The court reasoned that a statute cannot be an impermissible prior restraint on the exercise of Second Amendment rights unless "the First Amendment's prior-restraint framework applies equally to the rights protected by the Second Amendment." *Id.* The court then noted that five other circuits, including the 1st, 2nd, 3rd, 4th, and 7th Circuits, addressed the issue and none "extended First Amendment prior-restraint doctrine into the Second Amendment arena." *Id.* at 1284.

CONCLUSION: The 11th Circuit held that 18 U.S.C. § 922(a)(1)(A) is not "an impermissible prior restraint" as "the First Amendment's prior restraint framework" does not apply to the Second Amendment. *Id.* at 1283–84.

D.C. CIRCUIT

***United States v. Meadows*, 867 F.3d 1305 (D.C. Cir. 2017)**

QUESTION: Whether it was plain error to allow a prosecutor to make a statistical argument as to a defendant's guilt during closing argument at trial. *Id.* at 1318.

ANALYSIS: The D.C. Circuit first noted the distinction between a statement of probability made with "rhetorical flourish" and a true statistical argument. *Id.* at 1318–19. As to the former, the court noted that where reasonable jurors would not understand mere rhetoric to a prosecutor's argument as an actual statistical argument, it cannot be established that the outcome or the "fairness, integrity, or public reputation" of the judicial proceedings are affected. *Id.* at 1318. The court further explained that if a prosecutor does not actually relate the rhetoric to the government's burden of proof beyond a reasonable doubt, the use of rhetorical flourish does not amount to prosecutorial error. *Id.* at 1319. With respect to a true statistical argument, however, the court reasoned that if a prosecutor offers a "true" statistical analysis in a closing argument, there is considerable risk of error and prejudice. *Id*. To this end, the court noted that because there is a risk of error and prejudice, any true statistical analysis should be supported by expert testimony. *Id.*

CONCLUSION: The D.C. Circuit concluded that although it was not plain error for a prosecutor to use "rhetorical flourish" in support of an argument, "a true statistical analysis, unsupported by expert testimony, in closing argument" poses considerable risk of error and prejudice to a defendant. *Id.*

FEDERAL CIRCUIT

***Arctic Cat Inc. v. Bombardier Rec. Prods.*, 876 F.3d 1350 (Fed. Cir. 2017)**

QUESTION: Whether the plaintiff or defendant bears the burden of proving compliance with marking of a patented product. *Id.* at 1367.

ANALYSIS: The court stated that "the alleged infringer need only put the patentee on notice that he or his authorized licensees sold specific unmarked products which the alleged infringer believes practice the patent." *Id.* at 1368. The court further reasoned that "[p]ermitting infringers to allege failure to mark without identifying any products could lead to a large scale fishing expedition and gamesmanship." *Id.*

CONCLUSION: The Federal Circuit held that "an alleged infringer who challenges the patentee's compliance with § 287 bears an initial burden of production to articulate the products it believes are unmarked 'patented articles' subject to [35 U.S.C. § 287]." *Id.*