First Impressions

The following pages contain brief summaries, drafted by the members of the *Seton Hall Circuit Review*, of issues of first impression identified by a federal court of appeals opinion announced between October 31, 2007 and March 31, 2008. This collection is organized by circuit.

Each summary presents an issue of first impression, a brief analysis, and the court's conclusion. It is intended to give only the briefest synopsis of the first impression issue, not a comprehensive analysis. This compilation makes no claim to be exhaustive, but will hopefully serve the reader well as a reference starting point. If a circuit does not appear on this list, it means that the editors did not identify any cases from that circuit for the specified time period that presented an issue of First Impression.

FIRST CIRCUIT

Alexander v. Brigham & Women's Physicians Org., Inc., 513 F.3d 37 (1st Cir. 2008)

Editor's Note—This case resolves "two issues of first impression concerning the scope of ERISA's exemption for so-called top-hat deferred compensation plans." *Id.* at 39.

QUESTION ONE: What constitutes a "select group" under ERISA's top-hat provision in a deferred compensation plan. *Id.* at 43.

ANALYSIS: The 1st Circuit first addressed the statutory language in ERISA, finding that the top-hat provision "applies only if, among other things, a plan is maintained for the primary benefit of 'a select group of management or highly compensated employees.'" *Id.* The court then examined the Congressional intent behind the statutory phrases flanking the provision—"maintained" and "highly compensated"—concluding that a plain reading of the statute indicates Congress, when carving out the top-hat provision, considered those employees who "realistically have the capacity to benefit from it." *Id.* at 44.

CONCLUSION: The 1st Circuit held that "[t]o come within the compass of the top-hat provision, the employer must be able to show a substantial disparity between the compensation paid to members of the top-hat group and the compensation paid to all other workers." *Id.* at 46.

QUESTION TWO: Whether ERISA implicitly requires that every individual in the "select group" possesses bargaining power sufficient to negotiate the terms of the plan. *Id.* at 46.

ANALYSIS: The 1st Circuit initially addressed the statutory language of the top-hat provision, asserting that Congress never mentioned bargaining power in the statute. *Id.* Further, the court noted that "the statutory language contains no indication that Congress contemplated that courts would consider employees' ability to bargain over the terms of their deferred compensation plans, either individually or collectively, when measuring the bona fides of a select group and determining the applicability of the top-hat provision." *Id.* at 46–47. The court reasoned that "[a]lthough Congress's rationale for fashioning the exemption was that the members of a 'select group of management or highly compensated employees' could fend for themselves, the statute,

by its terms, does not purport to require proof of power of any sort." *Id.* at 48.

CONCLUSION: The 1st Circuit concluded that "there is no requirement of individual bargaining power to qualify for the top-hat provision." *Id.*

***Cerqueira v. Am. Airlines, Inc.*, 520 F.3d 1 (1st Cir. 2008)**

QUESTION: What is the standard of review to be applied to an air carrier's decision to refuse transport to a passenger under 49 U.S.C. § 44902(b). *Id.* at 2–3.

ANALYSIS: The 1st Circuit emphasized that "§ 44902(b) does not merely create a defense," but rather, "the statute is an affirmative grant of permission to the air carrier." *Id.* at 30. The court also found that "[i]t is the plaintiff who carries the burden to show that § 44902(b) is inapplicable." *Id.* The court recognized that the 2nd and 9th Circuits have adopted an "arbitrary or capricious" standard for evaluating decisions of air carriers and that such a standard "reconciles the primary priority of safety with other important policies, such as . . . prohibitions on racial discrimination." *Id.* at 31–32.

CONCLUSION: The 1st Circuit held that "an air carrier's decisions to refuse transport under § 44902(b) are not subject to liability unless the decision is arbitrary or capricious." *Id.* at 32.

***Larson v. Howell*, 513 F.3d 325 (1st Cir. 2008)**

QUESTION: "[W]hether the state crime of negligent vehicular homicide qualifies as a 'criminal act' which would cap a debtor's homestead exemption to $125,000 under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA")." *Id.* at 327.

ANALYSIS: The 1st Circuit interpreted the language in §522(q)(1)(B)(iv) of the BAPCPA, which applied a $125,000 cap on the homestead exemption to "'any criminal act, intentional tort, or willful or reckless misconduct that caused serious physical injury or death . . . ," to include state law criminal negligence. *Id.* at 328. The court found that the word "or" in the statute signified that criminal acts were to be considered as a separate trigger to the subsection, independent of any intent or recklessness. *Id.* The court also dismissed an argument that "a debtor must be 'convicted' of a 'criminal act' in order for 522(q)(1)(B)(iv) to apply," holding instead that the provision "applies wherever the debtor's debt 'arises from . . . any criminal act." *Id.* at 330.

Further, the court also found that "an admission of facts sufficient for a finding of guilt" was enough to trigger the provision. *Id.*

CONCLUSION: The 1st Circuit held that the $125,000 cap on the homestead provision imposed by § 522(q)(1)(B)(iv) of the BAPCPA applies to crimes of negligence in which a debtor's debt arises from the criminal act. *Id.*

SECOND CIRCUIT

Chao v. Gotham Registry, Inc., 514 F.3d 280 (2d Cir. 2008)

QUESTION: Whether an employer's pre-approval rule, which required advance notice and authorization for overtime payments to its employees, violated the Fair Labor Standards Act ("FLSA"). *Id.* at 17.

ANALYSIS: The 2nd Circuit first examined the Department of Labor regulation addressing such rules, stipulating that "[i]n all such cases it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed . . . *The mere promulgation of a rule against such work is not enough*. Management has the power to enforce the rule and must make every effort to do so." *Id.* The court then followed the precedents of the Supreme Court and the 11th Circuit, which held that an "agency could not avoid overtime compensation simply by adopting a policy against overtime and issuing periodic warnings." *Id.* at 289.

CONCLUSION: The 2nd Circuit held that an employer's pre-approval rule violates the FLSA because "employees cannot waive the overtime protections granted them in the FLSA without nullifying the Act's purposes and setting aside the legislative goals Congress wanted effectuated." *Id.* at 290.

Ogunwomoju v. United States, 512 F.3d 69 (2d Cir. 2008)

QUESTION: "Whether a petitioner in immigration detention or under an order of removal as a consequence of a state conviction is 'in custody' within the meaning of the statute providing for a writ of habeas corpus to challenge such a conviction." *Id.* at 70.

ANALYSIS: The 2nd Circuit distinguished a petitioner who "is currently serving a state sentence" and "seeks to challenge a final order of removal," from a petitioner whose "sentence imposed for a conviction has completely expired." *Id.* at 74–75. The court supported this conclusion by noting that "the collateral consequences of that conviction

are not themselves sufficient to render an individual 'in custody' for the purposes of a habeas attack on it." *Id.* at 75. Finally, the court stated that the statute in question, 28 U.S.C. § 2254(a), is jurisdictional and requires that "habeas petitioners be in custody under a state conviction or sentence when they file for habeas relief . . . ." *Id.*

CONCLUSION: The 2nd Circuit held that "immigration detention is not 'custody' for the purposes of establishing jurisdiction to consider a habeas petition challenging a state court conviction pursuant to 28 U.S.C. § 2254." *Id.* at 70.

THIRD CIRCUIT

Frett-Smith v. Vanterpool, 511 F.3d 396 (3d Cir. 2008)

QUESTION: Whether a United States citizen could invoke alienage jurisdiction pursuant to 28 U.S.C. § 1332(a)(2) if she possessed dual citizenship. *Id.* at 399.

ANALYSIS: The 3rd Circuit noted that a number of circuits have held that "for a dual national citizen, only the American nationality is relevant for purposes of diversity under 28 U.S.C. § 1332." *Id.* The court applied the 5th Circuit's reasoning in *Coury v. Prot*, which concluded that "the dual citizen should not be allowed to invoke alienage jurisdiction because this would give him an advantage not enjoyed by native-born American citizens." *Id.* at 400. Furthermore, the court agreed with the 5th Circuit that affording alienage jurisdiction to an American dual citizen would frustrate its purpose of allowing foreign subjects to avoid real or perceived bias in the state courts. *Id.*

CONCLUSION: The 3rd Circuit held that a dual national could not utilize foreign nationality for purposes of diversity jurisdiction because only the American nationality of a dual national is recognized in such cases. *Id.*

Doe v. Pa. Bd. of Prob. & Parole, 513 F.3d 95 (3d. Cir. 2008)

Editor's Note—This case resolves two issues of first impression involving an Interstate Compact Concerning Parole and Probation between Pennsylvania and New Jersey.

QUESTION ONE: Whether an Interstate Compact Concerning Parole and Probation ("the Parole Compact") between Pennsylvania and

New Jersey is state law subject only to state jurisdiction or federal law subject to jurisdiction of the federal courts. *Id.* at 103.

ANALYSIS: The 3rd Circuit first applied a four factor test, finding: (1) "the need to assert cross-border control of people subject to the jurisdiction of the criminal justice system . . ." is within the Constitution's Compact Clause; (2) the Parole Compact received Congressional consent; and (3) the need for interstate cooperation made the subject matter appropriate for Congressional legislation. *Id.*

CONCLUSION: The 3rd Circuit held that the Parole Compact was federal law as well as state law because it was a congressionally-sanctioned compact. *Id.*

QUESTION TWO: Whether an interstate parole compact provides a parolee with common law contractual rights as a third-party beneficiary. *Id.*

ANALYSIS: The 3rd Circuit found that, because an interstate compact is a contract with the states as parties, federal law controls in the absence of a federal statute to the contrary. *Id.* at 106. The court noted that "[i]n addition to the parties to a contract, 'third-party beneficiaries' of the contract can also enforce its terms." *Id.* The court applied two restatement tests for third-party beneficiary status: (1) whether the parties have indicated in the agreement that the third party is a beneficiary; or (2) whether circumstances compel recognition of third-party status to effectuate the intention of the parties. *Id.* The court found that the parolee was not explicitly mentioned in the agreement as a third-party beneficiary and there was no intention to confer third-party status upon the parolee set forth in the compact's statement of purpose. *Id.* at 106–07.

CONCLUSION: The 3rd Circuit held that although a compact is treated as a contract, parolees are not third-party beneficiaries to the Parole Compact between New Jersey and Pennsylvania according to both the explicit terms of the compact and the intent of the parties, as set forth in the compact's statement of purpose. *Id.*

Univ. of Pittsburgh v. United States, 507 F.3d 165 (3d Cir. 2007)

QUESTION: "[W]hether early retirement payments made by the University of Pittsburgh to its tenured faculty are taxable as 'wages' under the Federal Insurance Contribution Act ("FICA")." *Id.* at 166.

ANALYSIS: The 3rd Circuit noted that the "weight of authority holds that compensation paid to an employee for services to her employer constitutes wages under FICA regardless of whether it is

prospective (for lost earning potential), or retrospective (as a reward for past service)." *Id.* at 171.

CONCLUSION: The 3rd Circuit held "that the relinquishment of tenure rights—although a condition precedent to the payments—does not alter the Plan payments' character as compensation for services, and therefore as wages." *Id.*

United States v. Langford, 516 F.3d 205 (3d Cir. 2008)

QUESTION: Whether the miscalculation of advisory Sentencing Guidelines range is rendered harmless where the imposed sentence fell into the "overlap" between the incorrect and correct Guidelines range used by the sentencing court. *Id.* at 216.

ANALYSIS: The 3rd Circuit noted that in the "typical case in which an error in the calculating of Sentencing Guidelines has been held harmless, the sentence was dictated not by the erroneously calculated Guideline, but by a statutory minimum or maximum or another properly calculated Guideline." *Id.* Although the court acknowledged that other courts had adopted an "overlapping range" justification, it concluded that "overlap" does not inevitably render an error in the Guidelines calculation harmless. *Id.* Moreover, the court agreed with the other courts of appeals which had similarly concluded that "the selection of an incorrect Guidelines range was plain error even though the actual sentence happened to fall within the correct Guidelines range." *Id.* at 217. Specifically, the court indicated that a mere overlap is not conclusive, and that "the record must show that the sentencing judge would have imposed the same sentence under a correct Guidelines range, that is, that the sentencing Guidelines range did not affect the sentence actually imposed." *Id.* at 216. Thus, the court concluded that although the overlap may be useful, it is the sentencing judge's reasoning and not mere overlap that will be determinative. *Id.*

CONCLUSION: The 3rd Circuit held that the miscalculation of advisory Sentencing Guidelines range is not rendered harmless by the fact that the sentence imposed is within overlapping incorrect and correct ranges in the Guidelines. *Id.*

FOURTH CIRCUIT

United States v. Bly, 510 F.3d 453 (4th Cir. 2007)

QUESTION: Whether the term "person" as written in 18 U.S.C. § 876(b), outlining the elements of extortion, includes an entity that is a non-living person, specifically, the University of Virginia, which is "an arm of the sovereign, i.e., the Commonwealth of Virginia." *Id.* at 460.

ANALYSIS: The 4th Circuit first examined the plain language of the word "person" in the statute, finding that "[a]lthough [some portions of the statute] are realistically limited to live persons, it is entirely reasonable to conclude that an artificial entity, such as UVA, can be the victim of an extortion demand." *Id.* at 461. The court then considered the ordinary usage of "person" and noted that the Webster's Dictionary definition includes "legal entit[ies] recognized by law as the subject of rights and duties." *Id.* The court then rejected the contention that the "rule of uniform usage" should control, stating that "if a statutory term has multiple commonly understood and accepted meanings, among which a speaker may alternate without confusion, the rule of uniform usage will readily yield." *Id*. Next, the court disallowed an interpretation based on the "Dictionary Act, 1 U.S.C. § 1, which includes entities like corporations (but not governmental entities) in its definition of 'person'." *Id*. at 462. The court determined that the University of Virginia "is more than an extension of the Commonwealth of Virginia and, under Virginia law, it is a corporation." *Id.*

CONCLUSION: The 4th Circuit affirmed the district court's holding, finding that "the district court properly observed in assessing this contention, there is nothing in § 876(b) to indicate that Congress intended to protect only living persons from the extortion demands criminalized in § 876(b). . . . In context, it is clear that Congress, by using the term 'any person' in the Extortion Element, intended 'to penalize every extortion demand by mail which is coupled with an express threat or with any language or expression which carries with it the reasonable connotation of a threat.'" *Id.* at 464.

Pee Dee Health Care, P.A. v. Sanford, 509 F.3d 204 (4th Cir. 2007)

QUESTION: Whether 42 U.S.C. § 1396a(bb) of the Social Security Act creates an enforceable right of action under 42 U.S.C. § 1983. *Id.* at 211.

ANALYSIS: The 4th Circuit applied the *Blessing* test to section 1396a(bb) as a whole to find that: (1) Congress intended the statute "to benefit" Rural Health Clinics ("RHCs"); (2) the use of the phrase 'shall provide for payment' "is not unduly vague or amorphous such that the judiciary cannot enforce it"; and (3) "the language unambiguously binds the states as indicated by the repeated use of 'shall.'" *Id.* The court further noted that § 1396a(bb), as required by *Gonzaga*, "contains rights-creating language because it specifically designates the beneficiaries—the RHCs—and it mandates action on the part of the states." *Id.* at 212. The court stated that "§ 1396a(bb) has an individual focus rather than an aggregate focus on institutional policy or practice." *Id.* The court found that the statute's focus was in stark contrast to the 'policy or practice' language present in the provision interpreted in *Gonzaga*. *Id.*

CONCLUSION: The 4th Circuit held that "the language of § 1396a(bb) and the case law interpreting Medicaid provisions of similar import in light of the *Blessing* factors" indicate that § 1396a(bb) "creates an enforceable right under § 1983." *Id.*

Cetto v. LaSalle Bank Nat'l Ass'n, 518 F.3d 263 (4th Cir. 2008)

QUESTION: "[W]hether, under TILA ("Truth in Lending Act") and HOEPA ("Home Ownership and Equity Protection Act"), the definition of 'creditor,' as set forth in 15 U.S.C. § 1602(f), includes a person who acted only as a mortgage broker in the particular transaction, but who had acted as a lender in the past for unrelated transactions." *Id.* at 267.

ANALYSIS: The 4th Circuit noted that "the universal definition of 'creditor' in the first sentence of § 1602(f), the substantive and linguistic connections between the first and last sentences, the differential terminology between 'creditor' and 'mortgage broker,' the history of the last sentence's enactment, and common sense" led it to conclude that the last sentence was not a standalone definition but rather "a particularizing clarification of the first sentence, which defines 'creditor' in an installment loan as the person to whom the obligation is initially payable." *Id.* at 272. The court also considered Regulation Z, promulgated by the Federal Reserve Board to assist in applying § 1602(f), and noted that it did not include a mortgage broker who does not extend credit in the transaction as a 'creditor.' *Id.* Finally, the 4th Circuit found that the last sentence of § 1602(f) "explained the first prong of the 'creditor' definition in the first sentence—what it means to 'regularly extend' credit—in circumstances when high-cost mortgages are involved." *Id.*

CONCLUSION: The 4th Circuit held that, based on both section 1602(f) and Regulation Z promulgated under it, a person who acted only as a mortgage broker is not a creditor. *Id.* at 273.

FIFTH CIRCUIT

Hyder v. Keisler, 506 F.3d 388 (5th Cir. 2007)

QUESTION: Whether [an] alien's conviction for misuse of a social security number under 42 U.S.C.S. § 408(a)(7)(A) was a Crime Involving Moral Turpitude ("CIMT"). *Id.* at 390.

ANALYSIS: The 5th Circuit noted that it has "repeatedly emphasized that crimes whose essential elements involve fraud or deception tend to be CIMTs." *Id.* at 391. Additionally, the court recognized the Supreme Court's declaration that "fraud has consistently been regarded as such a contaminating component in any crime that American courts have, without exception, included such crimes within the scope of moral turpitude." *Id.* The court reasoned that the inherent nature of the crime is more important than the specific circumstances surrounding the individual transgression, and that in general, "courts have held that intentionally deceiving the government involves moral turpitude." *Id.* at 392. The court declined to follow the 9th Circuit's decision in *Beltran-Tirado v. I.N.S.*, exempting social security misuse from CIMTs, explaining that it was not binding precedent and erroneously expanded "a narrow exemption beyond what Congress intended." *Id.* at 393.

CONCLUSION: The 5th Circuit held that "[m]isuse of a social security number in violation of 42 U.S.C. § 408(a)(7)(A) falls within the circuit's understanding of the definition of CIMT." *Id.*

Giri v. Keisler, 507 F.3d 833 (5th Cir. 2007)

QUESTION: Whether a fugitive alien may invoke the fugitive disentitlement doctrine "to dismiss a petition for review of a Board of Immigration Appeals decision . . . ." *Id.* at 835.

ANALYSIS: The 5th Circuit followed the Supreme Court's framework for the fugitive disentitlement doctrine, adopting the same questions to determine when its use is justified: "whether it may be impossible for the court to enforce any judgment that it renders"; whether "by fleeing custody, the defendant is thought to have waived or abandoned his right to an appeal"; whether "dismiss[al] of a fugitive's

case is thought to 'discourage [] the felony of escape and encourage [] voluntary surrenders'"; and whether the "dismissal of the case furthers the court's 'interest in efficient practice.'" *Id.* In addition, the 5th Circuit remarked that "the criminal defendant's escape is thought to represent an affront to the dignity and authority of the court." *Id.*

CONCLUSION: The 5th Circuit extended the fugitive disentitlement doctrine "to the immigration context [when] the petitioners are fugitive aliens who have evaded custody and failed to comply with a removal order." *Id.*

United States v. Lopez-Salas, 513 F.3d 174 (5th Cir. 2008)

QUESTION: "[W]hether a state's presumption of intent can create a drug trafficking offense under . . . [§ 2L1.2(b)(1)(A) of the United States Sentencing] Guidelines . . . ." *Id.* at 179.

ANALYSIS: The 5th Circuit recognized that the issue was one of first impression for it, and that a split existed among the circuit courts of appeals. *Id.* Following the reasoning of the 6th, 9th, and 10th Circuits, the 5th Circuit held that "[s]entencing enhancements are defined by federal, not state, law." *Id.* at 180. The court reasoned that the Guidelines "could have defined a drug trafficking offense based on the quantity of drugs possessed, . . . [but] [i]nstead, they require that a state prove an intent to manufacture, import, export, distribute, or dispense." *Id.*

CONCLUSION: The 5th Circuit held that the defendant's state conviction did "not constitute a drug trafficking offense" under the United States Sentencing Guidelines. *Id.*

Arif v. Mukasey, 509 F.3d 677 (5th Cir. 2007)

QUESTION: Whether, under federal immigration law, the principle of "derivative beneficiaries" allows a petitioner seeking "withholding of removal" to rely on a spouse's ground for "withholding of removal." *Id.* at 681.

ANALYSIS: The 5th Circuit first looked to the decisions of the 2nd, 6th, 8th, 9th, and 11th Circuits, finding that they each noted (and held, in the 11th Circuit) that "withholding of removal does not afford derivative relief to members of an alien's family." *Id.* The court next examined the intent of Congress to find that "no evidence in the language of the statute to indicate that Congress intended to extend the relief afforded by withholding of removal to an alien's spouse or minor children without an independent ground for granting such relief to them." *Id.* at 682. The 5th Circuit also recognized that Federal regulations involving withholding of

removal supported the finding. *Id.* Finally, the court indicated that the I-589 application for withholding of removal only referenced the spouse and minor children of the alien because it could serve as an application for asylum, noting that the application clearly stated that "[w]ithholding of removal does not apply to any spouse or child included in the application." *Id.*

CONCLUSION: The 5th Circuit agreed with the Board of Immigration Appeals, holding "as a matter of law, 'there are no derivative beneficiaries for an application for withholding of removal.'" *Id.* at 681.

***United States v. Huy Tan Nguyen*, 507 F.3d 836 (5th Cir. 2007)**

QUESTION: "[W]hether a district court has the authority to grant a new trial on a ground other than one raised by a defendant's motion under Federal Rule of Criminal Procedure 33." *Id.* at 837.

ANALYSIS: The 5th Circuit noted a recent 3rd Circuit holding "that a district court is without the authority to grant a motion for new trial on a basis not raised by the defendant." *Id.* at 839. The court acknowledged that the drafters added the words "on motion of a defendant" to Rule 33 at the same time they "expanded the district court's power to grant a new trial in civil cases, specifically stating in Rule 59(d) of the Federal Rules of Civil Procedure that a new trial could be granted for 'a reason not stated in the motion.'" *Id.* The 5th Circuit found the 3rd Circuit's reasoning persuasive, explaining that "the drafters would have inserted similar language in the criminal rules if they intended a district court to have the power to grant a new trial on a basis not stated in the motion for new trial." *Id.*

Conclusion: The 5th Circuit agreed with the 3rd Circuit to hold that a district court "does not have the authority to grant a motion for new trial under Rule 33 on a basis not raised by the defendant." *Id.*

***Trinity Marine Prods., Inc. v. Sec'y of Labor*, 512 F.3d 198, (5th Cir. 2007)**

QUESTION: Whether there is a constitutional right "to contest an administrative warrant's validity in federal court before its execution." *Id.* at 7.

ANALYSIS: The 5th Circuit noted that the Plaintiff Trinity's "right finds no support in the Constitution's text or history and has never been blessed by the Supreme Court." The court further observed that "the best

reading of the leading Supreme Court case on point, *Marshall v. Barlow's, Inc.*, is decidedly against Trinity's claim." *Id.*

CONCLUSION: The 5th Circuit held that "there is no constitutional right to a pre-execution contempt hearing and . . . administrative warrants, like criminal warrants, can be executed by means of reasonable force." *Id.*

In re *Wallace*; *Wallace v. Rogers*, 513 F.3d 212 (5th Cir. 2008)

QUESTION: "Whether the homestead exemption cap applies to a homestead interest established within the 1,215-day period preceding the filing of the bankruptcy petition despite the fact that the debtor acquired title to the property before that statutory period." *Id.* at 215.

ANALYSIS: The 5th Circuit noted that "Congress could have defined all [of the] debtors' exemptions to be whatever they would have been 1215 days before the filing of the petition. Instead, Congress defined the cap more narrowly." *Id.* at 227. The court further stated that text of the statute and its legislative history indicated that "the term 'interest' refers to vested economic interests in the property that were acquired by the debtor within the 1,215-day period preceding the filing of the petition." *Id.*

CONCLUSION: The 5th Circuit concluded that the defendant was "entitled to [the] full homestead exemption." *Id.*

***Bocchi Ams. Assocs. Inc. v. Commerce Fresh Mktg. Inc.*, 515 F.3d 383 (5th Cir. 2008)**

QUESTION: "[W]hether an oral agreement is sufficient to effect a waiver or forfeiture of PACA trust rights." *Id.* at 390.

ANALYSIS: The 5th Circuit adopted the rule "that waiver or forfeiture of PACA trust rights by entering into an extension agreement requires an agreement in writing." *Id.* at 390–91. The court declined to accept the viewpoint of the 2nd Circuit, and instead agreed with a majority of other circuits deciding the issue. *Id.*

CONCLUSION: The 5th Circuit held that the "waiver or forfeiture of PACA trust rights by entering into an extension agreement requires an agreement in writing." *Id.*

***Ayanbadejo v. Chertoff*, 517 F.3d 273 (5th Cir. 2008)**

QUESTION: "Whether the district court erred in granting the government's motion to dismiss for lack of subject matter jurisdiction because § 1252(a)(2)(B) precluded its review" of the plaintiffs' I-130 petition and I-485 application. *Id.* at 276.

ANALYSIS: The 5th Circuit noted that its decision in *Zhao v. Gonzales*, which provided guidance for the interpretation of §1252(a)(2)(B), precisely identified "which discretionary decisions are beyond judicial review." *Id.* at 277. The court remarked that "section 1252(a)(2)(B)(i) simply does not include I-130 petition determinations in the discretionary category that expressly includes determinations of I-485 applications." *Id.* at 278. Consequently, the court held that because "[d]eterminations regarding the validity of marriage for I-130 petition purposes are not discretionary within the meaning of § 1252(a)(2)(B)," they are thus subject to review by courts. *Id.*

CONCLUSION: The 5th Circuit concluded that "[a]lthough the district court did not have jurisdiction to review the determinations made with respect to [the husband's] I-485 application, the court did have jurisdiction to review the determinations made with respect to [the wife's] I-130 petition." *Id.* at 276.

***Wagstaff v. United States Dep't of Educ.*, 509 F.3d 661 (5th Cir. 2007)**

QUESTION: Whether Congress waived the sovereign immunity of the United States by enacting the Fair Debt Collection Practices Act ("FDCPA"). *Id.* at 662.

ANALYSIS: The 5th Circuit noted that "[i]n order to hale the federal government into a court proceeding, a plaintiff must show that there has been a valid waiver of sovereign immunity." *Id.* at 664. Further, the court indicated that such a waiver must be unequivocally expressed in the text of the statute and would not be implied. *Id.* Additionally, the court remarked that such a waiver "will be strictly construed, in terms of its scope, in favor of the sovereign." *Id.* Thus, the court stated that "[a]bsent a waiver of sovereign immunity, the federal government is immune from suit." *Id.*

CONCLUSION: The 5th Circuit held that the FDCPA "does not contain an unequivocal and express waiver of sovereign immunity," and that subject matter jurisdiction was lacking in this case. *Id.*

SIXTH CIRCUIT

Graoch Assocs. #33, L.P. v. Louisville/Jefferson County Metro Human Relations Comm'n, 508 F.3d 366 (6th Cir. 2007)

QUESTION: Whether courts should analyze disparate-impact claims against private defendants under the Fair Housing Act ("FHA") using the modified burden-shifting framework utilized in Title VII disparate-impact cases, or the framework established in *Arthur v. City of Toledo*, when analyzing disparate-impact cases against governmental defendants. *Id.* at 371, 372.

ANALYSIS: The 6th Circuit analyzed the three-step burden-shifting framework applied in disparate-impact claims under Title VII. *Id.* at 372. The court next explained that a number of circuits, "relying on the analogy between Title VII and the FHA," had used the Title VII burden-shifting approach for dealing with disparate-impact claims under the FHA. *Id.*

The 6th Circuit then considered the framework it had applied in a disparate-impact case against governmental defendants under the FHA in *Arthur v. City of Toledo*, noting that it had "not mention[ed] the burden-shifting framework or the elements of a prima facie case" in that case. *Id.* Rather, the court explained it had applied a "three-factor balancing approach" which focused on "(1) the strength of the plaintiff's showing of discriminatory effect; (2) the strength of the defendant's interest in taking the challenged action; and (3) whether the plaintiff seeks to compel the defendant affirmatively to provide housing for members of minority groups or merely restrain the defendant from interfering with individual property owners who wish to provide such housing." *Id.* at 372–73.

The appellate court reasoned that these two approaches were complimentary, and therefore merged the frameworks, noting that "the *Arthur* standard nicely captures the inquiry that we must perform at the third step in the burden-shifting framework." *Id.* at 373. The court, however, remarked that the third *Arthur* factor was "not relevant to claims against private defendants." *Id.*

CONCLUSION: The 6th Circuit concluded that "disparate-impact claims against private defendants under the FHA should be analyzed using a form of the [Title VII] burden-shifting framework" that incorporates the *Arthur* factors by considering the "strength of the

plaintiff's showing of discriminatory effect against the strength of the defendant's interest in taking the challenged action." *Id.* at 374.

***United States v. James T. Fore, II*, 507 F.3d 412 (6th Cir. 2007)**

QUESTION: [W]hether the district court properly denied defendant's request for a two-level reduction in his base offense level pursuant to U.S.S.G § 2G2(b)(1) (2005), which allows such a reduction if the 'defendant's conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor; and . . . the defendant did not intend to traffic in, or distribute, such material.'" *Id.* at 413.

ANALYSIS: The 6th Circuit noted the defendant's argument that it it was "undisputed that the pornographic images traveled in interstate commerce, [therefore] the pivotal issue is whether there was 'distribution' of the materials . . ." *Id.* at 415. The court concluded that the Sentencing Guidelines expressly permit the pertinent reduction in base offense level only if, among other requirements, the defendant's conduct is "limited in scope to the receipt or solicitation of material involving the sexual exploitation of a minor . . ." *Id.* Here, the court found that the defendant's conduct "was not *limited* to the receipt or solicitation of pornographic materials, but also encompassed the transportation of materials involving the sexual exploitation of a minor in interstate commerce . . . an offense that is separate and distinct from . . . the mere receipt or solicitation of pornography . . ." *Id.*

CONCLUSION: The 6th Circuit held that because the "defendant's conduct was not 'limited' to the receipt or solicitation of materials involving the sexual exploitation of a minor, he does not qualify for the two-level reduction under the plain language of U.S.S.G § 2G2.2(b)(1)(B)." *Id.*

***Gonter v. Hunt Valve Co.*, 510 F.3d 610 (6th Cir. 2007)**

QUESTION: Whether plaintiffs' counsel has standing to appeal a district court's order of attorneys' fees under the False Claims Act ("FCA"), 31 U.S.C. § 3730(d) (2000). *Id.* at 614.

ANALYSIS: The 6th Circuit noted that the because the plaintiffs had fully resolved their FCA claims regarding contingency fees and attorneys' fees prior to appeal, therefore any additional award would only affect the interests of the plaintiffs' counsel. *Id.* at 615. Further, the court observed that counsel had suffered a putative injury in fact since district court's award of attorney fees was lower than the amount sought

in the petition. *Id.* Finally, the court found that the plaintiffs implicitly approved the entire amount sought by counsel when it filed the original fee petition for the full amount, concluding that "[t]o refuse standing, therefore, would be to tantamount to 'exalt[ing] form over substance.'" *Id.* at 615.

CONCLUSION: The 6th Circuit held "that [counsel] does have standing to bring this appeal," reiterating its earlier observation that "[w]hen they are the real parties in interest, attorneys are entitled to their day in court." *Id.* at 616.

***Pennington v. Metro. Gov't*, 511 F.3d 647 (6th Cir. 2008)**

QUESTION: "Whether a breathalyzer test administered to an off-duty police officer amounts to an unconstitutional seizure." *Id.* at 651.

ANALYSIS: The 6th Circuit analogized the case before it to a decision rendered by the 7th Circuit in *Driebel v. City of Milwaukee* and agreed that "[b]ecause the Fourth Amendment does not protect against the threat of job loss, the relevant constitutional inquiry must focus on whether reasonable people in the position of the subordinate officers would have feared *seizure* or *detention* if they had refused to obey the commands given by their superior officers." *Id.* at 652. The court also noted that the plaintiff admitted he complied with the orders of his superior officers due to his fear of losing his job. *Id.*

CONCLUSION: The 6th Circuit concluded that "Pennington was not seized when he submitted to the breathalyzer test" because "Pennington himself did not fear seizure or detention; instead, he was afraid he would be terminated or suspended." *Id.*

***United States v Goins*, 516 F.3d 416 (6th Cir. 2008)**

QUESTION: "[W]hether pretrial detention with respect to an indictment that later yields a conviction tolls the running of a period of supervised release under 18 U.S.C. § 3624." *Id.* at 417.

ANALYSIS: As a preliminary matter, the 6th Circuit found that the plain meaning of a defendant's "release" under section 3624(e) was defined by the Supreme Court as "not commenc[ing] until an individual 'is released from imprisonment,'" and thus required a "strict temporal" interpretation, "rather than "some fictitious earlier time." *Id.* at 420. The court then rejected the 9th Circuit's reasoning that the term "imprison" in section 3624(e) inherently requires a penalty or sentence, finding that such a reading would render the "in connection with a conviction" portion of the statute superfluous. *Id.* at 421. Instead, the court indicated

that the plain meaning encompassed a broader dictionary definition including "detain in custody," which could include a pretrial detention. *Id.* at 422.

The court then buttressed this conclusion using the connection between pretrial detention and later conviction iterated in 18 U.S.C. § 3585(b), that "credit toward the service of a term of imprisonment for any time [the defendant] has spent in official detention prior to the date the sentence commences . . . as a result of the offense for which the sentence was imposed." *Id.*

CONCLUSION: The 6th Circuit concluded that "when a defendant is held for thirty days or longer in pretrial detention, and he is later convicted for the offense for which he was held, and his pretrial detention is credited as time served toward his sentence, then the pretrial detention is 'in connection with' a conviction and tolls the period of supervised release under § 3624." *Id.* at 417.

Kistner v. Law Offices of Michael P. Margelefsky, LLC, 518 F.3d 433 (6th Cir. 2008)

Editor's Note—This case resolves two issues of first impression concerning the Fair Debt Collection Practices Act, 15 U.S.C. § 1692.

QUESTION ONE: "[W]hether an individual member of an LLC that is engaged in debt collection may be held liable under the FDCPA ("Fair Debt Collection Practices Act," 15 U.S.C. § 1692) without piercing the corporate veil." *Id.* at 435.

ANALYSIS: The 6th Circuit recognized a circuit split over the issue, noting that the 7th Circuit decided that "a shareholder, officer of employee of a corporate debt collector may not be held personally liable without meeting the requirements necessary to pierce the corporate veil." *Id.* at 436. In contrast, the court also acknowledged several district courts that concluded "where a shareholder, officer, or employee of a corporation is personally involved in the debt collection at issue, he may be held personally liable as a debt collector without piercing the corporate veil." *Id.* Considering all approaches, the 6th Circuit found the analyses within the district courts as most persuasive. *Id.*

CONCLUSION: The 6th Circuit held "that subjecting the sole member of an LLC to individual liability for violations of the FDCPA will require proof that the individual is a 'debt collector,' but does not require piercing of the corporate veil." *Id.* at 437-38.

QUESTION TWO: Whether the use of "attorney letterhead" from a debt collector constitutes "[t]he false representation or implication that any individual is an attorney or that any communication is from an attorney." *Id.* at 438.

ANALYSIS: The 6th Circuit adopted the "least-sophisticated-consumer" test to determine whether the attorney's action in this case was deceptive. *Id.* The court noted that the letter from the LLC gave "repeated indications that it came from a law firm." *Id.* at 439. Specifically, the court remarked that the words 'law offices' appeared in the letterhead, on the signature block, and on the remittance voucher. *Id.* Furthermore, the court found that "the inclusion of 'Account Representative' [did] not necessarily blunt 'any effect in the reader's mind caused by' the repeated references to 'The Law Offices of Michael P. Margelefsky' and the payment voucher directing remittance to 'Michael P. Margelefsky.'" *Id.* at 440.

CONCLUSION: The 6th Circuit held that a genuine issue of material fact existed as to whether one could have reasonably concluded under the "least-sophisticated-consumer" test that the collection letter was "susceptible to a belief that it [was] from an attorney." *Id.* at 442.

***United States v. Ward*, 506 F.3d 468 (6th Cir. 2007)**

QUESTION: Whether a defendant, who has not been charged with conspiracy may receive a sentence enhancement under U.S.S.G § 2D1.1(b) for a co-defendant's possession of a firearm during a drug transaction. *Id.* at 474.

ANALYSIS: The 6th Circuit noted that section 2D1.1(b) of the Sentencing Guidelines states that a defendant's base offense level for a drug trafficking offense must be increased by two levels "[i]f a dangerous weapon (including a firearm) was possessed." *Id.* at 474. The court emphasized that application of the enhancement applies broadly, during "relevant conduct." *Id.* The court defined relevant conduct under the Sentencing Guidelines to include, "in the case of jointly undertaken criminal activity . . . all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy)." *Id.* at 475. Thus, the court reasoned that "whether the co-defendants are charged as conspirators is of no consequence," and found that a jointly undertaken activity is sufficient for the enhancement. *Id.*

CONCLUSION: The 6th Circuit held that a defendant may receive a sentence enhancement under U.S.S.G. § 2D1.1(b) of the Sentencing

Guidelines for a co-defendant's possession of a firearm during a drug transaction if the crime was a jointly undertaken activity. *Id.*

***United States v. King*, 516 F.3d 425 (6th Cir. 2008)**

QUESTION: Whether a court can consider only offenses that "took place within a limited time period" when considering what offenses qualify as a 'prior conviction for a similar offense' under § 2D1.1(a)(1) of the Sentencing Guidelines. *Id.* at 425–26.

ANALYSIS: The 6th Circuit rejected the defendant's argument "that a prior offense triggers § 2D1.1(a)(1) only when it is recent enough to count in calculating the criminal history category" under Chapter 4 of the Guildeliness as well. *Id.* at 427. The court stated that "both the text of the Guidelines and other circuits' conclusions contradict [the defendant's] arguments." *Id.*

First, the 6th Circuit reasoned that "even if § 4A1.2(e) does create a default time-limit within Chapter 4, there is no reason to believe that a limit in a chapter on criminal history would necessarily span all other chapters." *Id.* at 428. The court articulated that the "Sentencing Commission's explicit rejection of the 15-year limit in this section does not mean that the Commission intended to apply the 15-year limit in sections that say nothing about such a limit." *Id.*

Second, the 6th Circuit stated that section 4A1.2(e) was not a default time-limit applicable to Chapter 2 of the Guidelines, because "[i]f § 4A1.2(e) applied as an unstated background rule, the explicit mention of § 4A1.2(e) in Chapter 2 would be unnecessary." *Id.* Third, the court found that the defendant's contention that "§ 2L1.2's waiver of § 4A1.2's time limit proves that § 4A1.2(e) is indeed a default for Chapter 2," was unavailing because the term "'without regard to the date of conviction' [in the application notes to section 2L1.2] . . . [was] simply intended to make it clear that Chapter 2's no-time-limit default continues to apply even when the Guidelines draw upon terms from provisions that do contain time limits." *Id.* at 430.

Fourth, the 6th Circuit articulated that although "the words and rules of Chapter 4 do not exist in isolation[,] . . . when considering whether Chapter 2 includes the time limits of Chapter 4, we are not faced with a situation where Chapter 2 is somehow lacking important information" and thus "Chapter 2 stands alone and does not require consideration of Chapter 4." *Id.* at 431. Fifth, the court stated "that there is no reason to conclude that the time limits that the Commission created for § 4A1.2(e) were intended to signal a global policy that disparages all use of convictions older than fifteen years." *Id.* at 431–32. Finally, the

court found that "§ 2D1.1(a)(1) unambiguously precludes the application of § 4A1.2(e)'s time limits," noting that even if the court was to find some ambiguity in § 2D1.1(a)(1), "there would not be enough ambiguity to justify applying the rule of lenity." *Id.* at 432.

CONCLUSION: The 6th Circuit held that "§ 2D1.1(a)(1) contains no default time limit that would bar consideration of convictions older than fifteen years of age." *Id.*

SEVENTH CIRCUIT

U.S. v. Silvious, 512 F.3d 364 (7th Cir. 2008)

QUESTION: Whether 28 U.S.C. § 2461(c) authorizes criminal forfeiture of the proceeds of any offense that does not have a statutory basis for criminal forfeiture but permits a civil forfeiture in connection with that offense. *Id.* at 369.

ANALYSIS: The 7th Circuit first noted that other circuits considering the issue interpreted section 2461(c) to authorize criminal forfeiture as a punishment for any act for which civil forfeiture is authorized. *Id.* The court agreed with the weight of authority and affirmed the district court's finding that 28 U.S.C. § 2461(c) provides the statutory basis for criminal forfeiture. *Id.*

CONCLUSION: The 7th Circuit held that section 2461(c) authorizes criminal forfeiture of the proceeds of any offense that permits a civil forfeiture in connection with that offense but does not provide a statutory basis for criminal forfeiture. *Id.*

United States v. Moses, 513 F.3d 727 (7th Cir. 2008)

QUESTION: "[W]hether multiple and simultaneous violations of [26 U.S.C. § 5861(d)] constitute one criminal act or several separate acts." *Id.* at 731.

ANALYSIS: The 7th Circuit agreed with several courts of appeals that unanimously held that "there is one unit of prosecution under § 5861(d) for each non-registered firearm possessed, and that an individual accordingly may be prosecuted for each non-registered firearm he is alleged to have possessed." *Id.* at 732. The court noted that section 5861(d) of the Internal Revenue Code makes it "illegal for an individual 'to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record,' and thus evade the

excise tax that would have been due had the firearm been properly registered." *Id.* at 729.

The court then commented that the excise tax applied to "sawed-off shotguns, modified rifles, machine guns, silencers, and, as pertinent here, 'destructive devices,' meaning 'any explosive . . . grenade'" and that the charges against the defendant included such destructive devices. *Id.* at 729, 730. The 7th Circuit then adopted the reasoning of the 5th and 9th Circuits, agreeing that the purpose of the statutory scheme for § 5861(d) dictates that "each non-registered firearm (and thus each instance of tax evasion) corresponds to one unit of prosecution." *Id.* at 732.

CONCLUSION: The 7th Circuit held that the defendant's multiplicity challenge to 26 U.S.C. § 5861(d) must fail, because "the discernable need to prosecute each violation of the excise tax on firearms transfers explains why multiple and simultaneous violations of § 5861(d) may be prosecuted separately." *Id.*

NINTH CIRCUIT

In re *Weinstrin*; *Weinstrin v. Gill*, 512 F.3d 533 (9th Cir. 2008)

QUESTION: Whether a law firm could object to a motion filed by a trustee in bankruptcy which sought to augment the trustee's administrative fund with money "subtracted from accumulated funds held as collateral for [a] [l]ender's loans." *Id.* at 535.

ANALYSIS: The 9th Circuit noted that the debtor in bankruptcy was represented by the law firm during three negotiations with a lender for financing. *Id.* The court found that each of the negotiated agreements contained a clause that "[n]either the lender" nor any of the Collateral shall at any time be subject to surcharge or assessment, whether pursuant to Bankruptcy Code § 506(c) or otherwise." *Id.* The court opined that the "waiver of surcharge or assessment against the collateral is comprehensive," and "applies 'at any time.'" *Id.* The court further recognized that the waiver was approved by the law firm, and that the firm was aware that there would have been certain administrative expenses, thus, "it was not through ignorance or inadvertence that no provision was made to pay them." *Id.* at 535–36.

CONCLUSION: The 9th Circuit held that the firm had "no direct, pecuniary interest in the encumbered assets of the estate," and that the waiver effectively barred the claim of the law firm. *Id.*

***Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522 (9th Cir. 2008)**

QUESTION: Whether the plaintiff had "the right to visually display song lyrics in real time with song recordings, as well as print song lyrics, without holding anything more than the § 115 [of the Copyright Act, 17 U.S.C. §§ 101–1332] compulsory licenses it already possesses." *Id.* at 525.

ANALYSIS: The 9th Circuit stated that the plaintiff's karaoke device satisfied the statutory definition of an audiovisual work as defined by the Copyright Act. *Id.* at 527–28. The court recognized that section 101 of the Copyright Act defines an audiovisual work as a product "consisting of 'a series of related images' that are 'intrinsically intended to be shown by the use of machines'" *Id.* The court also found that the plaintiff's "visual representation of successive portions of song lyrics that [the] device projects onto a television screen constituted 'a series of related images.'" *Id.* at 528.

In addition, the court also recognized that an essential function of the karaoke device "is its ability to indicate to the consumer exactly when to sing each lyric." *Id.* Consequently, the court observed that while section 101 of the Copyright Act did not require that an audiovisual work have sound, the plaintiff's karaoke device with its images of successive portions of song lyrics were "intrinsically intended to be shown by the use of machine . . . together with accompanying sounds.'" *Id.* The court found that the karaoke device was able to indicate to the consumer when he or she should sing each lyric because "it utilize[d] a machine to project the song lyrics 'in real time' with the accompanying music." *Id.*

CONCLUSION: The 9th Circuit held that the karaoke device at issue was an audiovisual work as defined by the Copyright Act. *Id.* at 529. Therefore, "in addition to any section 115 compulsory licenses necessary to make and distribute phonorecords and reprint license necessary to reprint song lyrics, [the plaintiff was] also required to secure synchronization licenses to display images of song lyrics in timed relation with the recorded music." *Id.*

***United States v. Banks*, 506 F.3d 756 (9th Cir. 2007)**

QUESTION: Whether a conviction of Violence in the Aid of a Racketeering Enterprise ("VICAR") "requires the defendant to have committed the violent act for the primary or sole purpose of maintaining or enhancing his purpose in the criminal enterprise, or whether it is sufficient that he was motivated only in part by such purpose." *Id*. at 761.

ANALYSIS: The 9th Circuit first looked to the rulings of its sister circuits, finding that all "have concluded that VICAR's purpose element

is satisfied even if the maintenance or enhancement of his position in the criminal enterprise was not the defendant's sole or principal purpose." *Id*. The court then determined that "the purpose element is met if 'the jury could properly infer that the defendant committed his violent crime because he knew it was expected of him by reason of his membership in the enterprise or that he committed it in furtherance of that membership.'" *Id*.

The court proceeded to interpret the language of the statute, 18 U.S.C. § 1959(a), and concluded that Congress did not intend "for VICAR to apply only to defendants acting solely (or primarily) for the purpose of entering a gang or maintaining or enhancing their position within it." *Id*. at 762. The court also declined to use the rule of lenity because "an examination of the text, context, and purpose of the VICAR statute leaves no reasonable doubt that the purpose element is satisfied 'whether [the defendant's gang-related purpose] be primary or secondary.'" *Id*. at 764.

CONCLUSION: The 9th Circuit held that the purpose element of VICAR "does not require the Government to show that the defendant was solely, exclusively, or even primarily motivated by a desire to gain entry into, or maintain or increase his status within, the criminal organization." *Id*.

***United States v. Corona-Verbera*, 509 F.3d 1105 (9th Cir. 2007)**

QUESTION: "Whether or not our government is required formally to seek extradition and execute an arrest warrant when it believes extradition is futile." *Id*. at 1114.

ANALYSIS: The 9th Circuit observed that the 2nd Circuit addressed the issue in *United States v. Blanco*, holding that requiring a formal extradition for a defendant from Colombia would have been futile, and that "[d]ue diligence does not require the government to pursue goals that are futile." *Id.*

CONCLUSION: The 9th Circuit agreed with the 2nd Circuit and held that, "where our government has a good faith belief supported by substantial evidence that seeking extradition from a foreign country would be futile, due diligence does not require our government to do so." *Id*.

***Miller v. Thane Int'l, Inc.*, 508 F.3d 910 (9th Cir. 2007)**

QUESTION: "Whether a false promise to list shares on a national exchange like the NASDAQ is material" under section 12(a)(2) of the Securities Act of 1933. *Id.* at 920.

ANALYSIS: The 9th Circuit noted that the Supreme Court has held that an omitted fact "is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *Id.* at 919. Applying this standard, the court found that the defendant's promise to list its shares on NASDAQ was material because a "NASDAQ listing carries objective benefits that directly and positively affect corporate earnings, investor returns, and a stock's pool of potential shareholders." *Id.* at 921. The court remarked that shares listed on NASDAQ benefit from exemption from Blue Sky registration, "have greater liquidity . . . and thus have smaller spreads, on average, than shares traded on the OTCBB ["Over-the-Counter Bulletin Board"]," and listing shares on NASDAQ "may attract a larger pool of investors than listing on the OTCBB." *Id.* at 921–22.

CONCLUSION: The 9th Circuit held that the defendant's misrepresentations in the Final Prospectus regarding listing its shares on NASDAQ were material because a reasonable shareholder "would have wanted to know where the new shares would be trading and would have viewed the fact of defendant's nonlisting 'as having significantly altered the total mix of information made available.'" *Id.* at 922.

***United States v. Hir*, 517 F.3d 1081 (9th Cir. 2008)**

QUESTION: "Whether the Bail Reform Act permits the pretrial detention of individuals who pose a danger only to a foreign 'community.'" *Id.* at 1087.

ANALYSIS: The 9th Circuit first rejected the lower court's contention that the term "community" in the Bail Reform Act is limited to a geographic location within the court's jurisdiction. *Id.* The court next rejected the argument that the term community must be located within the geographical jurisdiction of the United States. *Id.* at 1088. The court also reasoned that excluding foreign lands from the definition of "community" in the Bail Reform Act would mean that "a court would be able to try a defendant under the laws of the United States for a crime the effects of which are felt abroad, but be unable to detain the defendant who committed the crime despite clear and convincing evidence that he continues to pose a danger to the same foreign community." *Id.*

CONCLUSION: The 9th Circuit held that a district court "may consider the threat that a defendant poses to a foreign community in a

case in which the defendant has been charged with an offense under American law, the effect of which occurs abroad." *Id.*

***Oak Harbor Freight Lines, Inc. v. Sears Roebuck & Co.*, 513 F.3d 949 (9th Cir. 2008)**

QUESTION: "Whether the shipper or the carrier bears the risk if a freight forwarder, broker, or consolidator fails to forward a freight payment, or if a consignee fails to forward a freight payment. . . ." *Id.* at 958.

ANALYSIS: The 9th Circuit disagreed with the appellant-shipper's argument that equitable estoppel should bar the carrier's collection of the freight charges from the shipper. *Id.* The court considered *Olson Distributing Systems, Inc. v. Glasurit America, Inc.*, but did not apply the shipper's argument from that case that the "risk of loss should rest with the carrier" because the extreme facts there bore little resemblance to the instant case. *Id.* The 9th Circuit instead agreed with the 4th, 5th, and 11th Circuits, which held that "a shipper should bear the risk when it chooses to pay for freight charges through a broker rather than directly to the carrier." *Id.* at 959.

The court found that policy reasons supported the holdings. *Id.* Specifically, the 9th Circuit recognized that: (1) the "economic reality" of the freight industry is that the freight forwarder usually has little net worth, profiting on the fees paid by carriers and shippers; (2) that "[c]arriers must expect payment will come from the shipper, although it may pass through the forwarder's hands;" and, (3) that "[w]hile the carrier may extend credit to the forwarder, there is no economically rational motive for the carrier to release the shipper" because "[t]he more parties that are liable, the greater the assurance for the carrier that he will be paid." *Id.* The court further reasoned that "the shipper, and not the carrier, is in the best position to avoid liability for double payment by dealing with a reputable freight forwarder, by contracting with the carrier to eliminate the shipper's liability, or by simply paying the carrier directly. *Id.*

CONCLUSION: The 9th Circuit held that equitable estoppel did not bar the carrier's recovery of freight charges from the shipper. *Id.* at 960.

***United States v. Lowry*, 512 F.3d 1194 (9th Cir. 2008)**

QUESTION: Whether the prosecution bears the burden of proof for establishing the defendant's lack of individual aboriginal title, or whether a claim of individual aboriginal title is an affirmative defense where the

defendant bears the burden of proof, for a violation of 36 C.F.R. § 261.10(b) and (k). *Id.* at 1195.

ANALYSIS: The 9th Circuit disagreed with the defendant's argument that "the phrase in 36 C.F.R. § 261.10(b), 'without a special-use authorization, or as otherwise authorized by Federal law or regulation,' merely 'negates an element of the crime' and may not be shifted to the defendant." *Id.* at 1199. The court stated that it was a "settled rule" that "an indictment or other pleading founded on a general provision defining the elements of an offense, or of a right conferred, need not negative the matter of an exception made by a proviso or other distinct clause, whether in the same section or elsewhere, and that it is incumbent on one who relies on such an exception to set it up and establish it." *Id.*

The 9th Circuit articulated that while "[t]he government bears the burden of proving possession, use or occupancy of the land," under 36 C.F.R. § 261.10(b) and (k), the "'without' clause simply recognizes the existence of [certain] exceptions to the general prohibition against residing in the nation's forests." *Id.* The court reasoned that "the person claiming individual aboriginal title must demonstrate continuous individual occupation that commenced before the land in question was withdrawn from entry for purposes of settlement," because "a defendant who relies upon an exception to a statute made by a proviso or distinct clause, whether in the same section of the statute or elsewhere, has the burden of establishing and showing that he comes within the exception." *Id.* at 1199–1200. The 9th Circuit explained that the approach was practical, because "it would be 'far easier for the defendant to present evidence' of her Indian ancestors and their history of land occupancy to establish that the exception applies than for the government to do so." *Id.* at 1200.

CONCLUSION: The 9th Circuit held that "where authorization [to occupy Forest Service land] is claimed by virtue of individual aboriginal title, it is an affirmative defense [to 36 C.F.R. § 261.10(b) and (k)] to be raised by a defendant," who thereafter bears the burden of establishing such individual aboriginal title." *Id.* at 1201.

In re *Wind N' Wave; North Sports, Inc. v. Knupper (*509 F.3d 938 (9th Cir. 2007)

QUESTION: Whether Bankruptcy Code Section 503(b)(4), which governs compensation for creditors' attorneys in bankruptcy cases, allows for expenses incurred by a creditor in appealing or defending a lower court's award or denial of fees. *Id.* at 940.

ANALYSIS: The 9th Circuit noted that while the statute was silent regarding compensation for expenses incurred by a creditor in appealing or defending an appeal, statutory silence does not foreclose a fee award. *Id.* at 942. The court recognized that other circuits as well as its own prior holdings have expressly granted compensation for litigation above a fee award, using fee-shifting statutes even when those statutes did not expressly allow for it. *Id.* The court applied the same rationale to the instant case, concluded that the petitioning creditors could file for the appropriate application for recovery of expenses under Section 503(b)(4). *Id.*

CONCLUSION: The 9th Circuit held that Bankruptcy Code Section 503(b)(4) allows creditors to recover expenses incurred in appealing or defending a lower court's award or denial of fees. *Id.*

TENTH CIRCUIT

U.S. v. Romero-Hernandez, 505 F.3d 1082 (10th Cir. 2007)

QUESTION: "Whether nonconsensual sexual contact constitutes a forcible sex offense and therefore a crime of violence" that warrants a sixteen-level upward sentence increase under Section 2L1.2(b)(1)(A)(ii) of the Sentencing Guidelines. *Id.* at 1086–87.

ANALYSIS: The 10th Circuit found that "a sex offense may be committed by means that do not involve 'physical' force, yet the offense may still be forcible." *Id.* at 1089. It noted that "the word 'force' does not necessarily connote the use of physical compulsion." *Id.* at 1088. Further, the court observed that "where one party has sufficient control of a situation to overcome the another's [sic] free will, force is present." *Id.*

CONCLUSION: The 10th Circuit held that the use of "disparities in situational power or influence" between the victim and the perpetrator that prevent the victim from giving consent, meet the definition of "force" under Section 2L1.2 of the Guidelines; therefore nonconsensual sexual conduct constitutes a forcible sex offense. *Id.* at 1089.

United States v. Contreras, 506 F.3d 1031 (10th Cir. 2008)

QUESTION: Whether enhancement for obstruction of justice in § 3C1.1 of the Sentencing Guidelines applies when a defendant's obstructive conduct occurred during the prosecution of state charges

preceding the federal indictment, but both federal and state charges were based on the same underlying conduct." *Id.* at 1034.

ANALYSIS: The 10th Circuit agreed with the defendant's argument that the language of the Guidelines confines the obstruction enhancement to obstruction of the administration of justice with respect to the 'instant' offense, meaning the federal prosecution. *Id.* at 1038. However, the court held that where a defendant's obstructive conduct impedes or delays prosecution by both federal and state authorities, the enhancement was applicable. *Id.* at 1038. The court noted that "[a] contrary interpretation would have strange consequences." *Id.* at 1038–39.

CONCLUSION: The 10th Circuit concluded that "the obstruction of a state investigation based on the same facts as the eventual federal conviction merits a § 3C1.1 enhancement." *Id.* at 1039.

ELEVENTH CIRCUIT

United States v. Al-Arian, 514 F.3d 1184 (11th Cir. 2008)

QUESTION: Whether the district court possessed subject matter jurisdiction to enforce an inmate's motion seeking specific enforcement of a plea agreement pursuant to 28 U.S.C.S. § 2255. *Id.* at 1189.

ANALYSIS: The 11th Circuit considered the Supreme Court's decision in *Santobello v. New York*, which held "that when a plea rests in any significant degree on a promise . . . of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.* at 1190. Based on this holding, the court noted that "the Supreme Court implicitly recognized that the court that accepts a guilty plea has jurisdiction to enforce a plea agreement if the government is in breach." *Id.*

CONCLUSION: Adopting the approach of the 1st and 7th Circuits and the Supreme Court's reasoning in *Santobello*, the 11th Circuit held that "the district court in which a defendant pled guilty pursuant to a written plea agreement has jurisdiction over a motion filed by the defendant to enforce the agreement under § 2255." *Id.* at 1191.

Sheely v. MRI Radiology Network, P.A., 505 F.3d 1173 (11th Cir. 2007)

QUESTION: Whether emotional damages are recoverable under section 504 of the Rehabilitation Act of 1973, 29 U.S.C.S. § 794. *Id*. at 1190.

ANALYSIS: In determining what remedies are available under the Rehabilitation Act, the court considered several factors, including: a "contract *metaphor* the Supreme Court has found useful in determining the available remedies under Spending Clause legislation"; actual contract law; and "the *Bell v. Hood* presumption, which the *Barnes* Court reaffirmed" by stating that "federal courts may use *any* available remedy to make good the wrong done." *Id*. at 1203.

CONCLUSION: The 11th Circuit concluded that "emotional damages are available to make whole the victims of the violations of § 504 of the Rehabilitation Act." *Id*. at 1204.

***United States v. Hurtado*, 508 F.3d 603 (11th Cir. 2007)**

QUESTION: Whether 18 U.S.C. § 1028A(a)(1) of the Aggravated Identity Theft statute "requires the government to prove (1) that [the defendant] stole the identification of another person, in order to show the possession or use was 'without lawful authority,' and (2) that [the defendant] knew that the identification . . . belonged to another actual person." *Id.* at 604.

ANALYSIS: The 11th Circuit addressed the first question by looking to the plain language of the statute. *Id.* at 607. The court noted that the statute simply required that "the transfer, possession, or use of the means of identification of another person to be 'without lawful authority.'" *Id.* The court of appeals reasoned that Congress could have narrowed the scope of the provision by including the terms "stolen" or "theft" as it had in the preceding statutory section. *Id.* at 608. The court then explained that Congress had clearly intended to "prohibit a wider range of activities . . . than just theft." *Id.*

Turning to the second question, the 11th Circuit used the plain language of the statute to reject the defendant's interpretation of the provision's requirement that one "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." *Id.* at 609. The court explained that "[t]he fact that the word 'knowingly'—an adverb—is placed before the verbs 'transfers, possesses, or uses' indicates that 'knowingly' modifies those verbs, not the later language in the statute." *Id.* Therefore, the court reasoned, a plain reading of the statute indicated that Congress had not intended to extend the knowledge requirement to the entire subsection. *Id.*

CONCLUSION: The court held that section 1028A(a)(1) did not require the government to prove that the defendant stole the identity of another person in order to show that the possession or use was "without

lawful authority," or that the defendant knew that the identification belonged to another person. *Id.* at 608, 610.

***Estate of Jelke v. Comm'r*, 507 F.3d 1317 (11th Cir. 2007)**

QUESTION: "Whether or not the Tax Court used the appropriate valuation methodology in computing the net asset value of CCC [a C corporation for tax purposes] to determine the value of . . . interest in [the] CCC for estate tax purposes on the date of death." *Id.* at 1318.

ANALYSIS: The 11th Circuit agreed with the 5th Circuit's valuation methodology in *Estate of Dunn*, based upon "historical overview, discussion, and precedential authority." *Id.* at 1319. Under the 5th Circuit's rationale, "a 100% dollar-for-dollar discount was mandated for CCC's entire contingent $51 million capital gains tax liability." *Id.* The 11th Circuit explained that this economic market reality theory assumed several factors, including the CCC's liquidation on the date of death, the valuation date, and that "all assets of CCC are sold, regardless of the parties' intent to liquidate or not, or [despite] restrictions on CCC's liquidation in general." *Id.*

CONCLUSION: Under de novo review, the 11th Circuit vacated the judgment of the Tax Court and remanded it with instructions that "it recalculate the net asset value of CCC on the date of [] death . . . using a dollar-for-dollar reduction of the entire [] built-in capital gains tax liability of CCC, under the arbitrary assumption that CCC is liquidated on the date of death and all assets sold." *Id.*

***Chen v. Att'y Gen.*, 513 F.3d 1255 (11th Cir. 2008)**

QUESTION: What level of conduct constitutes "assistance" in persecution for purposes of deciding whether an alien is ineligible for asylum and withholding of removal. *Id.* at 1258.

ANALYSIS: The 11th Circuit first noted the importance of assessing the individual's "personal culpability" as opposed to the overall persecution. *Id.* at 1258–59. The court then examined other circuit court decisions which had addressed the issue, and agreed with the 7th Circuit's holding that there is a "distinction between 'genuine assistance in persecution and inconsequential association with persecutor.'" Additionally, the court also adopted the 2nd Circuit's distinction between "active conduct having 'direct consequences for the victims,' and conduct merely 'tangential to the acts of oppression and passive in nature.'" *Id.* at 1259.

CONCLUSION: The 11th Circuit held that the personal conduct must be "active, direct and integral to the underlying persecution" to qualify as "assistance" and not "merely indirect, peripheral and inconsequential association." *Id.*

***Scheerer v. Att'y Gen.*, 513 F.3d 1244 (11th Cir. 2008)**

QUESTION: Whether the regulation 8 C.F.R. § 1245.2(a)(1), which provides that "[i]n the case of an arriving alien who is placed in removal proceedings, the immigration judge does not have jurisdiction to adjudicate any application for adjustment of status," is valid. *Id.* at 1249.

ANALYSIS: The 11th Circuit applied the two-step *Chevron* test, deciding that the validity of the regulation was more properly analyzed under the second step that examines whether the regulation is "based on a permissible construction of the statute." *Id.* at 1250–51. The court found that the "regulation appears fully consistent with the broader statutory framework governing adjustment applications, in which Congress has divided adjudication functions between [Department of Justice] and [Department of Homeland Security]" and in which Congress "has authorized those departments to fill the gap as to specific application procedures." *Id.* at 1252.

CONCLUSION: The 11th Circuit held that "the Attorney General did not exceed his authority in promulgating the amended 8 C.F.R. § 1245.2(a)(1)" and upheld the regulation as valid. *Id.*

***Pittsburg & Midway Coal Mining Co. v. U.S. Dep't of Labor, Office of Workers' Comp.*, 508 F.3d 975 (11th Cir. 2007)**

QUESTION: Whether the director correctly concluded that the term "massive lesions" was "merely one of several ways of describing the condition known as complicated pneumoconiosis" to create a rebuttable presumption under 20 C.F.R. § 718.304(b). *Id.* at 983.

ANALYSIS: The 11th Circuit noted that "the term 'massive lesions' means lesions revealed on autopsy or biopsy that support a diagnosis of complicated pneumoconiosis" and therefore "a physician need not employ the magic words 'massive lesions' in order to satisfy the requirements found in Section 718.304(b)." *Id.* at 986.

CONCLUSION: The 11th Circuit held that "until the Secretary provides further guidance on this matter, § 411(c)(3)(B) and § 718.304(b) are met if a preponderance of the evidence establishes that the [decedent's] autopsy reveals lesions that support a diagnosis of complicated pneumoconiosis." *Id.* at 987.

FEDERAL CIRCUIT

Int'l Gamco, Inc. v. Multimedia Games, Inc., 504 F.3d 1273 (Fed. Cir. 2007)

QUESTION: Whether an exclusive field of use licensee has standing to bring a patent infringement action without joining the patent holder, under 28 U.S.C. § 1292(b). *Id.* at 1276–77.

ANALYSIS: The Federal Circuit began by noting that "an exclusive licensee has standing to sue in its own name, without joining the patent holder, where 'all substantial rights' in the patent are transferred." *Id.* at 1276. While noting that the Supreme Court had not considered the standing of an exclusive field of use licensee to sue, the court analogized the exclusive field of use license to the "claim-by-claim exclusive license" at issue in *Pope Mfg. Co. v. Gormully & Jeffery Mfg. Co. Id.* at 1277–78. The court explained that both licenses "divide the scope of a patent right by its subject matter," thereby increasing the "potential for multiple litigations against any one defendant and among the licensees themselves" arising from "a single act of infringement." *Id.* The court reasoned that "[t]o alleviate this risk, this court's prudential standing requirement compels an exclusive licensee with less than all substantial rights, such as a field of use licensee, to join the patentee before initiating suit." *Id.*

CONCLUSION: The Federal Circuit held that "an exclusive field of use licensee does not have standing to sue in its own name without joining the patent owner" under 28 U.S.C. §1292(b). *Id.* at 1279.

Schwarz Pharma, Inc. v. Paddock Lab., Inc., 504 F.3d 1371 (Fed. Cir. 2007)

QUESTION: Whether a requirement exists to join "a patent owner when an exclusive licensee does not possess all substantial rights in the patent." *Id*. at 1374.

ANALYSIS: The Federal Circuit examined Supreme Court precedent on the issue of joinder in patent infringement cases, noting that *Independent Wireless Telegraph Co. v. Radio Corp. of America* requires the joinder of patent owners and their licensees. *Id.* However, the Federal Circuit observed that it had previously construed this joinder requirement on its own to be "one of prudential rather than constitutional standing." *Id.* The court determined that the primary reason for the joinder

requirement under *Independent Wireless* was "the possibility that the alleged infringer would be subject to multiple actions." *Id.* Thus, finding "no such danger" in this case, the court held joinder unnecessary. *Id.*

CONCLUSION: "[W]hen a patentee joins an exclusive licensee in bringing a patent infringement suit in a district court, the licensee does not lose standing to appeal even though the patentee does not join in the appeal." *Id.*

HIF Bio, Inc. v. Yung Shin Pharm. Indus. Co., 508 F.3d 659 (Fed. Cir. 2007)

QUESTION: "[W]hether a remand based on declining supplemental jurisdiction under [28 U.S.C.] § 1367(c) is within the class of remands described in [28 U.S.C.] § 1447(c), and thus barred from appellate review by § 1447(d)." *Id.* at 665.

ANALYSIS: The Federal Circuit noted that "[a]lthough we have not yet addressed this issue, several other Courts of Appeals, relying on the Supreme Court's decision in *Carnegie-Mellon Univ. v. Cohill*, . . . have held that review of a remand order based on declining supplemental jurisdiction is not barred by section 1447(d)." *Id.* However, the court noted that the Supreme Court holding in *Powerex* stated that "a remand order need only be colorably characterized as a remand based on lack of subject matter jurisdiction to be beyond the reach of appellate courts under § 1447(d)." *Id.* at 666. Thus, the Federal Circuit explained that when a district court declines supplemental jurisdiction over state claims, it "strips the claims of the only basis on which they are within the jurisdiction of the court." *Id.* at 667.

CONCLUSION: The Federal Circuit held that "a remand based on declining supplemental jurisdiction must be considered within the class of remands described in § 1447(c) and [is] thus barred from appellate review by § 1447(d)." *Id.*

DDB Techs., L.L.C. v. MLB Advanced Media, L.P., 517 F.3d 1284 (Fed. Cir. 2008)

QUESTION: Whether a plaintiff is entitled "to a jury trial on disputed jurisdictional facts that also implicate the merits of plaintiff's cause of action." *Id*. at 1291.

ANALYSIS: The Federal Circuit reviewed the approaches of other regional courts, which considered "the degree of intertwinement between the jurisdictional facts and the facts underlying the merits of the cause of action to determine whether dismissal on jurisdictional grounds is

appropriate, or whether resolution of the issues must await summary judgment proceedings or trial on the merits." *Id*. The court adopted the same approach and held that the "degree of intertwinement of jurisdictional facts and facts underlying the substantive claim should determine the appropriate procedure for resolution of those facts." *Id*.

CONCLUSION: The Federal Circuit held that a district court does not have to hold a preliminary hearing "rather than awaiting jury trial on the merits, to resolve the jurisdictional issues." *Id*.