First Impressions

The following pages contain brief summaries, drafted by the members of the *Seton Hall Circuit Review*, of issues of first impression identified by a federal court of appeals opinion announced between February 25, 2008 and October 8, 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

U.S. v. Beatty, 538 F.3d 8 (1st Cir. 2008)

QUESTION: Whether the 2003 amendments to the U.S. Sentencing Guidelines granted the government discretion in deciding whether to file a motion for an additional one-level decrease in the defendant's base level for acceptance of responsibility. *Id*.

ANALYSIS: The court followed every other circuit court that has decided this issue in its decision and held that the reduction is contingent upon a motion being filed by the government which requests the reduction. *Id*. at 14. The amended sentencing guideline, § 3E1.1(b), states that once a defendant has qualified for an offense level of 16 or greater, and upon motion of the government stating that the defendant has assisted authorities, the defendant qualifies for a decrease in the offense level by one level. *Id*. at 13–14. This language mirrors the language used in § 5K1.1, which was interpreted by the court in *Wade v. United States* as granting the government discretion to file the motion but limiting that discretion by stating that if the defendant can show that the government's motive was "based on an unconstitutional motive" or was "not rationally related to any legitimate Government end" then the discretion would be overturned. *Id.* at 16. The amendments to the sentencing guidelines changed the focus of the defendant's ability to be granted an offense level reduction. *Id.* Formerly the focus was based on whether the timeliness of the plea enabled the government to avoid trial preparation. Currently, the focus has shifted to whether the government believes that the acceptance of responsibility is genuine. *Id.* at 19. The court noted that granting the government broad discretion to file the motion may create a disincentive for defendants to challenge sentencing issues; however, the court felt that this was a cost that the defendant was going to have to weigh and that there was nothing improper about creating such a disincentive. *Id*. at 21.

CONCLUSION: The court held that the amendments granted the government discretionary power to file a motion for a one-level reduction in the defendant's base level. *Id*. at 15. The court further stated that the discretionary decision should only be challenged if the refusal to file the motion was based on an "unconstitutional motive" or was "not rationally related to any governmental end." *Id.*

***United States v. Vazquez-Botet, Nos.*, 532 F.3d 37 (1st Cir. 2008)**

QUESTION: Whether the district court committed legal error in interpreting "benefit . . . to be received in return for the payment" in § 2C1.1(b)(2)(A) to mean the payment a person in the defendant's position at the time the extortion occurred could have reasonably expected. *Id*. at 67.

ANALYSIS: The court first noted that the plain language of the sentencing guideline denoted the Sentencing Commission's intention that the inquiry be forward-looking. *Id*. The court then observed that the 5th Circuit has similarly held that "in determining the amount of benefits to be received, courts may consider the *expected* benefits, not only the actual benefit received." *Id*. The court stated that this prospective analysis was analogous to "case law on computing loss for purposes of sentencing." *Id*. "We have held that when a person is convicted of a fraud offense, a proper analysis of the loss he intended to cause asks what a person in his position at the relevant time would reasonably have expected to happen to the victim as a result of the fraud." *Id*. The court stated "the rationale for this ex ante inquiry lies in the purpose of the exercise: to set the defendant's punishment at a level commensurate with the degree of his moral culpability." *Id*.

CONCLUSION: The 1st Circuit held that the best interpretation of "benefit . . . to be received in return for the payment" is the benefit a person in the defendant's position at the time of the extortion would reasonably have expected the victim to receive by paying him the money he demanded. *Id.*

***Connectu LLC v. Zuckerberg*, 522 F.3d 82 (1st Cir. 2008)**

QUESTION: Whether "an amended complaint that switches the basis of the district court's subject matter jurisdiction from the existence of diversity of citizenship, 28 U.S.C. § 1332(a)(1), to the existence of a federal question, 28 U.S.C. § 1331, should be given effect when filed as of right before any jurisdictional challenge has been mounted." *Id.* at 85.

ANALYSIS: This case centers around a dispute between a group of Harvard undergraduate students who allegedly founded Connectu LLC, a social networking site designed toward college students. *Id*. at 86. Defendants allegedly stole the idea and created Facebook. *Id*. Connectu filed an amended complaint as of right under Fed. R. 15(a), the substance of which transformed the case from a diversity action to a federal

question action. *Id*. at 85. The court rejected the defendant's contention that the action "live or die from a jurisdictional standpoint as of the time of filing regardless of subsequent changes in either the facts or the underlying jurisdictional allegations." *Id*. at 90. The court found support in *Rockwell International Corp. v. United States*, wherein the Supreme Court stated that "when a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction." *Id*. at 91. The court also rejected the lower court's interpretation of the "time of filing" rule and opined that "no court has ever read the time-of-filing rule to bar a plaintiff from switching jurisdictional horses before any jurisdictional issue has been raised, abandoning a claimed entitlement to diversity jurisdiction, and substituting a claimed entitlement to federal question jurisdiction." *Id*. at 92.

CONCLUSION: The court held that "the instant appeal is not moot; that the amended complaint, filed as of right, superseded and replaced the original complaint; that the action was at that point transformed into a federal question case (at least in the circumstances at hand); that the time-of-filing rule does not apply to such a case." *Id.* at 96. The court further found that "the district court erred in looking to the original complaint and applying the time-of-filing rule. *Id*. The district court therefore mistakenly granted the defendants' motion to dismiss; the court had, and should have exercised, federal question jurisdiction over the action." *Id*.

United States v. Hernandez, 541 F.3d 422 (1st Cir. 2008)

QUESTION: Whether § 4A1.1(d) of the U.S. Sentencing Guidelines, which requires a sentencing court to add two points to a defendant's criminal history score "if the defendant committed the instant offense while under any criminal justice sentence, including probation," is applicable when a defendant's direct involvement in the instant offense of conspiracy occurred before the other criminal justice sentence was imposed, even though the overall conspiracy spanned a period running both before and after the secondary offense was committed. *Id*. at 424.

ANALYSIS: The court determined that although the use of "i.e." was imprecise, the statute should be read as "[t]wo points are added if the defendant committed any part of the instant offense (*and* any relevant conduct) while under any criminal justice sentence." *Id*. The court reached this conclusion because the definition of "offense" in the Guidelines encompasses: "the offense of conviction *and* all relevant

conduct." *Id*. (emphasis in original). Looking to how other courts had applied § 4A1.1(d) in analogous circumstances, the court determined that the portion of the statute relied on by the defendant allowed the use of relevant conduct to broaden the boundaries of the offense of conviction rather than to shrink those boundaries. *Id*. at 425.

CONCLUSION: The court concluded that the "guideline provision says what it means and means what it says." *Id*. at 422. Therein, the court affirmed the defendant's conviction and sentenced him in accordance with the lower court's decision. *Id*.

SECOND CIRCUIT

Garcia-Villeda v. Mukasey, 531 F.3d 141 (2d Cir. 2008)

QUESTION: Whether the Attorney General validly implemented the reinstatement of removal statute under 8 C.F.R. § 241.8. *Id*. at 145.

ANALYSIS: The court noted that although the issue is one of first impression within the 2nd Circuit, "[e]very other circuit that has considered the issue has upheld the regulation as a valid interpretation of the [Immigration and Nationality Act]." *Id*. at 146. To assess the validity of the regulation at issue, the court applied the two prong test annunciated in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc. Id.* Under the first prong of *Chevron*, the court must determine "'whether Congress has directly spoken to the precise question at issue . . . . If the intent of Congress is clear, that is the end of the matter' . . . . However, if the statute is found to be ambiguous, the question for us under the second prong 'is whether the agency's answer is based on a permissible construction of the statute.'" *Id*.

Applying *Chevron* to the present matter, the court determined that Congress was ambiguous regarding the procedures applicable to aliens who reenter the United States in violation of an existing removal order under INA §§ 240 and 241(a)(5). *Id*. at 148. The court then turned to the second prong of the test and found that the Attorney General had already interpreted the statute within 8 C.F.R. § 241.8. *Id*. at 149. Therefore, the court declared a lack of "authority to re-construe the statute, even to avoid potential constitutional problems." *Id*.

CONCLUSION: The 2nd Circuit held that the Attorney General's interpretation § 241.8 reflected a plausible reading of the statutory text, and the reinstatement procedure did not violate the alien's due process rights under the Fifth Amendment. *Id*.

***United States v. Aref,* 533 F.3d 72 (2d Cir. 2008)**

Editor's Note: This case involves two issues of first impression concerning the standard of review in criminal matters.

QUESTION ONE: What is "the standard for determining what [discoverable] classified information a criminal defendant is entitled to receive during discovery?" *Id.* at 76.

ANALYSIS: The court began its analysis by noting that "the House of Representatives Select Committee on Intelligence stated categorically in its report on CIPA that 'the common law state secrets privilege is not applicable in the criminal arena.'" *Id*. at 79. The court stated that the committee interpreted the Supreme Court cases dealing with the state secrets doctrine too broadly, and that those cases "recognize the privilege, but conclude that it must give way under some circumstances to a criminal defendant's right to present a meaningful defense." *Id*. The court purported to adopt the *Roviaro* standard enunciated by the Supreme Court in determining what discoverable, classified evidence is to be admitted in criminal proceedings. *Id*. However, the court changed the language of *Roviaro* from "relevant and helpful to the defense" to "material to the defense," which is arguably a more narrow construction. *Id*.

CONCLUSION: The 2nd Circuit held that discoverable, classified evidence may be admitted into criminal proceedings if it is "helpful or material to the defense." *Id.* at 80.

QUESTION TWO: What is "the standard of review for denials of motions to intervene in criminal cases?" *Id.* at 76.

ANALYSIS: Although "[t]he Federal Rules of Criminal Procedure make no reference to a motion to intervene in a criminal case," the court acknowledged that such motions are vital to the "public's First Amendment right of access to criminal proceedings." *Id*. at 81. Since denials of motions to intervene in civil cases are reviewed for abuse of discretion, the court concluded that the same standard should apply in criminal cases. *Id.*

CONCLUSION: The 2nd Circuit held that denials of motions to intervene in criminal cases are to be reviewed for abuse of discretion. *Id*.

***Estate of Pew v. Cardarelli,* 527 F.3d 25 (2d Cir. 2008)**

QUESTION: "[W]hether a state-law deceptive practices claim predicated on the sale of a security" is removable to federal court pursuant to the Class Action Fairness Act ("CAFA"). *Id.* at 29.

ANALYSIS: The court first identified 28 U.S.C. § 1332(d)(9)(C), which does not extend original jurisdiction to district courts, and 28 U.S.C. § 1453(d)(3), which prevents defendants from removing actions to federal court and precludes appellate review of district courts' remand orders for "any class action[s] that solely involve[] a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security," as the only potentially relevant statutes. *Id*. at 29–30. It posited that "rights" refer, for example, to "rights in the holders to a rate of interest and to principal repayment at certain dates" and cannot include the right to bring any cause of action relating to a security because that would render superfluous the exceptions to federal jurisdiction in §§ 1332(d)(9) and 1453(d)(1) for class actions "concerning a covered security." *Id.* at 31. The court explained that "duties" are owed by persons administering securities and therefore "obligations" must "be those created in instruments, such as a certificate of incorporation, an indenture, a note, or some other corporate document." *Id.* at 31–33. The 2nd Circuit explained that claims "relat[ing] to" these "rights" and "obligations" are those "grounded in the terms of the security itself" such as "where the interest rate was pegged to a rate set by a bank that later merges into another bank, or where a bond series is discontinued, or where a failure to negotiate replacement credit results in a default on principal." *Id*. at 31–32. The court then confirmed its statutory analysis by considering the relevant legislative history in Senate Judiciary Committee Report No. 109-14. *Id*. at 32–33. Citing the Report, the court reiterated that the CAFA exceptions apply only to litigation regarding "'the *terms of the securities* issued by business enterprises'" and that section 1332(d)(9) is "'intended to cover *disputes over the meaning of the terms of a security* . . . .'" *Id*. at 33. Finally, the court declared that it had appellate jurisdiction where the district court below had original jurisdiction. *Id*. at 31.

CONCLUSION: The 2nd Circuit held that the CAFA exceptions in §§ 1332(d)(9) and 1453(d)(3) "apply only to suits that seek to enforce the terms of instruments that create and define securities, and to duties imposed on persons who administer securities." *Id*. at 33. It therefore concluded that state-law fraud claims based on the sale of securities do not fall within the exception and are removable to federal court. *Id*.

***United States v. Douglas,* 525 F.3d 225 (2d Cir. 2008)**

QUESTION: Whether a court has an obligation, pursuant to 18 U.S.C. § 3005, to continue the appointment of a second attorney assigned to a defendant indicted for a capital crime when the government notifies the court that it will no longer seek the death penalty. *Id*. at 235.

ANALYSIS: The 2nd Circuit first noted that § 3005 is silent on the issue. *Id*. However, the court agreed with a majority of the other federal courts of appeals having considered the issue that a criminal "matter is no longer a capital case within the meaning of § 3005" once the government notifies the court and the defendant that it no longer intends to seek the death penalty. *Id*. at 237. Consequently, the court held that the statute no longer *required* the district court to maintain the dual appointment of attorneys under these circumstances. *Id*. However, the court expressed deep concern about the rights to a fair trial for those accused of criminal offenses. *Id*. at 238. Thus, the court maintained that district courts could continue the appointment of a second attorney in their discretion. *Id*.

CONCLUSION: The court held that § 3005 does not entitle a defendant to a second attorney "after the government's renunciation of any intent to seek the death penalty" but does not preclude a district court from continuing the dual appointment in its discretion. *Id.* at 237–38.

Holcomb v. Iona College, 521 F.3d 130 (2d Cir. 2008)

QUESTION: Whether an employee can bring an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) against his employer because of his association with a person of another race. *Id*. at 131.

ANALYSIS: The court noted that under "Title VII of the Civil Rights Act of 1964, as relevant, provides that it is an 'unlawful employment practice for an employer . . . to discharge any individual . . . because of such individual's race.'" *Id*. at 137. The court further noted that "in 1991, Congress amended the statute to make clear that 'an unlawful employment practice is established when the complaining party demonstrates that race . . . was a motivating factor for any employment practice, even though other factors also motivated the practice.' 42 U.S.C. § 2000(e)-2(m)." *Id*. The court reasoned that "[a]n employment decision, then, violates Title VII when it is 'based in whole or in part on discrimination.'" *Id.* at 137–38. Therefore, "[t]o avoid summary judgment in an employment discrimination case, 'the plaintiff is not

required to show that the employer's proffered reasons were false or played no role in the employment decision, but only that they were not the only reasons and that the prohibited factor was at least one of the 'motivating' factors." *Id*. The court agreed with the district court that "Holcomb has established a prima facie case of race-based employment discrimination under Title VII" and that the defendant sustained its burden of proof under *McDonnell Douglas Corp. v. Green*. *Id.* at 140–41. The court, however, disagreed with the district court finding that even though Iona produced evidence that it acted for a non-discriminatory reason, which would under normal circumstances render Holcomb incapable of relying on the presumption of discrimination raised by the prima facie case, Holcomb produced evidence "to prove that the decision was partly so motivated to prevail on the ultimate merits of his claim." *Id*. at 141–42.

CONCLUSION: The court held for the first time, "that an employer may violate Title VII if it takes action against an employee because of the employee's association with a person of another race." *Id*. at 131. The court reversed and remanded the case to the district court so that a reasonable jury could determine whether "Holcomb was fired in part because he was married to a black woman." *Id*.

Williams v. Beemiller, Inc., 527 F.3d 259 (2d Cir. 2008)

QUESTION: "[W]hether a magistrate judge may order a case remanded to state court under [28 U.S.C.] § 1447(c)," and whether such orders are dispositive. *Id*. at 265.

ANALYSIS: Because a § 1447(c) remand order determines the fundamental question of whether a case could proceed in a federal court, the court found that it is not distinguishable from a motion to dismiss an action from federal court based on a lack of subject matter jurisdiction for the purpose of § 636(b)(1)(A). *Id*. at 266. Adopting the reasoning of the 3rd, 6th, and 10th Circuits, the 2nd Circuit held that a remand order was a dispositive order, since it is functionally equivalent to an order of dismissal. *Id*. As such, a remand order can only be entered by district courts. *Id*.

CONCLUSION: A remand order is dispositive and can only be entered by district courts. *Id*. Therefore, a party is entitled to a district court's *de novo* review of a magistrate judge's report and recommendation regarding an opposing party's motion to remand. *Id*.

***United States v. Yannotti*, 541 F.3d 112 (2d Cir. 2008)**

QUESTION: Whether, for the purposes of sentencing a defendant for participation in a RICO conspiracy, the court should calculate the U.S. Sentencing Guidelines range "based only on predicate conduct that a fact-finder found him to have engaged in beyond a reasonable doubt." *Id*. at 128.

ANALYSIS: The court stated that "to secure [defendant]'s conviction for RICO conspiracy, the government was not required to prove *actual* commission of a single predicate act." *Id*. at 129. "Because overt acts are not distinct offenses that must be proven to sustain a RICO conspiracy conviction, and the RICO conspiracy charged in this case is appropriately viewed as single-object conspiracy, we now join the First and Sixth Circuits in concluding that U.S.S.G. § 1B1.2(d) is inapplicable." *Id*. Finally, the court acknowledged that, at sentencing, "a district court may consider all information adduced during trial, including acquitted conduct . . . While a fact-finder is required to find guilt beyond a reasonable doubt, the sentencing court may find facts relevant to sentencing by the lower preponderance of the evidence standard." *Id*.

CONCLUSION: "[A] sentencing court may consider predicate acts as relevant conduct under U.S.S.G. § 1 because their commission need not be proven beyond a reasonable doubt." *Id*.

***United States v. Amato*, 540 F.3d 153 (2d Cir. 2008)**

QUESTION: Whether attorney fees and accounting costs are "other expenses" includable in a restitution order under the Mandatory Victim Restitution Act. *Id*. at 159.

ANALYSIS: Section (b)(4) of the Mandatory Victim Restitution Act states that a victim is to be reimbursed "for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." *Id*. The court rejected the defendant's two arguments against the inclusion of attorney fees and accounting costs as "other expenses" in section (b)(4). First, the court found defendants' *ejusdem generis* theory, or expenses similar in nature argument, without merit. *Id*. at 160–61. The court noted that e*jusdem generis* is a guide to deciphering legislative intent, not a binding doctrine. *Id*. at 160. Furthermore, the court argued that for *ejusdem*

generis to be applicable, the statutory terms must collectively hold a common attribute—a factor absent from in the language of section (b)(4). *Id*. at 160–61. Second, the court found the defendant's causation argument without foundation. *Id*. at 161–62. According to the court, even if a "direct and foreseeable result" test was adopted, the inclusion of attorney fees and accounting costs would satisfy that threshold. *Id*. at 162. Finally, the court concluded that the plain language of the statute grants the courts broad authority in fashioning restitution orders. *Id*. at 160.

CONCLUSION: The 2nd Circuit held "that 'other expenses' incurred during the victim's participation in the investigation or prosecution of the offense or attendance at the proceeding related to the offense may include attorney fees and accounting costs." *Id*. at 159.

***United States v. Hassan*, 542 F.3d 968 (2d Cir. 2008)**

QUESTION: "[W]hether the Controlled Substance Act ("CSA") was unconstitutionally [vague] as it applied to khat, a leaf used to brew tea." *Id*. at 978.

ANALYSIS: The 2nd Circuit addressed the defendant's argument of vagueness under the Due Process Clause of the Fifth Amendment. *Id.* The court relied upon the decisions of the 1st, 6th, and 8th Circuits, which all rejected due process challenges to the khat-related regulatory scheme in the CSA. *Id*. The court emphasized that the vagueness doctrine requires a statute to "'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited' and 'provide explicit standards for those who apply [it].'" *Id*. In reliance upon other circuit court decisions, the court stressed that "what saves the statute at issue here—the CSA as it relates to khat—from constitutional trouble is the fact that scienter is required for a conviction." *Id*. at 978.

CONCLUSION: The 2nd Circuit held that the requirement that the government prove that a person "knowingly or intentionally" import or distribute khat with cathinone was sufficient to save the statue from unconstitutionality. *Id*. at 979.

***Sims v. Blot*, 534 F.3d 117 (2d Cir. 2008)**

QUESTION: Whether "a plaintiff asserting a civil rights claim forfeits his psychotherapist-patient privilege by reason of allegations in his pleading or answers to questions in discovery." *Id*. at 133.

ANALYSIS: The court stated that "the Supreme Court made clear that the federal courts are required to recognize" psychotherapist-patient

privilege, but accepted that the privilege can be waived like any other. *Id.* at 130–31. The court agreed with the analysis of the D.C. Circuit, having previously been "presented with precisely these questions" where the plaintiff therein also "made no claim for emotional distress and had expressly abandoned any such claim." *Id*. at 133–34. The court analogized "to other testimonial privileges," finding that privilege is waived where the privileged communication is used offensively, but not merely acknowledging a mental condition for which the plaintiff does not seek recompense, nor "when the plaintiff's mental state is put in issue only by the defendant." *Id*.

CONCLUSION: The 2nd Circuit held "that a plaintiff does not forfeit his psychotherapist-patient privilege merely by asserting a claim for injuries that do not include emotional damage" nor does he "forfeit that privilege by merely stating that he suffers from a condition . . . for which he does not seek damages; that a plaintiff may withdraw or formally abandon all claims for emotional distress in order to avoid forfeiting" the privilege; and that the privilege "is not overcome when [the plaintiff's] mental state is put in issue only by another party." *Id*. at 134.

***Wabtec Corp. v. Faiveley Transp. Malmo AB,* 525 F.3d 135 (2d Cir. 2008)**

QUESTION: "[W]hether a motion to dismiss based on an arbitration clause can be construed as a motion to compel arbitration, and therefore as falling within the parameters of 9 U.S.C. § 16(a)(1)(C) . . ." *Id*. at 139.

ANALYSIS: The 2nd Circuit joined the D.C. Circuit in refusing to treat Wabtec's motion to dismiss as a motion to compel arbitration. *Id*. at 140. The court based its refusal on the fact that Wabtec did not "explicitly request the district court to direct that arbitration be held . . . [but instead] requested only the dismissal of Faiveley's application for preliminary injunction and expedited discovery." *Id*. The 2nd Circuit followed the plain language of 9 U.S.C. § 16(a) which states that "the denial of a motion to dismiss based on an arbitration clause is not an order from which an appeal may be taken." *Id*.

CONCLUSION: The court determined that under the Federal Arbitration Act § 16(a)(1)(C), an order to dismiss based on an arbitration clause cannot be construed as a motion to compel arbitration where an appellant does "not frame its argument in terms of mandatory arbitration but in terms of *judicial preclusion*." *Id*. at 140.

***Dedji v. Mukasey,* 525 F.3d 187 (2d Cir. 2008)**

QUESTION: Whether an immigration judge has the discretion to "disregard the deadlines imposed" by local immigration court rule 8 C.F.R. § 1003.31. *Id*. at 188.

ANALYSIS: The court explained that immigration judges have the inherent power to depart from local rules "in certain circumstances where fairness demands that noncompliance be excused." *Id*. at 192. The court explained that where "an alien has demonstrated good cause for the failure . . . and substantial prejudice" will result from the strict enforcement of a deadline, the judge may exercise its "informed discretion." *Id*. The court found the immigration judge failed to consider whether a departure from the local rules was warranted. *Id*.

CONCLUSION: The 2nd Circuit concluded "where an alien has demonstrated good cause for failure to timely file documents" and "strict adherence to the local rules would cause unfairness" an Immigration Judge may allow for a "reprieve from the filing deadlines set forth in the local rules." *Id*. at 193.

***United States v. Darden,* 539 F.3d 116 (2d Cir. 2008)**

QUESTION: "Whether a prior state conviction was a conviction for a 'serious drug offense' within the meaning of the Armed Career Criminal Act ("ACCA"), where state law prescribed a maximum sentence of at least ten years for the offense at the time of the state conviction but state law, prior to federal sentencing, prospectively reduced the maximum sentence to less than ten years for the same offense conduct." *Id*. 120–21.

ANALYSIS: First, the 2nd Circuit addressed whether current state law or the state law in place at the time of the conviction should be used in determining the maximum term prescribed for the offense. *Id.* at 121. The court held that sentencing courts should examine the current state law because Congress's use of the present tense in the ACCA signals that the state's current sentencing process is applicable. *Id*. at 121–22. Then, the 2nd Circuit discussed whether "the date of the commission of the offense is property regarded as part of the offense . . . for which the maximum term is prescribed by law." *Id*. at 123. The court distinguished a Supreme Court decision, which held "that the increased maximum term applicable to recidivists was the maximum term prescribed for the offense by state law," but stated that this dicta did not apply since the act

in question does not view drug crimes committed before a certain date as more serious. *Id*. at 125–26. Therefore, the court found that "the timing of the offense conduct is not part of the offense of conviction to which the maximum term is tied for purposes of the ACCA." *Id*. at 127.

CONCLUSION: The 2nd Circuit concluded that the ACCA leaves no ambiguity and the maximum that is prescribed by state law falls under the current sentencing scheme. *Id*. at 128.

***Jin v. Mukasey,* 538 F.3d 143 (2d Cir. 2008)**

QUESTION: "Whether an alien subject to a final order of removal who files a successive asylum application based only on changed personal circumstances must also file a motion to reopen based on changed country conditions pursuant to 8 C.F.R. § 1003.2(c)(3)(ii), when the ninety-day deadline has passed for such a motion." *Id*. at 147.

ANALYSIS: The 2nd Circuit discussed whether the existence of a liberty or property interest in a discretionary grant of asylum was available to an alien who had previously been denied an asylum application. *Id.* at 157. The court agreed with the Board of Immigration Appeals' ("BIA") interpretation of the INA's relevant statutory provisions. *Id.* at 156. "The Board's determination that a properly filed motion to reopen is a prerequisite to the filing of a new asylum petition when the petitioner is under a final removal order has recently been affirmed by four other circuits and is based on sound reasoning." *Id.* at 152. The 2nd Circuit agreed with the 7th Circuit that some restrictions must be in place to limit manipulation by petitioners for asylum applications. *Id*. at 156. Thus, the 2nd Circuit held that "an alien under a final removal order must file a successive asylum application in conjunction with a motion to reopen and in accordance with those procedural requirements." *Id*.

CONCLUSION: The 2nd Circuit concluded that an alien who has previously filed an asylum application and been adjudicated deported and has nonetheless remained illegally in the country, does not have a property interest in a discretionary grant of asylum. *Id*. at 157.

***Sealed Plaintiff v. Sealed Defendant,* 537 F.3d 185 (2d Cir. 2008)**

QUESTION: Under what circumstance may a plaintiff file a complaint using a pseudonym and if a party appeals the court's denial of the right to file a complaint using a pseudonym, what standard does the appeals court use to review the district court decision. *Id*.

ANALYSIS: Rule 10(a) of the Federal Rules of Civil Procedure requires that parties' names are included in the title of the complaint in order to allow for public scrutiny of judicial proceedings. *Id*. at 188–89. Courts, however, have provided for some exceptions to this requirement. *Id*. If the plaintiff can show that it has a "substantial privacy right" which would counteract the need for openness in judicial proceedings, the court should permit the use of a pseudonym. *Id*. at 189. Additionally, courts should consider the prejudice to the defendant before permitting a plaintiff to use a pseudonym. *Id*. In order to balance the plaintiff's right to privacy without avoiding prejudice to the defendant, the court established a non-exhaustive list of factors that should be considered when deciding whether to permit the use of a pseudonym: whether the litigation involves matters that are highly sensitive and personal; whether identification poses a risk of retaliation; whether identification poses other risks and the severity of those harms; whether the plaintiff is particularly vulnerable to the harms of disclosure; whether the suit is challenging the government or private parties; whether the defendant is prejudiced by the use of a pseudonym; whether the plaintiff's identity has been kept confidential; whether the public interest is furthered by requiring disclosure; whether the public interest in the identity is particularly weak based on the nature of the issues being presented; and whether there are any alternative ways to protect the plaintiff. *Id*. at 189–90. This test requires a court to use its discretion based on the factual circumstance being presented to it to determine if the use of a pseudonym is necessary. *Id*. at 190.

CONCLUSION: The district court must balance the party's interest in anonymity with the potential prejudice to the other party when determining whether to permit a party to proceed under a pseudonym. *Id*. at 186. The court concluded that the District Court's denial of plaintiff's request to file under a pseudonym was erroneous, as was its dismissal of the complaint and vacated and remanded the decision. *Id*. at 193.

United States v. Siraj, 533 F.3d 99 (2d Cir. 2008)

QUESTION: Whether written police reports that memorialized oral statements made by a defendant to an undercover officer had to be produced on demand under Fed. R. Crim. P. 16(a)(1)(B)(i). *Id*. at 100.

ANALYSIS: The court analyzed the plain language of Federal Rules of Criminal Procedure 16(a)(1)(B). *Id*. at 101. The court then noted that the language of Rule 16(a)(1)(B) distinguishes between two types of "Written or Recorded" statements. *Id*. "Subsection (i) makes discoverable all "relevant written or recorded statement[s] by the

defendant" that the prosecutor could reasonably know are within the "government's possession, custody, or control." *Id*. Subsection (ii) makes discoverable certain portions of "written record[s] containing the substance of any relevant oral statement" made by the defendant—if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent." *Id*. at 101. The court relied upon "subsection (a)(1)(B)(ii)" in finding that such records need not be produced upon demand. *Id*.

CONCLUSION: The 2nd Circuit held that such reports must not be produced upon demand under Federal Rule of Criminal Procedure 16(a)(1)(B)(i). *Id*. at 100.

THIRD CIRCUIT

United States v. Wecht, 537 F.3d 222 (3d Cir. 2008)

QUESTION: Whether the First Amendment requires disclosure of the jurors' names prior to empanelment of the jury in this criminal trial. *Id*. at 233.

ANALYSIS: The court examined whether the "experience and logic" test established the existence of a First Amendment right of access to obtain jurors' names prior to empanelment of the jury. *Id*. at 235. The court looked at history, and it concluded that "public knowledge of jurors' names is a well-established part of American judicial tradition" because "since the development of trial by jury, the process of" jury selection has been "a public process with exceptions only for good cause shown." *Id*. at 235–36. The court reasoned that "knowledge of juror identities allows the public to verify the impartiality" of the jurors. *Id*. at 238.

CONCLUSION: The court stated that knowing the identity of jurors should occur no later than swearing in and empanelment because "corruption and bias should be rooted out" before the trial. *Id*. at 239.

Pardini v. Allegheny Intermediate Unit, 524 F.3d 419 (3d Cir. 2008)

QUESTION: Whether the Individuals with Disabilities in Education Act ("IDEA") "authorizes an award of attorney's fees to an attorney-parent who represented his child" in both IDEA administrative proceedings and federal court proceedings. *Id*. at 422.

ANALYSIS: The court explained that "fee-shifting statutes are meant to encourage the effective prosecution of meritorious claims," and

"attorney-parents are generally incapable of exercising sufficient independent judgment on behalf of their children." *Id*. at 422. Because fee-shifting provisions serve "as an incentive to retain independent counsel," the court found the rule better served by the denial of attorney fees to attorney-parents in IDEA cases. *Id*. at 425.

CONCLUSION: The court concluded that an attorney-parent cannot receive attorney fees in the representation of his minor child in IDEA administrative proceedings or federal court proceedings. *Id*.

United States v. Iglesias, 535 F.3d 150 (3d Cir. 2008)

Editor's Note: This case involves two issues of first impression, one concerning the Federal Rules of Evidence and the other concerning the United States Sentencing Guidelines.

QUESTION ONE: Whether under Rule 801(d)(1)(A) of the Federal Rules of Evidence, testimony is considered inconsistent when a witness refuses to answer questions that they had previously answered unequivocally in evidentiary hearings. *Id*. at 159.

ANALYSIS: Addressing the first issue, the Court looked to the plain language of Rule 801(d)(1)(A) of the Federal Rules of Evidence, which does not consider evidence inadmissible as hearsay if "[t]he declarant testifies at trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . inconsistent with the declarant's testimony, and was given under oath . . . at a trial, hearing, or other proceeding. . . ." *Id*. at 158. Consistent with its sister courts in the 8th and 7th Circuits, the 3rd Circuit held that inconsistency may be found not only where a witness gives overtly contradictory testimony, but also where a witness gives "evasive and rambling responses" to questions that had been answered clearly at a prior evidentiary hearing. *Id*. at 159. The court reasoned that "inconsistency is not limited to diametrically opposed answers, inability to recall, silence, or changes of position." *Id*.

CONCLUSION: The 3rd Circuit held that (a) witnesses who refuse to clearly answer questions that they had previously answered under oath may not have their prior testimony deemed inadmissible as hearsay. *Id*. at 159.

QUESTION TWO: Whether in sentencing a conspirator to drug distribution, a court should "exclude from the quantity of drugs seized an amount (the conspirator) intended to keep for personal consumption." *Id*. at 160.

ANALYSIS: Turning to the second issue, the court observed that commentary to the United States Sentencing Guidelines § 1B1.3(a)(1)(B) explains that a convicted conspirator "is accountable for all quantities of contraband with which he was directly involved." *Id*. at 160. The 3rd Circuit noted that "[e]very circuit to address the question has held that where a member of a conspiracy to distribute drugs handles drugs both for personal consumption and distribution in the course of the conspiracy, the entire quantity of drugs handled is relevant [for sentencing purposes]."

CONCLUSION: The 3rd Circuit held that "[d]rugs that a defendant earmarks for his personal use" should not "be deducted from the total quantity involved in a conspiracy" when calculating a conspirator's sentence. *Id*. at 160.

***Prusky v. ReliaStar Life Ins. Co.,* 532 F.3d 252 (3d Cir. 2008)**

QUESTION: "What constitutes a reasonable substitute for mitigation purposes in the context of the breach of an investment contract." *Id*. at 259.

ANALYSIS: The court found that the view espoused in *Teachers Insurance and Annuity Association of America v. Ormesa Geothermal* was well reasoned. *Id*. The *Ormesa Geothermal* court found that "a reasonable substitute must be one with a similar risk-reward profile to that of the opportunity lost as a result of the breach." *Id*. "The court emphasized that in the mitigation context, an alternative investment should have investment characteristics as close as possible to the original investment in terms of principal, interest rate, borrower credit rating and intended duration." *Id.*

CONCLUSION: The 3rd Circuit concluded that "courts should consider the specific nature and characteristics of the performance lost as a result of the breach in determining whether a proposed substitute was in fact reasonable . . . ."*Id*.

***Mallon v. Trust Company of New Jersey Severance Pay Plan*, 282 Fed. App'x 991 (3d Cir. 2008)**

Editors's Note: This case resolves two issues of first impression concerning severance administration under ERISA.

QUESTION ONE: Whether the district court erred in reviewing the Severance Plan Administrator's decision to deny Plaintiff's severance claim too deferentially. *Id*. at 994.

ANALYSIS: The court noted that under the Employee Retirement Income Security Act ("ERISA") "if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a factor in determining whether there is an abuse of discretion." *Id*. at 994. However, the 3rd Circuit found that the district court had "properly [taken] into account" all of the relevant factors that "could have heightened its scrutiny." *Id.*

QUESTION TWO: Whether the Severance Plan Administrator erred in construing the severance plan in such a way that Plaintiffs were denied severance benefits due to their resignations. *Id*. at 995.

ANALYSIS: The court noted that in reviewing a Plan Administrator's decision it would consider "(1) whether the interpretation is consistent with the goals of the Plan; (2) whether it renders any language in the Plan meaningless or internally inconsistent; (3) whether it conflicts with the substantive or procedural requirements of the ERISA statute; (4) whether the [relevant entities have] interpreted the provision at issue consistently; and (5) whether the interpretation is contrary to the clear language of the Plan." *Id*. at 995.

CONCLUSION: The 3rd Circuit held that both the standard of the district court's review and its interpretation of the severance plan were not "arbitrary and capricious." *Id*. at 997. The court stated that "[e]ven under a heightened standard of review, our task is not to substitute our view for that of the Plan Administrator." *Id*.

***United States v. Geiser*, 527 F.3d 288 (3d Cir. 2008)**

QUESTION: Whether the term "personally" is textually ambiguous as included in the Refugee Relief Act of 1953, Pub. L. No. 83-203 § 14(a), 67 Stat. 400, 406 (2003) prohibiting the issuance of visas to "any person who personally advocated or assisted in the persecution of any person or group of persons" as applied to the case of an armed Nazi concentration camp guard who did not commit atrocities himself. *Id*. at 297.

ANALYSIS: The 3rd Circuit discerned the meaning of the term "personally" by looking first at the "'plain' and 'literal' language of the statute." *Id.* The court consulted various dictionary definitions and found that the "plain meaning of 'personally advocated or assisted in the persecution of any person' is that an individual, by his own actions performed in person, advocated or assisted in persecution." *Id.* The court then referred to the decisions of the 7th and 8th Circuits to support its

conclusion that an armed guard at a concentration camp "personally advocated or assisted in . . . persecution" because "his personal actions assisted in keeping the prisoners confined in the camps where they were persecuted." *Id*. at 297–98. These actions included standing "watch at the perimeter of the concentration camps with instructions to fire his rifle if a prisoner tried to escape" and "march[ing] prisoners to and from their work sites." *Id*. at 297.

CONCLUSION: The 3rd Circuit concluded that the term "personally" is not textually ambiguous as included in the Refugee Relief Act § 14(a). *Id*.

***Lawrence v. City of Philadelphia*, 527 F.3d 299 (3d Cir. 2008)**

QUESTION: "[W]hether paramedics employed by the City of Philadelphia Fire Department have 'legal authority and responsibility' for fire suppression activities within the meaning of the Fair Labor Standards Act [("FLSA")], thereby bringing them among the exemptions" from overtime pay. *Id*. at 302.

ANALYSIS: The court noted that under 29 U.S.C. § 207(a) of the FLSA an employer must pay an employee "time-and-a-half" for all work over 40 hours a week. *Id*. at 303. However, the court added that § 207(k) exempts a "public agency" from subsection (a)'s overtime requirements with respect to various categories of employees, including individuals engaged in "fire protection activities." *Id*. For work to qualify as "fire protection activities" the worker: (1) must be "trained in fire suppression;" (2) must have "legal authority and responsibility to engage in fire suppression;" and (3) must be "employed by a fire department." *Id*. at 303. The court noted that § 203(y) was added to clarify that dual function paramedics are to be exempt from the FLSA overtime provision and are to be treated as firefighters, whereas paramedics are entitled to the time-and-a-half overtime pay. *Id*. at 318.

CONCLUSION: The court found that where paramedics do not have training in fire suppression, they are not exempted from the overtime requirements of § 207(A) of the FLSA. *Id*. at 319.

***United States v. Iglesias,* 535 F.3d 150 (3d Cir. 2008)**

Editor's Note: This case resolves two issues of first impression.

QUESTION ONE: Whether, under Rule 801(d)(1)(A) of the Federal Rules of Evidence, testimony is considered inconsistent when a witness refuses to answer questions that they had previously answered unequivocally in evidentiary hearings. *Id*. at 159.

ANALYSIS: The 3rd Circuit concluded that inconsistency may be found not only where a witness gives overtly contradictory testimony, but also where a witness gives "evasive and rambling responses" to questions that had been answered clearly at a prior evidentiary hearing. *Id*. The court reasoned that "inconsistency is not limited to diametrically opposed answers, inability to recall, silence, or changes of position." *Id*.

CONCLUSION: The 3rd Circuit held that witnesses who refuse to clearly answer questions that they had previously answered under oath may not have their prior testimony deemed inadmissible as hearsay. *Id*.

QUESTION TWO: Whether, in sentencing a conspirator to drug distribution, a court should "exclude from the quantity of drugs seized an amount that [the conspirator] intended to keep for personal consumption." *Id*. at 160.

ANALYSIS: The court began by looking to the commentary to the U.S. Sentencing Guidelines Manual § 1B1.3(a)(1)(B), which explains that a convicted conspirator "is accountable for all quantities of contraband with which he was directly involved." *Id*. at 160. The 3rd Circuit noted that "[e]very circuit to address the question has held that where a member of a conspiracy to distribute drugs handles drugs both for personal consumption and distribution in the course of the conspiracy, the entire quantity of drugs handled is relevant [for sentencing purposes]." *Id*. at 160.

CONCLUSION: The 3rd Circuit joined the 1st, 7th, 8th, and 10th circuits in holding that "[d]rugs that a defendant earmarks for his personal use" should not "be deducted from the total quantity involved in a conspiracy" when calculating a conspirator's sentence. *Id*. at 160.

***United States v. Whitted,* 541 F.3d 480 (3d Cir. 2008)**

QUESTION: "[W]hether the Fourth Amendment requires any level of suspicion to justify a border search of a passenger cabin aboard a cruise liner arriving in the United States from a foreign port." *Id*. at 482.

ANALYSIS: The court acknowledged that "routine" border searches "may be conducted . . . [without] any suspicion of wrongdoing," but "nonroutine" border searches require reasonable suspicion to be constitutional. *Id*. at 485. Looking to the decisions of several other courts, the 3rd Circuit likened the search of a cruise ship cabin to the search of a personal residence more than a vehicle, and found "that the search of private living quarters aboard a ship at the functional equivalent of a border is a nonroutine border search and must be supported by reasonable suspicion." *Id*. at 488. The court then "consider[ed] the totality of circumstances in determining whether reasonable suspicion existed at the time of the search," and concluded that "the facts here support the conclusion that the customs officers reasonably suspected [the defendant] of criminal activity." *Id*. at 489.

CONCLUSION: A border search of a passenger cabin is considered "nonroutine," requiring reasonable suspicion to justify such a search. *Id*. at 482.

***Rosenau v. Unifund Corp.,* 539 F.3d 218 (3d Cir. 2008)**

QUESTION: "[W]hether a letter from a Legal Department that employs no lawyers is misleading under [15 U.S.C.S. §] § 1692e(3)" of the Fair Debt Collection Practices Act ("FDCPA"). *Id*. at 222.

ANALYSIS: The court began by noting that "[a] debt collection letter is deceptive where it can be reasonably read to have two or more different meanings, one of which is inaccurate." *Id*. The court concluded that in light of its precedent, "the issue in this case is whether under the least sophisticated debtor standard, Unifund's letter to Rosenau can be reasonably read to have two different meanings, one of which is inaccurate." *Id*. at 223.

CONCLUSION: The court concluded that "the statute forbids '[t]he false representation or implication that . . . any communication is from an attorney. . . .' [and therefore] a debt-collection letter can be deceptive under the FDCPA even if it only implies that it is from an attorney." *Id*. at 224. The Court concluded that the district court had misapplied this standard and therefore remanded for proceedings therewith. *Id*. at 225.

***Swiger v. Allegheny Energy, Inc.*, 540 F.3d 179 (3d Cir. 2008)**

QUESTION: "Whether a federal district court has diversity jurisdiction over a lawsuit involving a partnership that has among its partners an American citizen domiciled in a foreign state." *Id.* at 181.

ANALYSIS: The Supreme Court has consistently applied the *Chapman* rule to establish "[a] partnership's citizenship for purposes of diversity." *Id*. at 185. This rule determines a partnership's citizenship, for diversity purposes, "by reference to *all* partners, and *all* partners must be diverse from *all* parties on the opposing side." *Id*. at 184. "The rule of *Chapman* is a legal construct that allows a real legal entity, though a non-citizen, to sue and be sued in federal court based upon diversity by looking through the partnership to the citizenship of each partner." *Id*. at 185. The 3rd Circuit further noted that "all courts that have addressed this issue have held that . . . an entity [such as the partnership here] does not qualify for diversity jurisdiction." *Id*. at 181.

CONCLUSION: The 3rd Circuit adopted the *Chapman* rule and held, "[w]henever a partnership (or other unincorporated association) brings suit or is sued in a federal court, the citizenship of each of its partners (or members) must be considered in determining whether diversity jurisdiction exists, and all partners (or members) must be diverse from all parties on the opposing side." *Id*. at 185.

***In re APA Transp. Corp. Consol. Litig.*, 541 F.3d 233 (3d Cir. 2008)**

QUESTION: "[W]hether the Plaintiff Funds can be considered 'person[s]' permitted to seek enforcement of the WARN Act pursuant to 29 U.S.C. § 2104(a)(5)." *Id*. at 241.

ANALYSIS: The court first noted that the relevant provision of the WARN Act provides that a civil suit may be brought by "[a] person seeking to enforce such liability, including a representative of employees or a unit of local government aggrieved under paragraph (1) or (3)." *Id*. at 241. Since the WARN Act failed to define the word "person," the court turned to the "reasonable" regulations promulgated by the Department of Labor ("DOL") pertaining to "Warn Act enforcement." *Id*. The court cited to 20 C.F.R. § 639.1(d), which permits "[e]mployees, their representatives and units of local government" to initiate civil actions against "employers believed to be in violation of § 3 of the Act." *Id*. The court reasoned that since this provision indicated that only employees, union representatives and units of local government may bring suit, the Court would apply the DOL regulation. *Id*.

CONCLUSION: Under the applicable DOL enforcement regulations, the court found that Plaintiff Funds are not "person[s]" that may enforce the WARN Act. *Id*.

***Rranci v. Attorney General of the United States,* 540 F.3d 165 (3d Cir. 2008)**

QUESTION: Whether the United Nations Convention Against Transnational Organized Crime ("Convention") affects the removal of an alien who served as a government witness in the United States if the person he made a statement or testified against has threatened his life. *Id.* at 168.

ANALYSIS: The 3rd Circuit agreed with a Seton Hall Law School amicus brief that the plaintiff, an alien, deserved a chance to reopen his case due to his previous lawyer's ineffectiveness. *Id*. at 178. The court rejected the government's argument that the Convention introduced no new protections for aliens by noting that a senate report and a letter from President Bush stated that the law already complied with the convention. *Id.* Thus the court concluded that the absence of implementing legislation does not imply that the Board of Immigration Appeals ("BIA") has "no need to set out how existing law complies with the Convention." *Id*. Finally, the court ordered that on remand the BIA should determine how current law reflects compliance with the specific provisions of the Convention that are relevant to the plaintiff's claim. *Id*.

CONCLUSION: The 3rd Circuit concluded that the possibility that an alien was prejudiced by former counsel's alleged ineffectiveness in failing to argue that he was entitled to protection under the Convention warranted remand. *Id*. at 178–79.

***Pichler v. UNITE,* 542 F.3d 380 (3d Cir. 2008)**

Editor's Note: This case resolves three issues of first impression concerning the Driver's Privacy Protection Act.

QUESTION ONE: Whether plaintiffs alleging Driver's Privacy Protection Act ("DPPA") violations are entitled to a jury trial on the issue of punitive damages. *Id*. at 386.

ANALYSIS: After noting that the DPPA makes no mention of the right to a jury trial, the court proceeded to do a Seventh Amendment analysis outlined by the Supreme Court. *Id.* at 388. The court established that an action brought under the DPPA was an action in law, rather than equity, because it is analogous to common law suits that sought monetary

relief and "sounded in tort." *Id*. The court then noted that historically, punitive damages have always been a jury question. *Id*. at 389. Lastly, the court stated that factual issues such as the defendants' willfulness or recklessness are for juries to determine. *Id*.

CONCLUSION: The 3rd Circuit held that "where there is a genuine issue of material fact regarding the willfulness or recklessness of a defendant's conduct, . . . the Seventh Amendment requires a trial by jury on the issue of punitive damages under the DPPA." *Id*. at 390.

QUESTION TWO: Whether individuals who are not specifically identified in a motor vehicle record have standing to bring an action under the DPPA. *Id*. at 390.

ANALYSIS: The 3rd Circuit first interpreted the language of the DPPA to confer a cause of action only to those individuals "whose personal information from their motor vehicle records is at issue." *Id*. at 391. The court focused on the singular form of "individual" to exclude any cohabitants of the person listed in the motor vehicle records, such as spouses and children. *Id*. The court then noted that the consent provision of the statute also uses the singular "individual," and the purpose of the statute would be frustrated if any cohabitant of the individual could waive the individual's right to privacy under the DPPA. *Id*.

CONCLUSION: The 3rd Circuit held that individuals who are not specifically identified in a motor vehicle record have no standing to sue under the DPPA. *Id*.

QUESTION THREE: "[W]hether the DPPA permits a plaintiff to recover two separate liquidated damage awards because a defendant obtains and then uses plaintiff's confidential information." *Id*. at 392.

ANALYSIS: The court first noted that the statute used the term "liquidated damages," which means damages that could reasonably be anticipated *ex ante*. *Id*. at 393. The court stated that "Congress clearly contemplated that in most cases, a defendant who obtained motor vehicle information would put it to some use." *Id.* The court concluded that the minimum amount of liquidated damages stated in the statute "encompasses both aspects of a defendant's breach of the DPPA—one instance of obtaining and one of use," and a contrary holding would effectively double the liquidated damages amount in the statute. *Id*.

CONCLUSION: The 3rd Circuit held that the DPPA permits recovery of two separate damage awards, as the liquidated damages amount listed in the DPPA encompasses "one instance of obtaining and one of use" of private motor vehicle information. *Id*.

***Doe v. C.A.R.S. Prot. Plus Inc.,* 527 F.3d 358 (3d Cir. 2008)**

QUESTION: Whether the protections generally afforded pregnant women under the Pregnancy Discrimination Act ("PDA") also extend to women who have decided to have an abortion. *Id*. at 363.

ANALYSIS: In accordance with the Supreme Court's ruling in *Griggs v. Duke Power*, the 3rd Circuit gave a high degree of deference to Equal Employment Opportunity Commission (EEOC) guidelines. *Id*. at 364. Under these guidelines, the EEOC has determined that "the basic principle of the PDA is that women affected by pregnancy and related conditions must be treated the same as other applicants and employees on the basis of their ability or inability to work." *Id*. Therefore a woman is "protected against such practices as being fired . . . merely because she is pregnant or has had an abortion." *Id*. Further, the legislative history of the PDA noted that "[b]ecause the PDA applies to all situations in which women are affected by pregnancy . . . its basic language covers women who chose to terminate their pregnancies. Thus, no employer may . . . fire or refuse to hire a woman simply because she has exercised her right to have an abortion." *Id*. Thus, the court held that "the plain language of the statute, together with the EEOC guidelines and legislative history, supported the conclusion that an employer may not discriminate against a woman employee because she exercised her right to have an abortion." *Id*. The court also determined that the phrase "related medical conditions" used in the statute includes abortions. *Id*.

CONCLUSION: A woman employee may not be discriminated against by her employer because she has elected to terminate her pregnancy, as the PDA clearly protects such women from discrimination. *Id*.

***United States v. Miller,* 527 F.3d 54 (3d Cir. 2008)**

QUESTION: Whether possessing child pornography is a lesser-included offense of receiving child pornography, and thus that 18 U.S.C.A. § 2252A(a)(2) and 18 U.S.C.A. § 2252A(a)(5)(B) punish the same offense. *Id*. at 70–71.

ANALYSIS: The court noted that there is a rebuttable presumption where two statutory provisions proscribe the same offense that a legislature does not intend to impose two punishments for that offense. *Id*. at 70. Additionally, the court noted that if two statutory provisions proscribe the same offense and it is not clear that the legislature intended multiple punishments for the offense, then the double jeopardy clause protects a defendant from being convicted under both provisions. *Id.* Here, the defendant argued that a provision prohibiting receipt of child

pornography and a provision prohibiting possession of child pornography proscribed the same offense. *Id*. at 71. For the purposes of double jeopardy, two offenses are the same if one is a lesser-included offense of the other under the "same elements" test. *Id*. Under this test, if the elements of both offenses are the same, then they are the same offense. *Id*. Although the 3rd Circuit had not previously considered whether section 2252A(a)(5)(B) punished a lesser-included offense of section 2252A(a)(2), the court indicated that, "as a general matter, possession of a contraband item is a lesser-included offense of receipt of the item." *Id*. The Supreme Court has held that, in the case of receiving and possessing firearms, "Congress seems clearly to have recognized that a felon who receives a firearm must also possess it, and thus had no intention of subjecting that person to two convictions for the same criminal act." *Id*. Here, the 3rd Circuit next examined 9th and 6th Circuit cases that stated, in dicta, that section 2252A(a)(5)(B) did indeed punish a lesser-included offense of section 2252A(a)(2). Finding these rationales to be controlling, the 3rd Circuit held that Miller's separate convictions for both receiving and possessing child pornography violated the double jeopardy clause. *Id.* at 58.

CONCLUSION: The court concluded that possessing child pornography is a lesser-included offense of receiving child pornography and vacated the defendant's conviction. *Id*.

FOURTH CIRCUIT

United States v. Armstead, 524 F.3d 442 (4th Cir. 2008)

QUESTION: Whether the term "retail value" as used in 18 U.S.C. § 2319(b)(1) ("The Copyright Act") is determined by "the price a willing buyer would pay a willing seller" at the time of the violation or the highest of "face value, par value, or market value." *Id*. at 443–44.

ANALYSIS: The court examined § 2311 of The Copyright Act stating "value is measured not only by the actual transactions . . . but also by face or par values assigned to commodities or goods before reaching the market, and the statute instructs that the greatest of those values be used." *Id*. at 445. The court also noted that the House Committee Report confirmed that "courts may look to the suggested retail price, the wholesale price, the replacement cost . . . or financial injury" in determining "retail value." *Id*. at 446.

CONCLUSION: The 4th Circuit concluded that retail value "refers to the greatest of any face value, par value, or marker value of

commodities or goods in reference to actual or potential sales to ultimate consumers." *Id*. at 445.

***Tidewater Fin. Co. v. Kenney,* 531 F.3d 312 (4th Cir. 2008)**

QUESTION: Whether the "'hanging paragraph' in 11 U.S.C. § 1325(a) . . . prevents a creditor with a purchase money security interest in a '910 vehicle' from exercising his contractual right to an unsecured claim for the portion of the debt not covered by the sale of such vehicle . . . after the vehicle is surrendered to the creditor by a Chapter 13 debtor pursuant to section 1325(a)(5)(C)." *Id*. at 314.

ANALYSIS: The court reasoned that "section 506(a) specifies how an 'allowed claim of a creditor secured by a lien on property' should be valued by providing a method of bifurcating, or dividing, a consumer's debt into secured and unsecured amounts . . . ." *Id*. at 316–317. The court further reasoned that "section 506 is not the exclusive method for separating out the deficiency as an unsecured portion of a 910 claim." *Id*. at 320. As a result of the amendment to the Bankruptcy Abuse Prevention and Consumer Protection Act, "section 506 is no longer applicable to 910 claims," and the court therefore found "no other bifurcation method in the Bankruptcy Code nor a rule in the Code which qualifies or eliminates a 910 creditor's contractual entitlement to a deficiency claim under state law." *Id*. at 320.

CONCLUSION: The 4th Circuit held that the "hanging paragraph does not operate to deprive such undersecured '910 creditors' of their deficiency claims because the parties are bound to their contractual rights and obligations under operative state law, and the Bankruptcy Code does not command otherwise." *Id*. at 314.

***United States v. Chacon,* 533 F.3d 250 (4th Cir. 2008)**

QUESTION: Whether a sex offense perpetrated in the absence of consent, and which does not have as an element the use, attempted use, or threatened use of physical force, constitutes a "crime of violence" under the U.S. Sentencing Guidelines. *Id*. at 254.

ANALYSIS: Under the U.S. Sentencing Guidelines Manuel § 2L1.2, a rape offense is a crime of violence if it: (1) constitutes a forcible sex offense; (2) has as an element "the use, attempted use, or threatened use of physical force against" another person; or (3) otherwise falls within the "crime of violence" definition. *Id*. In order to determine whether the rape statute in the instant case constituted a "crime of violence," the Fourth Circuit utilized the "categorical approach" by examining whether

the full range of conduct covered under the statute falls within the scope of the Guidelines provision. *Id*. Under Md. Code Ann. art. 27 § 463, a second-degree rape offense can be committed if a person engages in vaginal intercourse with another: (1) by force or threat of force; or (2) with a person who is mentally defective, mentally incapacitated, or physically helpless, and the person performing the act knows or reasonably should know of such disability; or (3) with a person who is under 14 years of age and defendant is at least four years older than the victim. *Id*. at 255.

The court held that the first and third subparts of the statute plainly constituted a crime of violence, but examined the second subpart more carefully. The court recognized that the second subpart can be violated without the use or threat of physical force, and noted that other circuits are split on the issue of whether a sexual offense perpetrated without consent, but also without the element of physical force nevertheless constitutes a "forcible sex offense" and thus, a "crime of violence" under the Guidelines. *Id*. at 256. The court looked to the definition of the term "forcible" for its analysis, ultimately concluding that a "forcible sex offense" may be accomplished in the absence of physical force because force can be effected through power or pressure, which do not necessarily have physical components. *Id*. at 257. This meaning of a "forcible sex offense" is also supported by the fact that there are other offenses identified in the Guideline's definition of "crime of violence" that to do have physical force as an element. *Id*. at 258. Accordingly, second-degree rape, accomplished by taking advantage of someone who is physically helpless or incapacitated, would also readily constitute a "crime of violence." *Id.*

CONCLUSION: The Fourth Circuit held that a sex offense perpetrated in the absence of consent, whether or not that offense has physical force as an element, is a "forcible sex offense" encompassed within the U.S. Sentencing Guidelines definition of a "crime of violence." *Id*.

***Afanwi v. Mukasey,* 526 F.3d 788 (4th Cir. 2008)**

QUESTION: Whether the Board of Immigration Appeals (BIA) must rescind and reissue an order of removal when a petitioning alien fails to receive an order of removal "through no fault of the BIA." *Id*. at 794.

ANALYSIS: The court followed the 7th Circuit's reasoning in *Firmansjah v. Ashcroft*, which held that the BIA is always free to enter a new removal order that would then permit a new petition to be

submitted. *Id*. The court noted that in *Firmansjah* the petitioning alien received an order of removal after "the deadline to file a petition for review had passed." *Id*. It found no fault in the 7th Circuit's refusal to say that the BIA *must* reissue an order when a notice arrives late. *Id*.

CONCLUSION: The court held "that the decision to rescind and reissue an order of removal is properly left to the discretion of the BIA," including where a petitioner fails to receive an order and the BIA did not cause this failure. *Id.*

***United States v. Poole,* 531 F.3d 263 2008 (4th Cir. 2008)**

QUESTION: Whether a district court properly exercises jurisdiction over a habeas petition filed under 28 U.S.C. § 2241(c)(3) based upon a "temporary custody arrangement." *Id*. at 264.

ANALYSIS: The court noted that when a habeas petition filed under § 2255 "'appears . . . inadequate or ineffective to test the legality of [the] detention,'" a federal prisoner is entitled to seek habeas relief under § 2241 in the district court of his confinement. *Id*. at 270. Stating that the § 2241 petition "should name as respondent 'the person who has custody over [the prisoner],'" the court utilized the Supreme Court's "immediate custodian rule" of *Rumsfeld v. Padilla* to establish that "a district court properly exercises jurisdiction over a habeas petition whenever it has jurisdiction over the petitioner's custodian." *Id*. at 270–71. The court further noted that, in a similar context, "the writ of *habeas corpus ad prosequendum* . . . works a 'mere [] loan[] [of] the prisoner to federal authorities'" and does not alter the petitioner's custodian. *Id*. at 271. Relying on the fact that "the writs of *habeas corpus ad prosequendum* and *habeas corpus ad testificandum* are derived from adjacent language in the same statutory subsection" of § 2241(c)(5), the court stated that "it is reasonable to believe that the writ of habeas corpus ad testificandum would likewise be a 'mere[] loan[]' that does not effect a change in custody." *Id*. The court further noted that since "'[f]ederal courts are courts of limited jurisdiction' . . . [a] court is to presume, therefore, that a case lies *outside* its limited jurisdiction unless and until jurisdiction has been shown to be proper." *Id*. at 274.

CONCLUSION: The court held that the issuance of a writ of habeas corpus ad testificandum did not "transmute[] [the petitioner's] temporary presence in the district into a permanent stay that effected a change in custodian." *Id*. at 271. As such, the district court did not have proper jurisdiction over the matter. *Id*. at 275.

FIFTH CIRCUIT

Gates v. Tex. Dep't of Protective & Regulatory Servs., 537 F.3d 404 (5th Cir. Tex. 2008)

QUESTION: Whether "exigent circumstances" exist that would permit state child protective services to enter a home without a warrant in situations involving neither unusual circumstances nor immediate danger to the child. *Id*. at 419.

ANALYSIS: Although the Fourth Amendment protects against warrantless searches of a person's home, the Supreme Court has recognized an "exigent circumstances" exception wherein "[l]aw enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." *Id*. at 421. The 10th Circuit has held that where "there [is] nothing particularly unusual about the child's condition at the time he was removed [from the home], and the child's attending physician told the [social workers] that it would be a mistake to remove the child," no exigent circumstances exist. *Id*. at 422. In *Gates*, the 5th Circuit reasoned that where "the only evidence of danger to the . . . children was a one-time incident involving only [one of the children] and [the use of] questionable discipline methods" of physical exercise, the facts "do not give rise to an immediate danger." *Id*. at 423.

CONCLUSION: Where there is a lack of immediate physical danger to the child, along with a lack of evidence of serious physical abuse, the 5th Circuit will not apply the "exigent circumstances" exception to the Fourth Amendment's protection against warrantless searches. *Id*.

United States v. Arami, 536 F.3d 479 (5th Cir. 2008)

QUESTION: "[W]hether a defendant may withdraw his guilty plea before the district court formally accepts that plea." *Id*. at 479.

ANALYSIS: Federal Rule of Criminal Procedure 11(d) provides, "A defendant may withdraw a plea of guilty or nolo contendere: (1) before the court accepts the plea, for any reason or no reason . . . ." *Id*. at 480. Defendant asserted that he had an absolute right to withdraw his guilty plea before the district court formally accepted that plea. *Id*. at 481. His claim that the district court violated Rule 11(d)(1) was subject to plain error review. *Id*. at 482. The record revealed, and the government conceded, that the district court did not accept defendant's plea until

eight days after he submitted his motion to withdraw. *Id*. at 481. Under the clear language of Rule 11(d)(1), he had an absolute right to withdraw his plea, and the district court erred in denying defendant's request to do so. *Id.* There are four steps in a plain error analysis. *Id*. at 483. An appellate court must initially determine "whether (1) the district court committed error, (2) the error is clear and obvious, and (3) the error affects substantial rights. If those three conditions are present, an appellate court still cannot reverse the conviction unless the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id*. Here, defendant easily satisfied the first two prongs of the plain error analysis. *Id*. Additionally, he showed that the error affected his substantial rights, thereby satisfying the third prong. *Id*. at 484. Finally, denying defendant his right to a jury trial seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id*. at 485.

CONCLUSION: The Federal Rules of Criminal Procedure afford a defendant the right to withdraw his guilty plea before the district court formally accepts that plea. *Id*. at 479. The district court committed plain error in denying defendant's motion. *Id*. at 485. The court reversed the judgment of the district court, and the case was remanded for defendant to withdraw his guilty plea and proceed to trial. *Id*.

CleanCOAlition v. TXU Power, 536 F.3d 469 (5th Cir. 2008)

Editor's Note: This case involves two issues of first impression concerning the Clean Air Act.

QUESTION ONE: Whether § 7604(a)(1) of the Clean Air Act ("CAA") authorizes citizen suits to redress alleged pre-permit, preconstruction, pre-operation CAA violations. *Id*. at 469.

ANALYSIS: The 5th Circuit addressed the first question by looking to the language of the statute, and noted that §7604(f)(3) authorizes citizen suits for violations of "any condition or requirement of a permit," not "any condition or requirement *to obtain* a permit." *Id*. at 475 (emphasis in original). The court also observed that regardless of whether or not § 7604(f)(4) includes preconstruction requirements, a defendant cannot violate these requirements "simply by filing an incomplete permit application, in response to which a permit may or may not issue, especially when the permit process is still pending and subject to state judicial review." *Id.* at 477.

CONCLUSION: The 5th Circuit concluded that § 7604(a)(1) does not authorize citizen suits to redress alleged pre-permit, preconstruction, pre-operation CAA violations. *Id*. at 478.

QUESTION TWO: Whether § 7604(a)(3) authorizes preconstruction citizen suits against facilities that either have obtained a permit or are in the process of doing so." *Id*. 478.

ANALYSIS: Turning to the second issue, the court looked to the language of § 7604(a)(3), which authorizes citizen suits "when an entity proposes to construct or constructs a facility without a permit whatsoever." *Id*. at 478–79. As such, the statute does not authorize preconstruction citizen suits unless a permit has already been obtained. *Id.*

CONCLUSION: The 5th Circuit held that § 7604(a)(3) does not authorize preconstruction citizen suits against facilities that have either obtained a permit or are in the process of doing so." *Id*. at 478.

Cooper v. Comm'r, No. 07-10761, 2008 U.S. App. LEXIS 12193 (5th Cir. June 6, 2008)

QUESTION: Whether the Internal Revenue Service ("IRS") can raise, and the district court can accept, a new argument on appeal that the IRS did not raise at any time during the administrative proceedings over the same claim. *Id*. at *8–10.

ANALYSIS: The 5th Circuit noted the taxpayer's assertion that the district court, in allowing the IRS to assert "for the first time, new reasons to deny [his] claim for refund . . . not asserted in the administrative proceedings" violated his constitutional rights. *Id.* at *8–9. However, the court found that the taxpayer did not provide any support for this assertion, failing to cite the Constitution or "even a single case." *Id.* The court determined this failure to provide any support for a claim constituted the forfeiture of the right to subsequently assert that same objection. *Id.* The court then noted that where "exceptional circumstances" are shown, it would allow the party to assert the forfeited claim; however, there were no such circumstances in the present case. *Id*. at *9–10.

CONCLUSION: The 5th Circuit held that because the party forfeited his right to make this argument on appeal and there were no extraordinary circumstances present, the government was able to raise a new argument on appeal that it did not assert during the administrative proceedings. *Id*. at *10–11.

***Peres v. Sherman (In re Peres),* 530 F.3d 375 (5th Cir. 2008)**

QUESTION: Whether an 11 U.S.C.S. § 341(a) creditors' meeting is concluded where there is no formal announcement of a continuation date. *Id*. at 377.

ANALYSIS: The 5th Circuit adopted the majority position and declined to adopt the bright-line rule "that a meeting of creditors is not concluded until such time as the trustee so declares or the court so orders. *Id*. at 378. The Court reasoned that "[s]uch a holding ignores the clearly-established policy of the Bankruptcy Code of encouraging promptness in the filing of objections to exemptions, because it would permit a trustee to continue a meeting of creditors indefinitely." *Id*. Such a strict rule could "impede justice in complex cases where a trustee needs further time and information to fully understand a debtor's financial affairs." *Id.* The court instead chose to adopt a more flexible case-by-case approach and enumerated four factors to consider in determining "the reasonableness of a trustee's delay in adjourning a meeting of creditors: (1) the length of the delay; (2) the complexity of the estate; (3) the cooperativeness of the debtor; and (4) the existence of any ambiguity regarding whether the trustee continued or concluded the meeting." *Id*.

CONCLUSION: A § 341(a) creditors' meeting can conclude without a formal announcement or continuation date so long as the Trustee acts reasonably and the debtor is not prejudiced. *Id*.

***In re: Katrina Canal Litigation Breaches. Louisiana v. AAA Ins*., 524 F.3d 700 (5th Cir. 2008)**

QUESTION: "[W]hether the State [of Louisiana] can extend [its immunity from federal process] to private citizens of the State," when the State is suing citizens of other states "in its own courts to enforce its own laws." *Id*. at 707.

ANALYSIS: The Fifth Circuit first noted that the State enjoys "some measure of insulation" from federal process when suing as plaintiff in its own courts to enforce its own laws. *Id*. The court next sought to determine the scope of sovereign immunity enjoyed by the states by examining the "intersection of Article III, Section 2 of the Constitution…and the Eleventh Amendment." *Id*. The majority of case law examining "immunity's purpose…have all focused on the importance of protecting states as defendants, as did the Founders' debates over Article III." *Id*. at 709. The court noted that the Tenth

Circuit has held that, "'a [s]tate cannot assert Eleventh Amendment immunity to bar the removal of a suit it has brought,'" but concluded that there is no case precedent or "founding history that speak directly to the issue at hand." *Id*. at 711.

CONCLUSION: The Fifth Circuit did not answer the question of whether a state can invoke Eleventh Amendment immunity preventing removal of suit it commenced to federal court. Rather, the court, presuming a threshold level of government, concluded that such immunity "cannot be conferred by the State upon the prosecution of suits by private citizens . . . that the State cannot pull these citizens under its claimed umbrella of protection in frustration of a congressional decision to give access to federal district courts to defendants exposed to these private claims." *Id*. As such, the court affirmed the district court's denial of remand to state court.

***Harvey v. Grey Wolf Drilling Co.*, 542 F.3d 1077 (5th Cir. 2008)**

QUESTION: "Whether, for purposes of federal diversity jurisdiction, a limited liability company ("LLC") is a citizen of the state where it is organized or is a citizen of the states of which its members are citizens." *Id*. at 1078.

ANALYSIS: Relying on the conclusions reached by all other federal appellate courts that have addressed the issue, the Fifth Circuit held that, like limited partnerships and other unincorporated entities, the citizenship of a LLC is determined by the citizenship of all of its members. *Id*. at 1079–80.

CONCLUSION: The citizenship of an LLC is not treated as a corporation for purposes of diversity jurisdiction. *Id*. at 1080. Rather, the citizenship is determined by the citizenship of all of its members. *Id*.

***Abbott v. Abbott*, 542 F.3d 1081 (5th Cir. 2008)**

QUESTION: Whether "*ne exeat* orders and statutory *ne exeat* provisions . . . create 'rights of custody' under the Hague Convention." *Id.* at 1084.

ANALYSIS: The court first noted that "[t]hree federal appellate courts have determined" that such rights are not created. *Id*. Next, the court pointed to the 2nd Circuit's reasoning that "a *ne exeat* veto right is only a partial power—in other words, only one of a bundle of residence-determining rights," and that such right is not "an affirmative right to determine the child's residence." *Id*. at 1085. The court then noted the 11th Circuit's rejection of the 2nd Circuit's reasoning, finding that the

language of the *ne exeat* provision therein provided for joint parental responsibility in matters relating to the child, and thus rights of custody. *Id*. at 1085–86. The 5th Circuit ultimately found the 2nd Circuit's "reasoning that the Hague Convention clearly distinguishes between 'rights of custody' and 'rights of access'" persuasive. *Id.* at 1087.

CONCLUSION: The 5th Circuit held "that *ne exeat* rights, even when coupled with 'rights of access,' do not constitute 'rights of custody' within the meaning of the Hague Convention." *Id*. at 1087.

***Bernhard Mechanical Contractors, Inc. v. St. Paul Companies,* No. 07-30905, 2008 U.S. App. LEXIS 17195 (5th Cir. Aug. 8, 2008)**

QUESTION: Whether the peremptory bar of La. Rev. Stat. Ann. § 9:5606 for insurance agents, brokers, solicitors, or similar licensees applies to insurers by virtue of the insurance agent's actions. *Id.* at *9.

ANALYSIS: In holding that the peremptory bar for § 9:5606 did not apply to claims against an insurer, the court was guided by the Louisiana Civil Code as well as "basic cannons of statutory construction." *Id*. at *9–10. The 5th Circuit stated that "by its terms, § 9:5606 applies only to actions for damages against an 'insurance agent, broker, solicitor, or other similar licensee,' [and] it is undisputed that an insurance company is neither an insurance agent, broker, or solicitor." *Id*. at *10. The court differentiated between insurers and "other licensees," noting that insurers are "not required to obtain an insurance agent's license," thus barring their inclusion from the category of "other licensees." *Id*. at *12.

CONCLUSION: The 5th Circuit held that "the peremptory bar of § 9:5606 does not apply to claims against an insurer merely because those claims rely on imputing the conduct of an agent to the insurer." *Id*. at *10.

***United States v. Molina,* 530 F.3d 326 (5th Cir. 2008)**

QUESTION: Whether a prosecutor's option to prosecute an underlying crime as either an independent substantive criminal offense, or to instead use the underlying crime as a factor in requesting an enhanced sentence for the primary crime is permissible under the U.S. Sentencing Guidelines when the resulting prison time is different. *Id*. at 329–30.

ANALYSIS: The 5th Circuit found persuasive the holdings of several other circuit courts that had previously been presented with the same issue. *Id*. at 330. In those cases, the defendants challenged their sentences, arguing that the Sentencing Guidelines were "invalid" because

the prosecutor's discretion to choose between pursuing the independent charge and pursuing the sentencing enhancement for the same conduct created a sentencing disparity, in violation of 18 U.S.C. § 3553(a)(6). *Id*. The 2nd, 7th, and 8th Circuits held that the Sentencing Commission was fully aware of such disparities when drafting the Guidelines, and that a prosecutor's power to choose between the two options is properly based on his or her evaluation of the strength of the case, and does not violate the statutory goal of "avoid[ing] unwarranted sentence disparities. *Id*. The 2nd and 8th Circuit decisions held that a defendant does not have the right to choose the penalty scheme under which he will be sentenced, as long as the government's choice is not based on an unjustifiable standard such as race or religion. *Id*.

The 5th Circuit then noted two legal principles that underlie the decisions of its sister circuits, and which it found congruent with its own case law. *Id*. at 331–32. The first was that significant deference is to be given to prosecutorial discretion in the absence of actual vindictiveness or an equal protection violation. *Id*. at 332. The second principle pertained to Molina's argument that Congress did not intend for a person convicted of both drug trafficking and weapons possession to be imprisoned longer than the mandatory sentence for the drug trafficking offense alone, absent aggravating circumstances. *Id*. However, the court found that the plain language of the Sentencing Guidelines indicated that such punishment shall be "in addition to the punishment provided for [the underlying] crime of violence or drug trafficking." *Id*.

CONCLUSION: The court found that there was no inconsistency or internal contradiction in the Federal Sentencing Guidelines, despite the disparity of a sentence depending on whether certain criminal conduct was treated as a separate offense or as a factor to argue for an enhanced sentence. *Id*. The court determined that the plain language of the statute, intended for a weapons possession sentence to be in addition to the sentence for the underlying crime of drug trafficking. *Id*.

SIXTH CIRCUIT

Hereford v. Warren, 536 F.3d 523 (6th Cir. 2008)

QUESTION: "[W]hether the state court unreasonably declined to apply the rule of structural error to this lawyer-less stage in Hereford's criminal trial, or whether it reasonably held that Hereford must point to actual prejudice arising from his counsel's absence to obtain relief." *Id.* at 527.

ANALYSIS: The court stated that the "denial of counsel at a 'critical stage' of the criminal proceedings," entitles the defendant to a new trial. *Id*. at 529. In order to determine if an event is a critical stage, the court looked at the following factors: "steps that hold 'significant consequences for the accused;' where '[a]vailable defenses may be irretrievably lost if not then and there asserted;' where 'rights are perceived or lost;' when counsel's presence is 'necessary to mount a meaningful defense;' and where 'potential substantial prejudice to defendant's rights inheres in the confrontation . . . and where counsel can help avoid that prejudice.'" *Id*. at 529–30. Applying this test, the court concluded that the *ex parte* communication was not at a critical stage in the criminal proceedings. *Id*. at 533. Therefore, the proceeding did not require the rule of structural error because the communication was a "brief, administrative conference" that did not hold "significant consequences for the accused." *Id*.

CONCLUSION: The court held that "the state court reasonably ruled that the *ex parte* communication" between the trial judge and the prosecutor "did not involve a critical stage and that any error arising from defense counsel's absence was harmless." *Id.* at 533.

***John B. v. Goetz,* 531 F.3d 448 (6th Cir. 2008)**

QUESTION: Whether a party served with an order to compel forensic imaging orders, which include confidential medical information of non-parties, is entitled to mandamus relief. *Id.* at 457.

ANALYSIS: In examining whether the orders were narrowly tailored to the information sought, the court reasoned that "the compelled forensic imaging orders here fail to account properly for the significant privacy and confidentiality concerns . . . ." *Id*. at 460. The court noted that "the media at issue will almost certainly contain confidential state or private personal information that is wholly unrelated to the litigation" and any order compelling such forensic imaging "must be premised on an interest significant enough to override that risk." *Id*.

CONCLUSION: The court found that the interests at stake did not outweigh the risk because "forensic imaging is not the only available means by which . . . [a] court may respond to what it perceives to be discovery misconduct" and that mandamus review is an appropriate form of appellate review. *Id.*

***Niswander v. Cincinnati Ins. Co.*, 529 F.3d 714 (6th Cir. 2008)**

QUESTION: Whether the delivery of confidential information about an employer by an employee pursuing a class-action lawsuit, in violation of the employer's privacy policy, is considered protected activity under Title VII of the Civil Rights Act of 1964. *Id*. at 721.

ANALYSIS: The court first found that the plaintiff's activity did not constitute participation, as defined under Title VII, in the class-action lawsuit, so as to protect that activity. *Id*. at 722. The court reasoned that if plaintiff's conduct were "protected participation in the [class-action] lawsuit," then employees would have "near-immunity for their actions in connection with antidiscrimination lawsuits . . . even when they knowingly provide irrelevant, confidential information solely to jog their memory regarding instances of alleged retaliation." *Id*. In finding the plaintiff's conduct unprotected as opposition to unlawful conduct under Title VII, the court weighed factors including "how the documents were obtained, to whom the documents were produced, the content of the documents, . . . why the documents were produced, . . . the scope of the employer's privacy policy, and the ability of the employee to preserve the evidence in a manner that does not violate the employer's privacy policy." *Id*. at 726. Finally, the court determined that "balance must be achieved between the employer's recognized, legitimate need to maintain an orderly workplace and to protect confidential business and client information, and the equally compelling need of employees to be properly safeguarded against retaliatory actions." *Id*. at 727.

CONCLUSION: The court held that when an employee intentionally and unnecessarily produces confidential documents for the purpose of recalling allegedly discriminatory acts by the employer, and alternative methods are available to accomplish the same goal, the employee does not partake in "the kind of reasonable opposition activity that justifies violating a company's privacy policy." *Id*. at 727.

***Jerman v. Carlisle,* 538 F.3d 469 (6th Cir. 2008)**

QUESTION: Whether use of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C.S. § 1692, bona fide error defense applies to mistakes of law, or is limited to procedural or clerical errors. *Id.* at 471.

ANALYSIS: The 6th Circuit referred to a recent decision handed down by the 10th Circuit in *Johnson v. Riddle* regarding 15 U.S.C.S. § 1692. *Id.* at 473. There, the 10th Circuit rejected the argument that the

FDCPA bona fide error defense was similar to the bona fide error defense provided in the Truth in Lending Act ("TILA"). *Id.* at 474. The 10th Circuit explained that TILA explicitly limited the bona fide error defense to clerical errors. *Id*. The *Johnson* court concluded "that unlike the TILA the plain language of the FDCPA suggests no intent to limit the bona fide error defense to clerical errors." *Id*. Agreeing with the 10th Circuit, the court also held that "absent a clearer indication that Congress meant to limit the defense to clerical errors, we instead adhere to the unambiguous language of the statute as supported by the available legislative history." *Id*. at 476.

CONCLUSION: The 6th Circuit agreed with the "persuasive reasoning and analysis set forth in *Johnson*," and held that the "FDCPA's bona fide error defense applies to mistakes of law." *Id*.

***Bryant v. Dollar General Corp.*, 538 F.3d 394 (6th Cir. 2008)**

QUESTION: Whether the statutory text of the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2615, and its implementing regulations prohibit employers from retaliating against employees who take FMLA leave. *Id*. at 396.

ANALYSIS: The 6th Circuit refers to the "overwhelming consensus of the case law in the circuits as well as the nature of the statutory scheme and the FMLA's legislative history [that] weigh strongly in favor of rejecting [the] argument that the FMLA itself does not prohibit retaliating against an employee who exercises FMLA leave." *Id*. at 400. The court stated that FMLA requires employers to restore the employee after they return to the position of employment they held prior to the commencement of the leave. *Id*. at 401. "Interpreting § 2615(a)(2)'s ban on discrimination in a manner that would permit employers to fire employees for exercising FMLA leave would undoubtedly run contrary to Congress's purpose in passing the FMLA." *Id*.

CONCLUSION: The 6th Circuit concluded that "the FMLA itself prohibits employers from taking adverse employment actions against employees based on the employee's exercise of FMLA leave." *Id*.

***United States v. Bass*, 274 Fed. Appx. 443 (6th Cir. 2008)**

QUESTION: "Whether an offense charged under Mich. Comp. Laws. ("MCL") § 750.479 categorically qualifies as a crime of violence" in the context of the U.S. Sentencing Guidelines Manual. *Id*. at 448.

ANALYSIS: Michigan criminalizes assaulting, battering, obstructing, or endangering an officer performing his or her duties. *Id*. In

analyzing what constitutes a crime of violence, the 6th Circuit previously held that "neither actual violence nor an imminent threat of violence must occur before an offense can qualify as a crime of violence under U.S.S.G. § 4B1.2(a)(2). *Id*. at 449. The court acknowledged that the proper inquiry is whether "the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another." *Id*. The 6th Circuit analyzed MCL § 750.479 and found that the statute encompasses both conduct that possibly "presents a serious potential risk of physical injury to another" and conduct that does not. *Id*.

CONCLUSION: The court held that a prior conviction under MCL § 750.479 "cannot categorically qualify as a crime of violence." *Id*.

Carlisle v. Curtis, Mallet-Prevost, Colt & Mosle, LLP, 521 F.3d 597 (6th Cir. 2008)

QUESTION: Whether the circuit court has jurisdiction over an interlocutory appeal, pursuant to § 16(a)(1) of the Federal Arbitration Act ("Act"), of the district court's denial of a motion for a stay pending arbitration (§ 3) under the Act, when the moving parties are not signatories to a arbitration agreement, as required under the Act. *Id*. at 599–600.

ANALYSIS: The Federal Arbitration Act provides interlocutory appellate jurisdiction to review denials of a motion to stay or to compel arbitration under the Act. *Id*. at 600. Here, defendants moved, pursuant to § 3 of the Act, for a stay pending arbitration. *Id*. at 598. The motion was denied and the defendants sought an interlocutory appeal pursuant to § 16(a)(1) of the Act. *Id*. Section 3 of the Act requires that the parties have "an agreement in writing" in order to seek a stay. *Id*. at 600. Defendants were not signatories to a written arbitration agreement, but argued that they were entitled a stay under a theory of equitable-estoppel because the plaintiffs had a written arbitration agreement with Bricolage Capital regarding the same issue. *Id*. at 600. The court noted that the 2nd Circuit has endorsed this theory of interlocutory appellate jurisdiction under equitable-estoppel, whereas the D.C. and 10th Circuits have rejected this rationale. *Id*. at 600–02.

CONCLUSION: The 6th Circuit joined the D.C. and 10th Circuits in finding, based upon the plain language of the statute, that there must be a written arbitration agreement between the parties in order for the circuit courts to have interlocutory jurisdiction over denials of motions made pursuant to Section 3 of the Federal Arbitration Act. *Id*. at 602.

***United States v. Gray,* 521 F.3d 514 (6th Cir. 2008)**

QUESTION: Whether "certain evidence obtained through court-authorized electronic surveillance pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III), 18 U.S.C.S. §§ 2510–22, was properly admitted at trial and, concomitantly, whether the district court abused its discretion by refusing to require disclosure of certain illegally intercepted conversations of defendants." *Id*. at 520.

ANALYSIS: The court agreed with the defendants argument "that here, as in [*United States v. Brock*], the [certain] conduct underlying their convictions is not within the scope of the Hobbs Act." *Id*. at 535. The defendants contended, "the evidence, at best, alleges a scheme to bribe state officials, but does not demonstrate that defendants conspired with, or aided and abetted, public officials in obtaining 'property from another,' a third party." *Id*. Defendants assert that "no third party was ever coerced or asked to make a payment in return for an official act; instead, taking the evidence in the light most favorable to the government, payments were made directly by defendants to public officials to gain favor and to improve their lot as consultants." *Id*. The court reasoned that it is their duty "to evaluate the proofs pertaining to the discrete transactions in three different cities that are the bases of the Hobbs Act convictions against defendants." *Id.* The court, relying on their decision in *Brock*, opined that, "where, as here, the government charges private individuals with Hobbs Act violations under a color of official right theory, it must satisfy the 'property from another' and 'with his consent' requirements of § 1951(b)(2)." *Id.* at 541. "The government did not meet this burden with respect to the charges against Gray in Counts 30, 31, and 41, and with respect to the charge against Jackson in Count 41." *Id*. The court reversed the convictions on these counts, yet affirmed the remainder concluding "defendants' remaining assignments of error concerning their Hobbs Act convictions are unfounded." *Id*.

CONCLUSION: The court reversed the defendant Gray's convictions "as to Counts, 30, 31, and 41 [conspiring to obstruct interstate commerce by extortion and obstructing interstate commerce] of the superseding indictment… [and] affirm[ed] the defendant's convictions and sentences pertaining to all remaining counts." *Id*. at 520, 544. The court "reverse[d] [defendant Jackson's] conviction on Count 41 [obstructing interstate commerce by extortion] only, but affirm[ed] in all other respects." *Id*. Accordingly, [the court] "affirm[ed] in part, reverse[d] in part, and remand[ed] both defendants' cases for resentencing consistent with this opinion." *Id*. at 544.

***Winget v. J.P. Morgan Chase Bank,* 537 F.3d 565 (6th Cir. 2008)**

QUESTION: Whether a bankruptcy court's final sale order is a final decision on the merits for the purpose of applying res judicata. *Id*.

ANALYSIS: The court held that "a bankruptcy court's sale order is a final order for res judicata purposes." *Id*. at 578. The court reached this decision by examining prior holdings that confirmed reorganization in a bankruptcy proceeding is a final order, and considering the policy matters behind res judicata. *Id*. The 6th Circuit noted that "public policy dictates that there be an end of litigation." *Id*. The execution of sale order, the court reasons, constitutes an end to litigation by mandating the sale of the debtor's assets and prohibiting further litigation regarding those assets absent the court undoing the sale. *Id*. at 578–79.

CONCLUSION: The 6th Circuit concluded that for res judicata purposes, a bankruptcy court's sale order is a final order. *Id*. at 578.

***Great Lakes Exploration Group, LLC v. Unidentified Wrecked & Abandoned Sailing Vessel,* 522 F.3d 682 (6th Cir. 2008)**

QUESTION: Whether a salvor, conscious of a shipwreck's precise location, must disclose such information to the state pursuant to the Abandoned Shipwreck Act ("ASA"). *Id*. at 689.

ANALYSIS: A state is able to exert ownership over a shipwreck and usurp the federal court of jurisdiction in two scenarios: (1) when the state acquires actual possession of the shipwreck; and (2) pursuant to the ASA, if the state intervenes in federal court and establishes the vessel is abandoned and embedded in the state's submerged lands. *Id*. at 685. Concerned that disclosure of the shipwreck's precise location would lead to the state taking actual possession of the shipwreck, thus barring federal jurisdiction, the salvor refused to disclose the shipwreck's location. *Id.* at 689. Accordingly, the court was forced to balance the salvor's interest in retaining federal jurisdiction and the state's interest in obtaining adequate information to further its investigation whether the shipwreck was embedded in its lands. *Id*. at 690. The court recognized that federal courts are required "to give due weight to the important interests that states have in abandoned shipwrecks embedded in their territorial waters." *Id*. Additionally, the court noted that federal courts must first issue an arrest warrant over the shipwreck, securing federal jurisdiction before the precise location is disclosed. *Id*. at 695–96.

CONCLUSION: The 6th Circuit held that "although a federal court may require a salvor to reveal the precise location of a vessel after a state

has intervened to assert a claim under the ASA, the court must first ensure that the state cannot divest the court of federal jurisdiction." *Id*. at 696.

SEVENTH CIRCUIT

Bayo v. Chertoff, 535 F.3d 749 (7th Cir. 2008)

QUESTION: Whether due process requires that an alien's waiver under the Visa Waiver Program ("VWP") must be knowing and voluntary. *Id*. at 753.

ANALYSIS: The court found that a waiver is "an intentional relinquishment of a known right, which means that it must be voluntary and knowing." *Id*. at 755. A signature alone is not enough to waive federal rights. *Id*. Instead, there must be a "reason beyond the signature alone to believe that the waiver is knowing and voluntary." *Id.*

CONCLUSION: The 7th Circuit held that a waiver under the VWP is valid only if entered knowingly. *Id*. at 757–58.

United States v. Rogers, 542 F.3d 197 (7th Cir. 2008)

QUESTION: Whether the probation that follows a convict's release from prison may be said to constitute confinement imposed for that conviction for the purpose of calculating the ten-year period in which a witness may be impeached for prior convictions pursuant to FED. R. EVID. 609(b). *Id* at 200–01.

ANALYSIS: In 2005, Anthony Rogers was tried on charges of making a false statement on a firearm purchase form and testified in his own defense. *Id.* at 198. The government then impeached Rogers with his 1993 conviction for distribution of cocaine. Subsequent to that conviction, Rogers was released from prison in 1994 and remained on probation until 1999. *Id*. The court noted that Rule 609(b) of the Federal Rules of Evidence states that "[e]vidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction whichever is later." *Id*. at 200. The court analyzed the revised draft of the rule of 1971 which made no mention of the time limit running from the end of parole as well as the Fifth Circuit's ruling that "confinement" for purposes of calculating the ten-year time limit in Rule 609(b) does not include parole supervision. *Id*. at 200.

CONCLUSION: The court held that "'confinement' for purposes of the ten-year time limit in Rule 609(b) does not include periods of probation or parole." *Id*. at 201.

***Andrews v. Chevy Chase Bank,* 545 F.3d 570 (7th Cir. 2008)**

QUESTION: Whether the Truth in Lending Act ("TILA") authorizes class action certification for claims seeking rescission. *Id*. at 571.

ANALYSIS: The 7th Circuit first noted that TILA was intended protect borrowers from the deceptive practices of lenders by requiring the lender to make certain disclosures of the credit terms. *Id.* at 573. When a creditor has violated TILA, the court observed, the borrower is entitled to either money damages or rescission of the loan transaction. *Id*. The court reasoned that rescission is a "purely personal remedy" that is not appropriate in class action suits. *Id*. The logistics of rescission and the decision to seek rescission varies among plaintiffs, and therefore is "an extremely poor fit for the class-action mechanism." *Id*. at 574. Further, the court noted that class action claims for damages are permitted, but are subject to a maximum. *Id*. The cap on damages, the court reasoned, implies that the rescission remedy of TILA is intended to be an "individualized" remedy that is inappropriate for class action claims. *Id*. at 575.

CONCLUSION: The 7th Circuit joined the 1st and 5th Circuits in holding that class action claims for rescission of loan transactions are not permitted under TILA. *Id*. at 578.

***Evers v. Astrue,* 536 F.3d 651 (7th Cir. 2008)**

QUESTION: Whether a plaintiff's due process and regulatory claims are claims "relating to" the contract under the Contract Disputes Act, 41 U.S.C. § 601 and therefore preclude the plaintiff from raising the claims in federal district court. *Id*. at 657.

ANALYSIS: The court first noted that "other circuits have determined whether a claim 'relates to the contract' based upon the source of the plaintiff's rights and the relief sought by the plaintiff." *Id*. The court reasoned that if the source of the plaintiff's rights and the remedies sought are "essentially contractual," then the plaintiff is precluded from raising his claims in federal district court. *Id*. The court then cited to the 6th Circuit's reasoning that the plaintiff's "'characterization of its claims is not controlling. [A] plaintiff may not avoid the jurisdictional bar of the [Contract Disputes Act] merely by alleging violations of regulatory or statutory provisions.'" *Id*. at 658. The

court then applied this framework and examined the source of the plaintiff's claims and remedies sought. *Id*.

CONCLUSION: The court concluded the plaintiff's due process and regulatory claims and remedies sought were related to the contract, thus they could not be raised in federal district court. *Id*. at 660–61. Therefore, the 7th Circuit affirmed the district court's dismissal for lack of jurisdiction. *Id*.

***Hall v. Nalco Co.,* 534 F.3d 644 (7th Cir. 2008)**

QUESTION: Whether firing a female employee "for taking time off from work to undergo in vitro fertilization after being diagnosed with infertility" is discrimination on the basis of sex "under Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act" ("Title VII"). *Id.* at 645.

ANALYSIS: The court first noted that the scope of Title VII claims includes "certain inherently gender-specific characteristics that may not form the basis for disparate treatment of employees," specifically pregnancy, "childbirth and medical conditions related to pregnancy or childbirth." *Id*. at 647. The court then analyzed a Supreme Court decision differentiating the permissible "gender-neutral characteristic of fertility alone" as opposed to "the gender-specific characteristic of childbearing capacity" held to be "invalid under [Title VII]." *Id*. at 648. Finally, the court recognized that "[e]mployees terminated for taking time off to undergo [in vitro fertilization]—just like those terminated for taking time off to give birth or receive other pregnancy-related care—will always be women" as the treatment "is one of several assisted reproductive technologies that involves a surgical impregnation procedure." *Id*. at 648–49.

CONCLUSION: The 7th Circuit held that termination of a female employee for undergoing in vitro fertilization is not termination "for the gender-neutral condition of infertility, but rather for the gender-specific quality of childbearing capacity" and thus a valid discrimination claim under Title VII. *Id*. at 649.

EIGHTH CIRCUIT

Mitchell v. United States Parole Comm., 538 F.3d 948 (8th Cir. 2008)

QUESTION: Whether the Parole Commission's ("Commission") failure to conduct a timely early-termination hearing renders a parolee's custody unlawful. *Id.* at 951.

ANALYSIS: The court began by looking at the text of 18 U.S.C.S. § 4211(c)(1), which requires the Commission to conduct an early-termination hearing after five years of a parolee's release on parole. *Id.* at 950. The court agreed with the other circuits which have held that the meaning of the statute cannot be resolved simply by conducting an analysis of the text of the statute. *Id.* at 951. However, the court reasoned that the legislative history of the statute strongly supports finding that the parolee has the ability to compel a prompt hearing if the hearing is not conducted in a timely manner. *Id.* There is nothing to indicate that the parolee should be released from custody as a result of an untimely hearing. *Id*. The question of release is then left to the Commission's discretion based on the likelihood that the parolee has been rehabilitated. *Id*. Once the Commission has rendered a decision, the parolee does not have the option to argue that the Commission would have held differently if the hearing had been held in a timely manner. *Id.* at 952.

CONCLUSION: The court held that the Commission's failure to conduct a timely early-termination hearing is a procedural error which does not warrant making the determination that the parolee's custody is unlawful. *Id* at 951. Additionally, the court noted that the proper relief for the parolee is to compel a prompt hearing. *Id* at 952.

United States v. Cole, 525 F.3d 656 (8th Cir. 2008)

QUESTION: Whether the phrase "any firearm" in the U.S. Sentencing Guidelines Manual § 2K2.1(b)(4) applies only "to the firearms that the defendant was convicted of possessing" for purposes of sentence enhancement. *Id.* at 659.

ANALYSIS: Although the 5th, 6th, and 11th Circuits have addressed the meaning of "any firearm," the 8th Circuit looked to its previous decision in *United States v. Mann* for guidance regarding the meaning of the phrase "any firearm." *Id.* Following the construction of the phrase in *Mann*, the court construed the term broadly in subsection (b)(4) because "[i]t is a principle of statutory interpretation that identical phrases in a

statute, particularly when they occur in close proximity, are ordinarily given an identical meaning." *Id.* Thus, the court did not limit the phrase to only firearms defendants are convicted of possessing. *Id.* at 659–60. However, the court explained that Congress impliedly limited the phrase "any firearm that was stolen" in subsection (b)(4) because Congress did not mention any conduct required to violate subsection (b)(4) and "a stolen firearm obviously cannot itself be conduct." *Id.* at 660. Since the guideline lacked "explicit instructions," the court concluded that general relevant conduct provisions apply. *Id.*

CONCLUSION: The 8th Circuit held that sentence enhancement for possession of a stolen firearm applies whenever the firearm "is involved in the offense of conviction or in relevant conduct." *Id.*

***United States v. Azure,* 539 F.3d 904 (8th Cir. 2008)**

QUESTION: Whether a district court's failure to properly "designate a magistrate judge to conduct hearings to modify, revoke, or terminate supervised release" pursuant to 18 U.S.C. § 3401(i) (2006) constitutes jurisdictional error. *Id.* at 907–08.

ANALYSIS: The 8th Circuit reviewed precedent of both the 1st and 5th Circuits and concluded that "the lack of a proper designation under section 3401(i) is not a jurisdictional error but a procedural error . . . because the district court retained subject matter jurisdiction, even as the magistrate judge conducted Azure's revocation hearing." *Id.* at 908.

CONCLUSION: The court held that the failure to designate the magistrate judge constitutes procedural rather than jurisdictional error. *Id.* Consequently, a defendant waives the right to raise this issue on appeal where the defendant fails to raise the issue prior to the district court's judgment. *Id.* at 910.

***Milavetz v. United States,* 541 F.3d 785 (8th Cir. 2008)**

QUESTION: Whether attorneys fall within the definition of debt relief agencies under 11 U.S.C. § 101(12A). *Id.* at 790.

ANALYSIS: Examining the definitions provided under 11 U.S.C.S. § 110, the 8th Circuit reasoned that "[t]he plain reading of the definition of debt relief agency, and the defined terms that make up that definition, leads us to conclude that attorneys who provide 'bankruptcy assistance' to 'assisted persons' are unambiguously included in the definition of 'debt relief agencies.'" *Id.* at 791. The court further reasoned that "Congress specifically listed five exclusions from the definition of 'debt relief agency,' and if it meant to exclude attorneys from that definition it

could have explicitly done so." *Id.* Finally, the 8th Circuit examined the legislative history behind 11 U.S.C. § 101 to find that attorneys are included in the definition. *Id.*

CONCLUSION: The Eighth Circuit held "attorneys that provide bankruptcy assistance to 'assisted persons' are 'debt relief agencies' as that term is defined in the Code." *Id.* at 792.

***In re Racing Servs.*, 540 F.3d 892 (8th Cir. 2008)**

QUESTION: Whether "a creditors' committee may proceed derivatively when the debtor-in-possession (or trustee) consents to its suit." *Id.* at 901–02.

ANALYSIS: The 8th Circuit followed the reasoning of the 2nd and 9th Circuits and indicated that a trustee, or debtor-in-possession, is obligated "to pursue all actions that are in the best interests of creditors and the estate." *Id.* The court stated that, in order to enable the debtor-in-possession to discharge its obligation, the debtor-in-possession should be able "to coordinate litigation responsibilities with an unsecured [creditor or] creditors' committee." *Id.* Additionally, the court indicated that, in order to establish derivative standing where the debtor-in-possession consents to a creditor committee's suit, the committee must show that the suit is "necessary and beneficial to the fair and efficient resolution of the bankruptcy proceedings." *Id* at 902. However, the court noted that the creditor committee's burden to establish derivative standing is higher where the debtor in possession consents to the action because "not every 'beneficial' action is 'necessary' for a given proceeding." *Id.*

CONCLUSION: The court held that "a creditor (or creditor's committee) may obtain derivative standing to pursue avoidance actions under circumstances in which the trustee (or debtor-in-possession) either unjustifiably refuses to bring the creditor's proposed claims or consents to the creditor pursuing such claims in his stead." *Id.* at 904–05. The court further held that "the bankruptcy courts may retroactively grant a creditor derivative standing," but "that under no circumstances may a creditor prosecute its derivative complaint without the bankruptcy court's permission." *Id.* at 905.

***Duluth, Winnipeg & Pac. Ry. Co. v. City of Orr*, 529 F.3d 794 (8th Cir. 2008)**

QUESTION: Whether the Federal Railway Safety Act, 49 U.S.C. § 20101, preempted a state law regulating the speed of trains. *Id.* at 795.

ANALYSIS: The court noted that "Congress passed the Federal Railway Safety Act (the Act) . . . to 'promote safety in every area of rail operations,'" and that the Secretary of Transportation "prescribes comprehensive national track safety standards which address maintenance, repair, and inspection of tracks." *Id.* at 796. Further noting that the Act generally preempts a state law that addresses the same subject matter, the court recognized that 49 U.S.C. § 20106(a)(2) "nevertheless creates a narrow exception to preemption through its savings clause." *Id.* The court recognized that under the savings clause, a state may "enact an otherwise preempted law" to address "railroad safety or security if it '(A) is necessary to eliminate or reduce an essentially local safety or security hazard; (B) is not incompatible with a law, regulation, or order of the United States Government; and (C) does not unreasonably burden interstate commerce.'" *Id.* The court stated that the "purpose of the savings clause is to 'enable the states to respond to local situations not capable of being adequately encompassed within the uniform national standards.'" *Id.* The court relied on the Act's legislative history and how other circuits have defined "an essentially local safety hazard" to establish that "[i]f the local situation is actually statewide in character *or* capable of being adequately encompassed within national uniform standards, it will not be considered an essentially local safety hazard." *Id.* at 798. The court stated that "not one of the five cited conditions is unique to Orr . . . [and] the evidence . . . does not support a conclusion that this combination of conditions could not exist in other places in the state or elsewhere in the country." *Id.* at 799. Furthermore, the court noted that "[i]t is undisputed that each condition cited by Orr has been or could be adequately addressed within the national track safety standards." *Id.*

CONCLUSION: The court held that since "the special law does not meet the first of the three requirements to come within the § 20106 savings clause . . . it is preempted" by the Act. *Id.* at 800.

NINTH CIRCUIT

Jacobs v. Clark County Sch. Dist., 526 F.3d 419 (9th Cir. 2008)

QUESTION: Whether Nevada Revised Statute § 392.458 ("N.R.S. § 392.458"), establishing "a policy that requires pupils to wear school uniforms," violates the First Amendment's Free Speech and Free Exercise Clauses, the Fourteenth Amendment's Due Process Clause, or amounts to compelled speech. *Id*. at 422–23.

ANALYSIS: The 9th Circuit explained that the school uniform policies enacted under N.R.S. § 392.458 restricted only students' content-neutral speech and expression and therefore need only withstand intermediate scrutiny. *Id*. at 428. The court held the school uniform policies to be "content-neutral, despite their allowances for clothing containing school logos" because the goals of such policies were "not to suppress the expression of particular ideas." *Id*. at 432–33. The court found that the uniform policies withstood intermediate scrutiny because they furthered important governmental interests unrelated to the suppression of free expression and permitted "alternate channels for student communication." *Id*. at 435–37. The Court noted that the uniform policies did not compel students to communicate "any message whatsoever," and because the policy, if "applied to all students equally," did not violate the Free Exercise Clause of the First Amendment. *Id*. at 438–39. Additionally, the court also found that the Due Process Clause did not require school districts to adhere to their own regulations, and therefore any failure to seek parental approval for such uniform policies may only be a violation of state law. *Id*. at 441.

CONCLUSION: The 9th Circuit concluded that the schools uniform policies implemented under N.R.S. § 392.458 do not violate students' "free speech, free exercise, or due process rights." *Id*. at 442.

Clark v. Astrue, 529 F.3d 1211 (9th Cir. 2008)

QUESTION: Whether the Social Security Act's limit on attorneys' fees, to 25% of past due benefits, applies only to those fees awarded under section 406(b), or to those awarded under both section 406(a) and section 406(b). *Id.* at 1214-15.

ANALYSIS: In analyzing how the Social Security Act limits the award of attorney's fees, the court reasoned that "[s]ection 406(a) grants the Social Security Administration exclusive jurisdiction to award

attorney's fees for representation of a Social Security claimant in proceedings before the Administration." "[S]ection 406(b) grants federal courts exclusive jurisdiction to award attorney's fees for representation of the claimant in court." *Id.* at 1215. In examining the legislative history of section 406(a), the court determined that "[w]hile amending § 406(a), Congress chose not to impose a categorical ceiling on the Administration's authority to award attorney's fees for representation before the Administration." *Id.* In finding that section 406(b) limits awards only under its own section, the court reasoned that "if a fee award under § 406(a) can be greater than 25% of past-due benefits, it follows that the combined amount of fees awarded under both § 406(a) and § 406(b) must be capable of exceeding 25% of past-due benefits." *Id.* at 1218.

CONCLUSION: The 9th Circuit held that "the plain text of 42 U.S.C. section 406(b) limits only the amount of attorney's fees awarded under section 406(b), not the combined fees awarded under section 406(a) and section 406(b), to 25% of the claimant's past-due benefits." *Id.*

***Ordlock v. Comm'r. of Internal Revenue,* 533 F.3d 1136 (9th Cir. 2008)**

QUESTION: "Whether 26 U.S.C. § 6015 preempts community property law for purposes of calculating innocent spouse refunds." *Id.* at 1140.

ANALYSIS: The 9th Circuit held that 26 U.S.C. § 6015 determines whether a taxpayer qualifies as an "innocent spouse" for tax purposes, but that this statute does not preempt state law regarding the determination of an innocent spouse's eligibility for refunds. *Id.* The court reasoned that "if Congress had intended . . . § 6015(a) to preempt community property laws with respect to the issuance of a refund, it would have clarified that the decision to make such an issuance was a 'determination' within the meaning of the statute." *Id.* at 1141. Although the statute says that "notwithstanding any other law or rule of law . . . credit or refund shall be allowed or made to the extent attributable to the application of this section," the court, in keeping with its earlier decisions, held that this phrase was not to be read literally, but to be read in the context of Congress's evident intent to avoid issues of res judicata. *Id.* at 1144.

CONCLUSION: Drawing on the statute's legislative history, the 9th Circuit held that 26 U.S.C. § 6015 merely determines whether a taxpayer is an innocent spouse for purposes of tax refunds. *Id.* at 1141. Despite apparent language to the contrary, it does not preempt community

property law for the purposes of determining whether that taxpayer is eligible for innocent spouse refunds. *Id.* at 1143.

***Doissaint v. Mukasey*, 538 F.3d 1167 (9th Cir. 2008)**

QUESTION: Whether the Board of Immigration Appeals ("BIA") can cure the legal error of construing a properly raised and briefed Convention Against Torture ("CAT") claim as abandoned in subsequent consideration of a motion to reopen. *Id.* at 1170.

ANALYSIS: The 9th Circuit stated that a motion to reopen is "purely fact-based, seeking to present newly discovered facts or circumstances since a petitioner's hearing." *Id.* The court further noted that "a motion to reconsider does not present new law or facts, but rather challenges determinations of law and fact made by the BIA. In contrast, a motion to reopen seeks to present new facts that would entitle the alien to relief from deportation." *Id.* The court also stated that once the BIA realized its error, it should have reconsidered the previous decision and addressed the claim strictly on the merits. *Id.* at 1171.

CONCLUSION: The 9th Circuit held that "when the BIA commits legal error in a direct appeal, the BIA cannot cure that error in a denial of the motion to reopen." *Id.*

***United States v. Mi Kyung Byun*, 530 F.3d 1139 (9th Cir. 2008)**

QUESTION: Whether a conviction for importation of an alien, who is a minor, for the purposes of prostitution makes the convicted person a sex offender under Title I of the Walsh Act, which requires sex offenders to register under the Sex Offender Registration and Notification Act. *Id*. at 1143.

ANALYSIS: The Sex Offender Registration and Notification Act ("SORNA") requires that individuals who have been convicted of a "sex offense" under § 16911(5)(A) register, and keep the registration current. *Id*. at 1143. Importing an alien, who is also a minor, for the purposes of prostitution does not directly match a specified offense against a minor under § 16911(5)(A)(ii). *Id*. at 1144. The closest offense delineated is "solicitation to practice prostitution," however, importing an alien for the purposes of prostitution does not necessarily mean that the person was "solicited, urged, advised, or otherwise incited" to engage in prostitution. *Id.* at 1145. The provision includes a catchall provision for an instance when the offense charged is not specifically tailored to one of the listed offenses that define a sex offense as any "conduct that by its nature is a sex offense against a minor." *Id*. The court determined that importing an

alien with the intent to engage that minor in prostitution is sufficient to fulfill the requirements of the catchall provision. *Id*. at 1146. Additionally, the court noted that even if the underlying conviction does not specifically state that the person who was imported was a minor, the court is permitted to use a non-categorical approach to determine if the person was in fact a minor. *Id*. at 1148. The court determined that both the language of SORNA and the legislative intent require this approach. *Id.* Because the statutory language states "when committed against a minor," rather than "convicted," the appropriate judicial inquiry is a categorical approach to determine if the offense falls into the sentencing guidelines. *Id.* The court determined that it is the underlying conduct, rather than the elements of the crime convicted of, that should steer the sentencing for purposes of SORNA. *Id*. at 1149. Additionally, the legislative history points towards Congress's desire to include "all individuals who commit sex crimes against minors, not only those who were convicted under a statute having the age of the victim as an element" within the purview of SORNA. *Id*.

CONCLUSION: Conviction for importation of an alien for the purposes of prostitution is a "specified offense against a minor" which constitutes a sex offense and subsequently triggers the registration requirements under Title I of the Walsh Act. *Id*. at 1144.

Farrar v. United States Dist. Court for the Dist. of Haw., 284 Fed. Appx. 463 (9th Cir. 2008)

QUESTION: Whether the petitioners met the strict prerequisites for a writ of mandamus to challenge the district court's denial of their motion alleging a due process violation based on an allegedly illegal seizure and detainment of their property without a timely filed civil forfeiture complaint, and requesting a return of their property and interest. *Id.* at 463–64.

ANALYSIS: In order to determine whether relief through a writ of mandamus is appropriate, the Ninth Circuit considered whether: (1) the petitioner has other means of attaining the desired relief, such as a direct appeal; (2) the petitioner will be damaged in a way not correctable on appeal; (3) the district court's order is clearly erroneous as a matter of law; (4) the order is an oft-repeated error or manifests a persistent disregard of the federal rules; and (5) the order raises new and important problems or legal issues of first impression. *Id.* at 464. The court held that a direct appeal would be available to correct the alleged error, in addition to the means currently available in the district court such as moving to dismiss the government's complaint. *Id.* The court also held

that it did not have a firm conviction that the district court clearly erred as a matter of law. *Id.* Further, it was not apparent that the district court committed an oft-repeated error. *Id.* Lastly, although the case did present an issue of first impression, this one favorable factor was not enough for the petitioners to carry their heavy burden of proving their clear and indisputable right to mandamus relief. *Id.* at 464–65.

CONCLUSION: Because the petitioners did not meet the strict prerequisites for a writ of mandamus, the Ninth Circuit denied their petition. *Id.*

United States v. Fuller, 531 F.3d 1020 (9th Cir. 2008)

QUESTION: Whether possession of falsified identification purportedly issued by a nonexistent government agency is prosecutable under 18 U.S.C. § 1028(a)(6). *Id.* at 1024.

ANALYSIS: The court first interpreted the statutory language to mean that "the statute requires that the document appear to be . . . issued under the authority of the United States; it does not require that the document actually be made . . . under the authority of the United States." *Id.* at 1026. The court then noted that Congress intended to punish knowing possession of such documents, and excluding identification from a nonexistent agency would defeat that purpose. *Id.* at 1027. Further, the court found that even if the document is suspect on its face, whether it purports to be issued under the authority of the United States is a determination to be made by a jury. *Id.* at 1026.

CONCLUSION: The 9th Circuit held that a person who knowingly possesses false identification that appears to be issued under the authority of the United States may be convicted under § 1028(a)(6), even if the agency that purportedly issued the document does not exist. *Id.* at 1028.

Arizona v. United States Dist. Court, 528 F.3d 652 (9th Cir. 2008)

QUESTION: "Whether a district court has the authority to require a defendant to prepare a *Martinez* report." *Id.* at 655–56.

ANALYSIS: The 9th Circuit noted that a *Martinez* report provides the district court with a factual basis and develops a record for the court to look to in determining preliminary decisions. *Id.* The court considered both the nature of the claims involved here and the timing of the district court's order and found that in these circumstances the "burden of production was appropriately shifted to" the government to produce a "comprehensive, substitute record" to allow the court to determine whether the incarcerated petitioner's claims against the government are

valid. *Id.* at 656, 659. The court further articulated that while in some cases such an order could be considered an abuse of discretion, here, the limitations that the district court placed on both the investigation and the report demonstrated that it had acted within its discretion in issuing the order for the preparation of the *Martinez* report. *Id.* at 659.

CONCLUSION: The 9th Circuit held that it is within a district court's discretion to require defendants to prepare a *Martinez* report where it "is reasonably tailored to the pretrial needs of the district court to assess the case." *Id.*

***United States v. Santos,* 527 F.3d 1003 (9th Cir. 2008)**

QUESTION: "Whether a district court may use the face value of stolen checks in estimating the intended loss of a counterfeit scheme . . . ." *Id.* at 1007.

ANALYSIS: The 9th Circuit adopted the approach of the 3rd and 11th Circuits, holding that "[a]bsent evidence to the contrary, the district court may reasonably infer that the participants in a counterfeiting scheme intend to take as much as they know they can." *Id.* at 1008. The 9th Circuit reasoned that where there is a counterfeiting scheme involved, the court can consider the nature of the scheme and the circumstances surrounding it, for instance whether the materials and equipment to continue the scheme were still in the defendant's possession at the time of arrest. *Id.* at 1009. In considering these circumstances, it is "reasonable for [a] district court to infer from this evidence that they would have continued to produce and cash counterfeit checks had they not been caught." *Id.*

CONCLUSION: The 9th Circuit held that "absent countervailing evidence showing that the defendant intended to take less, a district court may reasonably infer, for the purposes of calculating intended loss under [U.S. SENTENCING GUIDELINES MANUAL] § 2B1.1(b)(1), that a participant in a counterfeiting scheme intends to take up to the full face amount of the stolen checks on which the counterfeit checks are based." *Id.*

***Simpson v. Thomas*, 528 F.3d 685 (9th Cir. 2008)**

Editor's Note: This case resolves two issues of first impression concerning federal evidentiary findings.

QUESTION ONE: "[W]hether *Heck v. Humphrey*[, 512 U.S. 477 (1994)] may be used to bar evidence in a [42 U.S.C.] § 1983 [(2006)] claim for excessive force." *Id.* at 691.

ANALYSIS: The court began its analysis by examining the difference between section 1983 and the habeas corpus statute, 28 U.S.C. §2254 (2006), concluding that unlike the former, the latter requires state prisoners to exhaust state remedies. *Id.* at 693. The court then cited the Supreme Court's decision in *Heck* to find that "'when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence,'" and if it does not, "'the action should be allowed to proceed in the absence of some other bar to the suit.'" *Id.* at 693–94. Therefore, the court reasoned, *Heck* was only intended to restrain prisoners from undermining the provisions of § 2254 by filing suit under § 1983, not whether evidence should be admitted. *Id.* at 695.

CONCLUSION: The court found that "*Heck* does not create a rule of evidence exclusion. Therefore, if . . . a party is permitted to proceed on a § 1983 claim, relevant evidence may not be barred under the rule announced in *Heck*." *Id.* at 690.

QUESTION TWO: "[W]hether prior convictions more than ten years old may be used for impeachment purposes under FED. R. EVID. 609 if those prior convictions are used to enhance a sentence for a separate conviction that falls within the ten-year time limit of [FED. R. EVID.] 609(b)." *Id*. at 689.

ANALYSIS: Drawing from prior precedent, the 9th Circuit referenced its decision in cases challenging the Federal Three Strikes Provision. *Id.* In those cases, the court "declined to hold that such a provision violated the *Double Jeopardy Clause*, observing that the enhanced punishment imposed for the later offense is not [an] additional penalty for the earlier crimes, but instead . . . a stiffened penalty for the latest crime." *Id.* at 689–90. The court then applied this analysis to California's Three Strikes Provision and stated that if a defendant's prior convictions older than ten years were applied, they would not represent "a stiffened penalty for the latest crime." *Id.* at 690 (emphasis added). The court also considered the plain language of FED. R. EVID. 609(b), finding that it "exclude[s] evidence of a conviction if it has been more

than ten years 'since the date of the conviction or the release of the witness from the confinement *imposed for that conviction*.'" *Id.* (quoting FED. R. EVID. 609(b)).

CONCLUSION: The court held that prior convictions more than ten years old "do not endure for the purposes of [FED. R. EVID.] 609(b) and therefore are not admissible against the witness, unless the court determines "'that the probative value of the conviction supported by specific facts and evidence substantially outweighs its prejudicial effect.'" *Id.* at 689 (quoting FED. R. EVID. 609(b)).

***United States v. Reveles-Espinoza,* 522 F.3d 1044 (9th Cir. 2008)**

QUESTION: Whether the felony cultivation of marijuana under California Health and Safety Code § 11358 constitutes an aggravated felony within the meaning of federal law. *Id*. at 1047.

ANALYSIS: The 9th Circuit provided that "in determining whether a state offense fits within the generic definition of aggravated felony, we first make a categorical comparison of the elements of that statute of conviction to the generic definition." *Id*. The California law criminalizes "planting, cultivating, harvesting, drying, or processing any marijuana." *Id*. The court stated that the offense under California law is essentially a drug-trafficking crime that would constitute aggravated felony under 8 U.S.C. § 1229(b). *Id*.

CONCLUSION: The court held that felony cultivation of marijuana under California law qualifies as an aggravated felony under federal law. *Id*.

***Phillips v. E.I Dupont de Nemours & Co. (In re Hanford Nuclear Reservation Litig.),* 521 F.3d 1028 (9th Cir. 2008)**

QUESTION: The Bellwether trial brought forth the issue of whether a defendant "may seek complete immunity under the common law government contractor defense, because they were operating Hanford [Nuclear Weapons Reservation] at the request of the federal government." *Id.* at 1039.

ANALYSIS: In determining whether a federal statute trumps a common law right, the court must determine whether a purpose contrary to a common law defense is evident. *Id.* at 1045. Using a two-step inquiry, the court upheld the District Court's ruling that the Price-Anderson Act ("PAA") pre-empted the defendant's common law government contractor defense because: (1) the statute predates any judicial recognition of the defense; and (2) "the statute's comprehensive

liability scheme is patently inconsistent with the defense and precludes its operation in [the] case." *Id.* The court found that the defense was inconsistent with Congressional intent. *Id.* at 1046. The court also upheld the District Court's imposition of strict liability. *Id.* at 1047. It upheld the District Court's instruction to the jury to substitute its own reasonable "emission standard," since there were no government standards to apply. *Id.* The court also agreed with the District Court holding that Defendant's conduct was a dangerous activity and that it did not qualify for a public duty exemption. *Id.* at 1049. Certain plaintiffs appealed that their medical monitoring claims should have been decided in state court. *Id.* The court upheld the District Court's decision to retain jurisdiction and that medical monitoring claims were not compensable under the PAA. *Id.* at 1054. The court also concluded "that members of the plaintiff-class who have filed individual suits are entitled to the benefits of American Pipe tolling." *Id.* at 1053. As to the District Court rulings during the Bellwether trial, the court held: (1) that the district court properly instructed the jury on but-for causation; (2) that a new trial be ordered, since one of plaintiff's experts was erroneously banned from testifying that he authored particular articles and that another expert should not have been cross-examined with deposition testimony of a non-testifying expert. *Id.* at 1054–57. The court found the latter to be prejudicial to Plaintiff. *Id.* at 1055. The court also ruled that excluding Hurthle Cell evidence was prejudicial. *Id.* at 1057. Finally, the Court affirmed on ancillary matters, including but not limited to: excluding certain witness testimony; voir dire and juror misconduct. *Id.* at 1058–61.

CONCLUSION: The court held that the immunity defense is "inapplicable as a matter of law, because Congress enacted the PAA before the courts recognized the government contractor defense, and "the PAA provides a comprehensive liability scheme that precludes Defendants' reliance on such a defense." *Id.* at 1039. The court held that under Washington law, "the district court properly instructed the jury that to impose liability, it had to find Hanford was the 'but for' cause of Plaintiffs' diseases and not just a contributing cause under the more lenient 'substantial factor' test." *Id.* at 1040. The court further held that among the evidentiary rulings before it, three constituted reversible error with respect to three Bellwether Plaintiffs. *Id.*

***Sanchez v. Mukasey*, 521 F.3d 1106 (9th Cir. 2008)**

QUESTION: Whether subsequent to *Moran v. Ashcroft*, "the family unity waiver [contained in 8 U.S.C. § 1182(a)(6)(E)(iii)] is available to

an alien denied cancellation because he smuggled his spouse, parent, or child into this country." *Id.* at 1106.

ANALYSIS: In *Moran*, the court "concluded that an applicant for cancellation of removal is eligible to be considered for a discretionary 'family unity' waiver of the alien-smuggling bar when the smuggled alien was the applicant's spouse, parent, son or daughter." *Id.* The court denied the petitioner relief in that case, "because when the petitioner smuggled the alien, she was not yet his wife." *Id.* The court reasoned that, "the waiver would have applied if they had been married at the time of the entry." *Id.* at 1106–07. In the present case, the court applied its reasoning in *Moran*, opining that "under *Moran*, all of the provisions of § 1182(a)(6)(E) pertaining to admissibility, including the family unity waiver, must be read into the provisions governing eligibility for cancellation. The government's position cannot be squared with the reasoning of *Moran*." *Id.* at 1109. The court disagreed with the government's contention that the reasoning in *Moran* was "dictum" holding that the law in their circuit "when a panel selects a single line of reasoning to support its result, the reasoning cannot be ignored as dictum." *Id.* at 1110.

CONCLUSION: The court granted petitioner's request for remand, commenting that "Congress knows how to create exceptions to the smuggling bar for the benefit of family reunification, and has done so. Here, Congress has clearly limited the application of the waiver. If Congress decides that a person who has smuggled immediate family members does not lack the good moral character required for cancellation of removal, it can so legislate. We cannot." *Id.* at 1114.

Ordlock v. Commissioner of Internal Revenue, 533 F.3d 1136 (9th Cir. 2008)

QUESTION: "Whether [the Internal Revenue Code, 26 U.S.C.] § 6015 preempts community property law for purposes of calculating innocent spouse refunds." *Id.* at 1140.

ANALYSIS: The 9th Circuit held that § 6015 determines whether a taxpayer qualifies as an "innocent spouse" for tax purposes, but that this statute does not preempt state law regarding the determination of an innocent spouse's eligibility for refunds. *Id.* The court reasoned that "if Congress had intended . . . § 6015(a) to preempt community property laws with respect to the issuance of a refund, it would have clarified that the decision to make such an issuance was a 'determination' within the meaning of the statute." *Id.* at 1141.

CONCLUSION: Drawing on the statute's legislative history, the 9th Circuit held that § 6015 merely determines whether a taxpayer is an innocent spouse for purposes of tax refunds. *Id.* at 1141. Despite apparent language to the contrary, it does not preempt community property law for the purposes of determining whether that taxpayer is eligible for innocent spouse refunds. *Id.* at 1143.

***United States v. Becerril-Lopez,* 541 F.3d 881 (9th Cir. 2008)**

QUESTION: Whether a violation of California Penal Code § 211 constitutes a "violent crime" within the meaning of § 2L1.2 of the United States Sentencing Guidelines. *Id*. at 889.

ANALYSIS: In order to address the issue at hand, the 9th Circuit utilized the categorical approach established in *Taylor v. United States*. *Id*. at 890. In order "to demonstrate that § 211 is not per se an offense within the Guideline" the court emphasized that one must show "'a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of [the] crime[s]' listed in the enhancement guideline and also outside the enhancement's 'catch-all' language." *Id*.

CONCLUSION: The 9th Circuit held that "if a conviction under Cal. Penal Code § 211 involved a threat not encompassed by generic robbery, it would necessarily constitute generic extortion and therefore be a 'crime of violence' under" § 2L1.2 of the United States Sentencing Guidelines. *Id.* at 892.

***Steven N.S. Cheung, Inc. v. United States,* 545 F.3d 695 (9th Cir. 2008)**

QUESTION: "Whether the flush language of 26 U.S.C. § 6621(a)(1)," which applies a rate reduction to the extent that an overpayment exceeds $10,000, "applies in the case of a wrongful levy judgment." *Id.* at 695–98.

ANALYSIS: The 9th Circuit found that Congress intended 26 U.S.C. § 6621 to treat wrongful levy judgments as though they were overpayments "regardless of their true nature." *Id.* at 699. Section 7426(g) provides that the interest rate on wrongful levies shall be paid "at the overpayment rate described in § 6621." *Id.* at 700. The court held that by "subjecting wrongful levy judgments to the overpayment rate as described in § 6621, Congress expressed its intent to give effect to the whole of § 6621(a)(1) in calculating the overpayment rate, including the rate reduction articulated" therein. *Id*. The court noted that 30 U.S.C. §

1721, which applies § 6621 to overpayments in oil and gas leases, specifically states that the rate reduction of § 6621 shall not apply to those situations. *Id.* The court reasoned that had Congress intended a similar exemption for wrongful levies, it would have included similar language in § 7426(g). *Id.* at 701.

CONCLUSION: The 9th Circuit held that "[t]he flush language of 26 U.S.C. § 6621," should be used to determine the interest rate in cases of wrongful levy judgments. *Id.* at 696.

***Carmona v. Carmona,* 544 F.3d 988 (9th Cir. 2008)**

QUESTION: Whether a "plan participant's retirement cuts off a putative alternate payee's right to obtain an enforceable [Qualified Domestic Relations Order ("DRO")] with regard to the surviving spouse benefits of a [Qualified Joint and Survivor Annuity]." *Id.* at 1000.

ANALYSIS: The court noted that "[a]llowing participants to change surviving spouse beneficiaries after the participant has retired and already begun receiving benefit payments would make it difficult for trustees to administer plans based on the actuarial value of both the participant and the surviving spouse." *Id.* at 1004. The court therefore adopted the position of "other courts that have either implicitly or explicitly concluded that the surviving spouse benefits irrevocably vest in the current spouse when the plan participant retires." *Id.*

CONCLUSION: The court held "only that a state DRO may not create an enforceable interest in surviving spouse benefits to an alternate payee after a participant's retirement, because ordinarily at retirement the surviving spouse's interest irrevocably vests." *Id.*

***McClung v. City of Sumter,* 545 F.3d 803 (9th Cir. 2008)**

QUESTION: Whether "a legislative, generally applicable development condition that does not require the owner to relinquish rights in the real property, as opposed to an adjudicative land-use exaction, should be reviewed pursuant to the ad hoc standards of *Penn Central Transportation Co. v. City of New York*, or the nexus and proportionality standards of *Nollan v. California Coastal Commission*, and *Dolan v. City of Tigard*." *Id.* at 805.

ANALYSIS: The court stated that the City's requirement that new developments include at least 12-inch storm pipes is subject to the *Penn Central* test because the City Ordinance 1603 is "akin to the classic example recognized by *Penn Central* of zoning laws that generally do not affect existing uses of real property but rather affect proposed

development, and are upheld where the health, safety, morals, or general welfare would be promoted by prohibiting particular contemplated uses of land." *Id.* at 810. In addition, the court explained that unlike *Nollan* and *Dolan*, this case does not involve an adjudicative determination, and the McClungs are not required to relinquish rights in their real property. *Id.* The court found that the McClungs impliedly contracted to install the 24-inch pipe because the McClungs received a letter from the City that gave the McClungs a choice of "either agreeing to install a 12-inch pipe and pay the usual fees, or install a 24-inch pipe." *Id.* at 813. The court noted that the letter's language indicated that the 24-inch pipe was not a mandatory requirement, and the McClungs installation of the 24-inch pipe was an acceptance of the letter's offer. *Id.* "Because the McClungs were not compelled to install a 24-inch pipe, but voluntarily contracted with the City to do so, there was simply no 'taking' by the City." *Id.*

CONCLUSION: A legislative, generally applicable development condition that does not require the owner to relinquish rights in the real property should be reviewed pursuant to the ad hoc standards of *Penn Central*. *Id.* at 805. Holding that the *Penn Central* standard applied "to the City's requirement that the McClungs install a storm pipe at least 12 inches in diameter," the court concluded "that the McClungs impliedly contracted to install a 24-inch pipe." *Id.* at 813. Therefore, the City's request "that the McClungs install a 24-inch pipe in exchange for the City approving their permit application and waiving certain permit and facilities fees" did not effect an illegal taking of their property by the City. *Id.* at 805.

United States v. Nader, 542 F.3d 713 (9th Cir. 2008)

QUESTION: "[W]hether telephone calls within a single state—intrastate rather than interstate calls—can violate the Travel Act [18 U.S.C. § 1952]." *Id.* at 715–16.

ANALYSIS: The 9th Circuit recognized "that this is a question of congressional intent . . . ." *Id.* at 717. First, the court "consider[ed] the plain meaning of the statute's text." *Id.* According to the Travel Act, "'[w]hoever . . . uses the mail or any facility in interstate or foreign commerce' with the intent to carry on unlawful activity is guilty of a crime." *Id.* The court concluded that "[t]he plain language of the statute is unambiguous." *Id.* at 718. More specifically, "[t]he facility itself, not its use, must be in interstate commerce." *Id.*

The 9th Circuit acknowledged that other courts "have recognized a distinction between the phrases 'in interstate commerce' and 'of interstate commerce.'" *Id.* at 718. However, the court resolved that it

would "attach no special significance to the use of the preposition 'in' rather than 'of' in the Travel Act." *Id.* at 719. To support its argument, the 9th Circuit analogized the Travel Act to the closely-related murder-for-hire statute, 18 U.S.C. § 1958. *Id.* at 719–20. The court opined that "[t]he murder-for-hire statute supports the conclusion that Congress did not intend to require actual interstate activity by using the phrase 'in interstate or foreign commerce' in the Travel Act," and "[t]hat Congress intended the two phrases to be interchangeable [because] the murder-for-hire statute supports the view that its use of one [phrase] rather than the other in the Travel Act has no special significance." *Id.* Thus, "intrastate telephone calls involve the use of a facility 'in' interstate commerce." *Id.* at 720. Noting that the Travel Act is worded broadly, the court concluded that "[i]ts plain text prevent[ed] [the court] from reading it to encompass only cases that involve organized crime or interstate criminal enterprises[,]" and thus a narrow reading of Congress's legislative intent was without merit and should be outweighed by the textual interpretation of the Travel Act itself and its analogy to the murder-for-hire statute. *Id.* at 720–21.

CONCLUSION: The 9th Circuit determined "that intrastate telephone calls made with the intent to further unlawful activity can violate the Travel Act [18 U.S.C. § 1952] because the telephone is a facility in interstate commerce." *Id.*

***United States v. Craighead,* 539 F.3d 1073 (9th Cir. 2008)**

QUESTION: Whether an interrogation was custodial in nature under *Miranda* when the interrogation occurred in a closet of the suspect's home while other law enforcement officers from three different agencies were searching his house pursuant to a valid search warrant. *Id.* at 1077.

ANALYSIS: The 9th Circuit stated that the relevant inquiry is one which considers the "totality of circumstances," to "decide whether a reasonable person in [the suspect's] position would have felt deprived of his freedom of action in any significant way, such that he would not have felt free to terminate the interrogation." *Id*. at 1082. Although a suspect is generally less likely to feel deprived of his freedom to act in his own home, the court held that the analysis turns on whether the interrogation environment was familiar and comfortable to the suspect or a "police-dominated atmosphere." *Id*. at 1083. The court considered four factors to determine if the interrogation took place in a police-dominated atmosphere: "(1) the number of law enforcement personnel and whether the were armed; (2) whether the suspect was at any point restrained, either by physical force or by threats; (3) whether the suspect was

isolated from others; and (4) whether the suspect was informed that he was free to leave or to terminate the interview, and the context in which any such statements were made." *Id*. at 1084.

First, the court reasoned that the presence of eight officers from three agencies, all of whom were wearing "raid vests," and some of whom had unholstered their weapons created a law enforcement dominated environment. *Id*. at 1085. Second, the court found that although the suspect was not physically restrained, the fact that he was escorted to a closet with a detective blocking the door could lead a reasonable person to believe that he was not free to leave or terminate the interview. *Id*. at 1085–86. Third, the court concluded that the suspect was in fact isolated from the outside world, which is a hallmark of a coercive custodial interrogation. *Id.* at 1086–87. And fourth, the FBI agent informed the suspect that he was free to leave before being brought to the closet, but it was unclear if that fact was reiterated once he was brought to the closet, where he was sealed off from everyone else. *Id*. at 1087–89. In addition to these four factors, the court emphasized the concern that—even if the suspect had felt free to leave—his home was overrun by law enforcement, effectively depriving the suspect of any freedom of action. *Id*. at 1083–88.

CONCLUSION: The court concluded that in considering the totality of the circumstances, the in-home interrogation was custodial in nature, and therefore *Miranda* warnings were required. *Id.* at 1089. Despite the fact that the FBI agent informed the suspect that he was free to leave before bringing him to the closet, the circumstances were such that a reasonable person would have felt deprived of his freedom of action or unable to terminate the interrogation. *Id.*

Western Filter Corp. v. Argan, Inc., 540 F.3d 947 (9th Cir. 2008)

QUESTION: "[W]hether a provision within a Stock Purchase Agreement ("SPA") permitting the representations and warranties of the parties to survive closing, also serves as a contractual statute of limitation that reduces a longer period otherwise provided by [state] law." *Id*. at 949.

ANALYSIS: The parties in this case disputed whether the plaintiff's claims "were barred by the one-year limitation set forth in the Survival Clause [of the Stock Purchase Agreement]." *Id*. at 950. Plaintiff argued that the one-year limitation contained in the Survival Clause "serves only to set forth the time period for which a breach may occur or be discovered." *Id*. at 951. The defendant argued that "the Survival Clause serves as a contractual limitation on the applicable statute of limitation."

Id. The court agreed with plaintiff and held that "the one year limitation [in the Survival Clause] serves only to specify when a breach of the representations and warranties may occur, but not when an action must be filed." *Id.* at 954. The court found that a party may "sue for breach of representations and warranties based on facts discovered pre-closing and up to one year after closing" and may bring its action for such breach "anytime so long as it is within the applicable California statute of limitation." *Id.* at n.8. The court justified its finding as reasonable "in light of California's policy of strictly construing any contractual limitation against the party seeking to invoke the time limitation." *Id*. at 954.

CONCLUSION: A one-year limitation permitting the representations and warranties of the parties to survive closing "serves only to specify when a breach . . . may occur, but not when an action must be filed." *Id.*

***Rodriguez v. Smith*, 541 F.3d 1180 (9th Cir. 2008)**

QUESTION: Whether the Bureau of Prisons' ("BOP") exercise of discretion pursuant to 28 C.F.R. §§ 570.20 and 570.21 in refusing inmate placement and transfer at a correctional facility violates Congressional intent that the BOP first consider the factors outlined in 18 U.S.C. § 3621(b). *Id.* at 1181–82.

ANALYSIS: The court observed that other circuits have already addressed the issue at hand. *Id.* at 1182. The court noted that the 2nd, 3rd, 8th and 10th Circuits have found that Congressional intent is clear from the text of § 3621(b) and, as such, the BOP regulations limiting an inmate's placement and transfer to a correctional facility directly contradict the statute. *Id.* at 1183. The court further noted that only the 1st Circuit has found that the BOP regulations are a valid exercise of discretion. *Id.* The court then utilized the framework set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* to decide whether Congressional intent was clear, for if so, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.*

The court turned to the "plain language" of the statute and concluded that while § 3624(c) places an "affirmative duty" on the BOP to consider placement at a correctional facility near the end of an inmate's prison sentence, it does not prevent the BOP from considering such placement prior to the end of an inmate's prison sentence. *Id.* at 1184–85. Indeed, the court noted that § 3621(b) specifically provides that the BOP has discretion to place or transfer an inmate to a correctional facility. *Id.* at 1185. The court stated that the BOP regulations conflict

with the provisions set forth in § 3621(b). *Id.* at 1187. The court agreed with the 3rd Circuit, finding an "'unavoidable conflict'" inherent in the BOP regulations because "the statute requires the BOP to consider five factors in determining . . . placement, while the regulation provides that the enumerated factors will not be fully considered." *Id.* In failing to consider the "mandatory" factors of § 3621(b), the court stated that the BOP regulations violate clear Congressional intent and deemed them invalid. *Id.* at 1187–88.

CONCLUSION: The court held that the BOP regulations conflicted with § 3621(b). *Id.* at 1189.

McDonald v. Checks-N-Advance, Inc. (In re Ferell), 539 F.3d 1186 (9th Cir. 2008)

QUESTION: Whether statutory damages are available for violations of the Truth in Lending Act, 15 U.S.C. §§ 1638(b)(1) and 1632(a). *Id.* at 1188.

ANALYSIS: The court addressed the scope of the exceptions to recovery of statutory damages under the Truth in Lending Act 15 U.S.C. § 1640(a). *Id.* at 1190. In connection with violations under § 1638, the court found that "the use of the word 'only' then limits recovery for violations of any of these disclosures to a closed list of violations" of § 1638, which prohibited recovery of statutory damages in this case. *Id.* at 1191. The court also reasoned that a violation of § 1632 "cannot form the basis for statutory damages, as it does not fall within the closed list of § 1638(a) subsections, violations of which can support an award of statutory damages." *Id.* at 1192.

CONCLUSION: The 9th Circuit affirmed the bankruptcy appellate court decision, which was "based on a close analysis of the text and legislative history of the Truth in Lending Act, and rejected the Trustee's request for statutory damages." *Id.* at 1189.

United States v. Lam Thanh Pham, 545 F.3d 712 (9th Cir. 2008)

Editor's Note: This case resolves two issues of first impression concerning sentence enhancements under the United States Sentencing Guidelines.

QUESTION ONE: Whether including in the financial losses absorbed by banks upon bank fraud those losses suffered by the banks' account holders constitutes impermissible double counting of victims for

the purposes of determining the appropriate sentencing enhancement. *Id.* at 717.

ANALYSIS: The 9th Circuit stated that impermissible double counting occurs when one part of the United States Sentencing Guidelines ("Guidelines") "is applied to increase a defendant's punishment on account of . . . harm that has already been fully accounted for by application of another part of the Guidelines." *Id.* Although the harm to the account holders had already been accounted for via banks, the court applied its holding from *United States v. Thornton*, in which it held that double counting is permissible "when it is necessary to make the defendant's sentence reflect the full extent of the wrongfulness of his conduct." *Id.*

CONCLUSION: "If the account holders and the banks suffered distinct wrongs as a result of [the fraud] and if accounting for those distinct wrongs is necessary to make the defendant's sentence reflect the full extent of the wrongfulness of his conduct, then . . . it is not impermissible double counting to consider both groups as victims even if their losses are ultimately traceable to the same fraudulently obtained funds." *Id.*

QUESTION TWO: Whether the expenses incurred by account holders in attempting to resolve the shortfalls in their accounts after bank fraud can be considered "actual loss" under the Guidelines, thus classifying the account holders as victims for purposes of sentencing enhancement. *Id.* at 721.

ANALYSIS: The 9th Circuit stated that the expenses incurred by the account holders satisfy the Guidelines' definition of "actual loss" because they are monetary or readily measurable in money. *Id.* Additionally, the court noted that "[t]he costs associated with resolving disputed account activity, canceling credit cards and initiating fraud investigations with credit reporting agencies a . . . reasonably foreseeable consequences of identity theft," which can be an integral component of bank fraud. *Id.*

CONCLUSION: The court held that the costs incurred by account holders in the course of resolving fraud damage to their accounts may be included in the calculation of "actual loss," and therefore those who incurred the costs may qualify as victims under the Guidelines. *Id.*

EEOC v. Fed. Express Corp., 543 F.3d 531 (9th Cir. 2008)

QUESTION: "[W]hether the [Equal Employment Opportunity Commission ("EEOC")] retains the authority to issue an administrative

subpoena against an employer after a charging party has been issued a right-to-sue notice and instituted a private action." *Id.* at 534.

ANALYSIS: The 9th Circuit, noting that the scope of judicial inquiry in an agency subpoena enforcement proceeding is fairly narrow, first considered whether Congress had granted the EEOC the authority to investigate an employer charged with racial discrimination. *Id.* at 538. After determining that the EEOC was required to investigate the charge and could subsequently issue a right-to-sue notice to the charging party, the court stated that because the charge under investigation involved a possible pattern of discrimination affecting more than just the charging party, it constituted a circumstance in which continued inquiry was permissible. *Id.* at 539–40.

CONCLUSION: While the "EEOC normally terminates the processing of the charge when it issues the right-to-sue notice, it can, under limited circumstances, continue to investigate the allegations in the charge, which includes the authority to subpoena information relevant to that charge." *Id.* at 540.

***Ortiz-Magana v. Mukasey*, 542 F.3d 653 (9th Cir. 2008)**

QUESTION: "[W]hether an alien is . . . an 'aggravated felon' when he is convicted under [California Penal Code] section 245(a)(1) as an aider and abettor instead of as a principal." *Id.* at 654.

ANALYSIS: The 9th Circuit initially recognized that "[a]ssault with a deadly weapon under California Penal Code § 245(a)(1) is a crime of violence as defined by 18 U.S.C. § 16; therefore, an alien convicted of that offense generally is an 'aggravated felon' for immigration purposes." *Id.* Relying on the Supreme Court's analysis in *Gonzales v. Duenas-Alvarez*, the 9th Circuit opined that generally, "those who aid and abet a felony are treated the same as if they had *personally* committed the offense." *Id.* at 658 (emphasis added). The court also recognized "that a conviction under section 245(a)(1) is a crime of violence, California convicts aiders and abettors under the same statute, and there is no material distinction between an aider and abettor and principals in any jurisdiction of the United States . . . [thus,] aiding and abetting an assault with a deadly weapon is the functional equivalent of personally committing that offense." *Id.* As a result, such a violent crime "constitutes an aggravated felony." *Id.* at 659.

The 9th Circuit also analyzed the type of offense that constitutes a crime of violence as defined by 18 U.S.C. § 16. *Id.* at 660. The court recognized that "nothing in the statutory definition [of 18 U.S.C. § 16] requires the offense to be personally committed by the individual." *Id.*

Therefore, the court determined "that the statutory language [of 18 U.S.C. § 16] encompasses crimes of violence that an alien aids and abets." *Id.* at 661. The 9th Circuit also recognized that Board of Immigration Appeals ("BIA") determined that a defendant could be removed as an aggravated felon because regardless of whether he was convicted of a crime as an aider and abettor or a principal, the defendant was still convicted of a crime of violence. *Id.*

CONCLUSION: The court concluded that "[a]n alien . . . who is convicted of aiding and abetting an assault with a deadly weapon under California Penal Code § 245(a)(1) has committed a crime of violence as if he had personally committed the offense[,]" and is thus removable for immigration purposes. *Id.*

AFI Holding, Inc. v. Brown (In re AFI Holding, Inc.), 530 F.3d 832 (9th Cir. 2008)

QUESTION: Whether a circuit court has jurisdiction over an order of removal of a bankruptcy trustee due to a conflict of interest pursuant to 11 U.S.C. § 324. *Id.* at 836–37.

ANALYSIS: The court stated that 28 U.S.C. § 158(d) "vests jurisdiction in the Courts of Appeals over appeals only from all 'final decisions, judgments, orders, and decrees entered' either by the district courts or the B[ankruptcy] A[ppellate] P[anel]." *Id.* at 836. The court noted that the 11th Circuit recently held that the "'removal of a bankruptcy trustee is a 'final' order appealable to this Court.'" *Id.* The court also noted the 3rd Circuit's conclusion that a "district court's order removing the trustee due to a conflict of interest was final." *Id.* The court stated that "the B[ankruptcy] A[ppellate] P[anel] thoroughly and carefully considered what constitutes cause for removal under § 324 in its well-reasoned opinion." *Id.* at 837–38. The court then noted the Bankruptcy Appellate Panel's determination that the "bankruptcy court did not abuse its discretion in concluding removal was proper due to the Trustee's past affiliations with insiders that created a potential for a materially adverse effect . . . and an appearance of impropriety." *Id.*

CONCLUSION: The court held that it had jurisdiction to review the order of removal and that the removal of the trustee was proper. *Id.*

Husyev v. Mukasey, 528 F.3d 1172 (9th Cir. 2008)

QUESTION: Whether a circuit court has jurisdiction pursuant to the REAL ID Act, 8 U.S.C. § 1252(a)(2)(D), to review final orders of the Board of Immigration Appeals ("BIA"). *Id.* at 1178.

ANALYSIS: The court noted that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1158(a)(2)(B), generally requires "an asylum application to be filed 'within 1 year after the date of the alien's arrival in the United States.'" *Id.* at 1177–78. The court noted, however, an exception that allows an application to be considered if the applicant "'demonstrates to the satisfaction of the Attorney General . . . extraordinary circumstances relating to the delay in filing the application'" within the specified one year. *Id.* at 1178. In examining the jurisdictional issue, the court noted that there are "two potential obstacles." *Id.*

First, the court recognized that 8 U.S.C. § 1158(a)(3) specifies that "'[n]o court shall have jurisdiction to review any determination of the Attorney General' regarding the one-year bar or its exceptions for changed or extraordinary circumstances." *Id.* The court noted, however, that under the REAL ID Act, "'[n]othing in . . . any . . . provision of this chapter . . . which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law.'" *Id.* The court therefore concluded that the "jurisdictional prohibition of § 1158(a)(3) is accordingly overridden by the REAL ID Act for questions of law and constitutional claims." *Id.* The court further held that determination of "extraordinary circumstances" presented a question of law "not subject to the jurisdictional restriction of § 1158(a)(3) on review of timeliness rulings in asylum cases." *Id.* at 1179.

Second, the court recognized the "restriction on jurisdiction to review discretionary determinations" pursuant to 8 U.S.C. § 1252(a)(2)(B). *Id.* The court noted, however, that the REAL ID Act serves as an exception to the prohibition and specifically preserves a court's jurisdiction "to review constitutional claims or questions of law." *Id.* The court further noted that "'[t]he plain language of the REAL ID Act grants jurisdiction to appellate courts to review questions of law presented in petitions for review of final orders . . . even those pertaining to otherwise discretionary determinations.'" *Id.* Thus, the court concluded that section 1252(a)(2)(B) did not prevent jurisdiction over "extraordinary circumstances" determinations. *Id.* at 1181.

CONCLUSION: The court held that a circuit court has jurisdiction pursuant to the REAL ID Act to review the BIA's final orders. *Id.* at 1181.

***Wolkowitz v. FDIC (In re Imperial Credit Indus.),* 527 F.3d 959 (9th Cir. 2008)**

QUESTION: Whether when a debtor converts from Chapter 11 bankruptcy to Chapter 7, the FDIC should be accorded administrative priority under 11 U.S.C. § 507(a)(2) or ninth priority under 11 U.S.C. § 365(*o*). *Id.*

ANALYSIS: Section 365(*o*) was enacted to prevent parties affiliated with federal depository institutions from "using bankruptcy to evade commitments to maintain capital reserve requirements of a federally insured depository institution." *Id.* at 973. The court analyzed pertinent provisions of § 11 and determined that "the plain language of § 365(*o*) and § 507(a)(9) suggests that the FDIC's claim under the performance guaranty—the result of a subsequent breach of an obligation under a capital maintenance commitment—is entitled to ninth priority." *Id.* at 974. The court rejected the district court's holding that the FDIC's claim was entitled to administrative priority under § 507(a)(2), which allows second priority to "administrative expenses." *Id.* The court explained that "to the extent there is any ambiguity in the meaning of §§ 507(a)(9) and 507(a)(2), § 507(a)(9)'s specific reference to debtors' commitments to federal depository institutions 'to maintain the capital of an insured depository institution' should govern over § 507(a)(2)'s more general provision which arguably could cover the same subject matter." *Id.*

CONCLUSION: The court held that a failure to cure a § 365(*o*) deficit in a Chapter 11 case does not give rise to an administrative priority in a Chapter 7 case. *Id.* at 976. As such, the FDIC's claim was entitled only to ninth priority under §§ 365(*o*) and 507(a)(9). *Id.*

***United States v. Mara,* 523 F.3d 1036 (9th Cir. 2008)**

QUESTION: "[W]hether unrelated criminal conduct following a guilty plea may be considered in evaluating a defendant's acceptance of responsibility." *Id*. at 1037–38.

ANALYSIS: In exchange for a reduced sentence pursuant to the United States Sentencing Guidelines ("Guidelines"), Mara pled guilty to illegal possession of a firearm. *Id*. at 1037. However, prior to sentencing, Mara was involved in a physical altercation unrelated to his criminal conduct, and the government withdrew its reduced sentencing recommendation. *Id.* at 1038. Section 3E1.1(a) of the Guidelines states that a defendant's offense may be reduced by two levels if there is a clear

demonstration of "acceptance of responsibility for his defense." *Id.* The court began its analysis by noting that neither the Guideline's text nor Application Notes "restrict consideration of criminal conduct to 'related' criminal conduct or even to conduct of the same nature as the offense." *Id*. Furthermore, the court recognized that "[t]he sentencing judge is given significant latitude under the Guidelines to access the sincerity of a defendant's claim of responsibility." *Id*.

CONCLUSION: "Consideration of unrelated conduct is not improper because 'the defendant's post-offense conduct can shed significant light on the genuineness of a defendant's claim remorse.'" *Id*.

TENTH CIRCUIT

Cuba Soil & Water Conservation Dist. v. Lewis, 527 F.3d 1061 (10th Cir. 2008)

QUESTION: Whether the Federal Mineral Leasing Act of 1920 ("FMLA"), 30 U.S.C. §§ 181–287, "provides political subdivisions of a State an *implied* cause of action to challenge the State's allocation of federal mineral royalties received pursuant to the FMLA." *Id.* at 1062.

ANALYSIS: The court looked to Congress's intent in enacting §191 of the FMLA to determine whether the statutory scheme provided political subdivisions a means to enforce it through litigation. *Id*. at 1063–64. The court determined that there was no clear indication that Congress intended to confer a cause of action to the plaintiffs, and for the court to do so would pose an "unwarranted intrusion upon State sovereignty." *Id*. at 1064. The 10th Circuit ruled that the Congressional enactment of § 195 to remedy FMLA violations indicates that Congress did not intend to create a cause of action to challenge the allocation of federal royalties. *Id.*

CONCLUSION: The court held that nothing in the FMLA was intended to create an implied cause of action for the Plaintiffs, and therefore, relief was only available through the political process rather than the courts. *Id*. at 1065.

Affordable Bail Bonds, Inc. v. Sandoval (In re Sandoval), 541 F.3d 997 (10th Cir. 2008)

QUESTION: Whether "11 U.S.C. § 523(a)(7) render[s] nondischargeable a debt incurred by a debtor who has guaranteed a bail

bondsman to make the bondsman whole in the event a criminal defendant jumps bail." *Id.* at 998.

ANALYSIS: The 10th Circuit first examined whether defendant Sandoval's debt was immune from discharge under 11 U.S.C. § 523(a)(7) by determining whether the debt met all three requirements specified in § 523(a)(7). *Id.* at 1001. Agreeing with the bankruptcy court, the 10th Circuit concluded that "'Sandoval was not a party to the Bonds that were forfeited, and therefore his debt is not for a forfeiture of a bond, nor is his debt for a fine or penalty imposed upon him by the State.'" *Id.* The court held that "[e]xceptions to discharge are to be narrowly construed, and because of the fresh start objectives of bankruptcy, doubt is to be resolved in the debtor's favor." *Id.*

CONCLUSION: The 10th Circuit affirmed the bankruptcy court ruling that a treatment of the debt as nondischargeable under §523(a)(7) would be inconsistent with the plain language of the section. *Id.*

Kelley v. City of Albuquerque, 542 F.3d 802 (10th Cir. 2008)

QUESTION: "[W]hether a defense attorney representing an alleged violator of discrimination laws during an EEOC mediation qualifies as a protected participant under the 'participation clause' of [42 U.S.C. § 2000e-3(a)]." *Id.* at 813.

ANALYSIS: The court turned to the plain language of section 2000e-3(a) to determine whether Title VII protected Plaintiff-Appellee from retaliation. *Id.* The court noted that the statute unambiguously provides protection to "'*any* . . . employee'" participating "'in *any* manner in . . . a proceeding.'" *Id.* (quoting § 2000e-3(a)). The court reasoned that the term "any" is expansive when "used without limitation," and therefore "given its natural effect in this statutory context[,] relates to all types of participation" in proceedings under Title VII. *Id.* at 814

CONCLUSION: The 10th Circuit held that "the plain language of [section] 2000e-3(a) provides anti-retaliation protection for a defense attorney who represents an alleged violator of discrimination laws in an EEOC mediation." *Id.* at 813.

***United States v. Davis,* 286 Fed. Appx. 574 (10th Cir. 2008)**

QUESTION: Whether "the post- 9/11 security environment" affects the "voluntariness of police encounters and baggage searches in airports." *Id.* at 578.

ANALYSIS: The court reasoned that the defendant's "'post-9/11' argument [regarding the airport and the officers' actions] is in essence one of coercion, . . . [and] was so inherently coercive that he could not have voluntarily consented to the encounter and the search [of his bag]." *Id.* at 579. The court noted that "'[a] consensual encounter is not a seizure for purposes of the Fourth Amendment.'" *Id.* In determining "'whether an encounter is consensual,'" the 10th Circuit considered a number of factors, including the place of the encounter, the behavior of the officers, length of time the defendant's belongings were held, and whether the officers informed the defendant of his rights. *Id.*

CONCLUSION: The court concluded that none of these factors were present in the encounter and search of the defendant's bag, therefore the encounter was not inherently coercive and the "post-9/11 security environment" did not affect the voluntariness of this airport encounter. *Id.*

***Scrivener v. Mashburn (In re Scrivener),* 535 F.3d 1258 (10th Cir. 2008)**

QUESTION: "[W]hether the bankruptcy court's authorization of the surcharge of exempt assets is consistent with other provisions of the Bankruptcy Code" when the debtor in question "fails to turn over estate property." *Id.* at 1263.

ANALYSIS: The 10th Circuit noted that, pursuant to *In re Alderete*, the court is not "at liberty to 'grant any more or less than what the clear language of [the Bankruptcy Code] mandates.'" *Id.* at 1264. Pursuant to the Bankruptcy Code, a debtor may claim property as exempt, and if "'a party in interest' does not object," that property will be exempt from the estate property. *Id*. The court found that while the Bankruptcy Code enumerates "exceptions to the rule that exempted property cannot be used to satisfy pre-petition debts or administrative expenses" under §§ 522(c) and (k), it does not permit the "surcharge or exempt property for failure to turn over estate property." *Id*. The court recognized that the Code contains specific remedies for a debtor's failure to relinquish estate property to the trustee under § 521(a)(4), such as denial of discharge and dismissal. *Id.* The court further noted that § 105(a) does not permit the bankruptcy court to "override explicit mandates of other sections of the Bankruptcy Code." *Id*.

CONCLUSION: The court held that the bankruptcy court exceeded its equitable authority under § 105(a) in authorizing the surcharge of the debtor's exempt property, as the surcharge of exempt property is inconsistent with the Code's provisions regarding exemptions. *Id.*

ELEVENTH CIRCUIT

In re Graupner, 537 F.3d 1295 (11th Cir. 2008)

QUESTION: Whether a debtor's negative equity in a trade-in vehicle is protected against "cramdown" under the hanging paragraph of 11 U.S.C. § 1325(a)(9). *Id.* at 1296.

ANALYSIS: U.C.C. § 9-103, Official Comment 3 lists expenses that are included within "purchase-money obligation" and the "price of collateral." *Id*. at 1301. Although "negative equity" is not listed, the court explained that Comment 3 states that "purchase money security interest 'requires a close nexus between the acquisition of collateral and the secured obligation.'" *Id.* at 1302. The court found that there is a close nexus between negative equity in a trade-in vehicle and the purchase of a new vehicle because the financing was part of the same "package deal." *Id.* In addition, the court found that the intended purpose of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 was to deal with negative equity. *Id.* at 1303.

CONCLUSION: The court agreed with the bankruptcy and district courts by holding that negative equity is "'debt for the money required to make the purchase' of a new vehicle" rather than "antecedent debt," and therefore protected against "cramdown." *Id.* at 1300–01.

Lenis v. United States AG, 525 F.3d 1291 (11th Cir. 2008)

QUESTION: Whether United States Court of Appeals has jurisdiction to review a decision by the Board of Immigration Appeals ("BIA") denying a motion for a *sua sponte* reopening of a case, pursuant to 8 C.F.R. § 1003.2(a). *Id*. at 1292.

ANALYSIS: The court noted that "ten courts of appeals have held that they have no jurisdiction to hear an appeal of the BIA's denial of a motion to reopen" *sua sponte*. *Id*. The court explained that under a "very narrow exception" of the Administrative Procedure Act, the court is unable to grant judicial review because "agency action is committed to agency discretion by law." *Id*. at 1293. The court held that review is not available when "a court would have no meaningful standard . . . to judge the agency's exercise of discretion." *Id*. The regulation at issue, 8 C.F.R. § 1003.2(a), provided the court with "absolutely no standard to govern the BIA's exercise of discretion." *Id*.

CONCLUSION: The 11th Circuit concluded that the BIA's decision "to reopen proceedings on its own motion . . . is committed to agency discretion by law" and therefore the court lacked jurisdiction to review the decision. *Id*. at 1294.

***Peter Letterese & Assocs. v. World Inst. of Scientology Enters.*, 533 F.3d 1287 (11th Cir. 2008)**

QUESTION: Whether the doctrine of laches can be used as a defense in a copyright infringement suit filed within the statute of limitations. *Id.* at 1319.

ANALYSIS: The 11th Circuit began by quoting an opinion by Judge Learned Hand that predates congressional imposition of the statute of limitations on copyright actions, stating that allowing the copyright owner to sit on his rights would be tantamount to speculating with the infringer's money and getting a windfall if the infringer's venture proves successful. *Id.* at 1320. The court noted that the 4th Circuit flatly refused to allow the doctrine of laches to curtail the statute of limitations due to concerns about separation of powers. *Id.* However, the 11th Circuit followed its own precedent in the former 5th Circuit by observing that "the intent of the drafters was that the limitations period would affect the remedy only, not the substantive right, and that equitable considerations would therefore apply to suspend the running of the statute." *Id.* The court's decision was also at odds with the 9th Circuit, which held that laches may be used to bar prospective injunctive relief "where the feared future infringements are identical to the alleged past infringements and are subject to the same prejudice that bars retrospective relief." *Id.* at 1322. The court explained that such a rule would "encourage copyright owners to initiate much needless litigation in order to prevent others from obtaining effective immunity from suit with respect to future infringements." *Id.* at 1321.

CONCLUSION: The 11th Circuit held that the equitable doctrine of laches may be used to bar recovery of retrospective damages, but not future relief, in copyright infringement suits filed within the statute of limitations. *Id.* at 1321.

***In re Donovan*, 532 F.3d 1134 (11th Cir. 2008)**

QUESTION: Whether for the purposes of 28 U.S.C. § 158(d) and § 1291, the denial of a motion to dismiss for an abusive conversion from Chapter 13 to Chapter 7 bankruptcy is a final appealable order. *Id.*

ANALYSIS: After finding that "[a] court of appeals has jurisdiction over only final judgments and orders from a bankruptcy court," the 11th Circuit stated the general rule that "to be 'final' under 28 U.S.C. 158(d) and § 1291, an order must end the litigation on the merits, leaving nothing to be done but execute the judgment." *Id.* at 1134–36. However, the court noted that "[f]inality is given a more flexible interpretation in the bankruptcy context, because bankruptcy is an aggregation of controversies and suits." *Id.* Therefore, the court found that what generally needs to be finally resolved is "the particular adversary proceeding or controversy . . . rather than the entire bankruptcy litigation." *Id.* The court then diverged from 3rd Circuit precedent and instead adopted the rule of the 2nd, 7th, and 9th Circuits which "specifically held that an order denying a motion to dismiss a Chapter 11 bankruptcy case for abusive filing is not a final order." *Id.* at 1137.

CONCLUSION: The 11th Circuit ultimately found that "the bankruptcy court permitted the Chapter 7 case to continue." *Id.* Essentially, this did not fulfill the finality requirements for appeals from bankruptcy proceedings for the purposes of 28 U.S.C. § 158(d) and § 1291 because the bankruptcy court did not "conclusively resolve the bankruptcy case as a whole, nor did [it] resolve any adversary proceeding or claim." *Id.*

Glazer v. Reliance Std. Life Ins. Co., 524 F.3d 1241 (11th Cir. 2008*)*

QUESTION: "Whether medical reports relied on by a plan administrator during the review of a denial of benefits must be produced to the claimant during pendency of review in order for her to receive a 'full and fair review.'" *Id*. at 1243.

ANALYSIS: Section 1133 of the Employment Retirement Income Security Act of 1974 ("ERISA") requires a plan administrator to provide a "full and fair review" of a decision denying benefits to the claimant. *Id*. at 1245. The 11th Circuit explained that producing documents "before a final decision is made would not assist a claimant in deciding whether to pursue an appeal because the claimant would not yet know if there has been an adverse determination." *Id*. The court further noted that requiring the disclosure of documents during the pendency of a decision would be superfluous to requiring the disclosure of documents after the final decision is determined. *Id*.

CONCLUSION: The 11th Circuit held that medical reports requested during the pendency of an ERISA claim review need not be disclosed to a claimant until after a final decision has been reached. *Id*.

***Hiwassee Coll., Inc. v. S. Ass'n of Coll. and Sch.*, 531 F.3d 1333 (11th Cir. 2008)**

QUESTION: Whether defendant, Southern Association of Colleges and Schools ("SACS"), is "a governmental actor bound by the Fifth Amendment's due process clause." *Id*. at 1335.

ANALYSIS: The court found that, "the overwhelming majority of courts who have considered the issue have found that accrediting agencies [such as SACS] are not state actors." *Id*.

CONCLUSION: Given the "absence of any persuasive authority to the contrary," the 11th Circuit joined the majority of courts and found that SACS's termination of Hiwassee College's accreditation was not state action subject to the due process clause under the Fifth Amendment. *Id*.

***Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment CSX Transp. N. Lines v. CSX Transp.*, 522 F.3d 1190 (11th Cir. 2008)**

QUESTION: Under the Railway Labor Act, 45 U.S.C. § 151 ("RLA"), when does an enforcement action accrue "under the statute of limitations after an arbitration award and, alternatively, whether a request for interpretation of an arbitration award tolls the limitations period." *Id.* at 1192.

ANALYSIS: After plaintiff received an arbitration award, it sought to enforce same in the district court. *Id.* at 1192. The court reasoned that the "the plain meaning of 'within the time limit in such order' in § 153 First (p) is that a cause of action to enforce an award arises at the end of the time limit set forth in that award." *Id.* at 1195. "By requiring a carrier to comply by a date certain, the RLA provides plaintiffs with a basis to determine whether they have a cause of action for enforcement. *Id.* No compliance by the requisite date indicates that a potential plaintiff had time to acquire sufficient factual knowledge for reasonable inquiry to reveal the cause of action." *Id.*

The court found that the plaintiff "has not identified any authority that supports an accrual rule different from the district judge's application of § 153 First (p). Accordingly, the district judge did not err in concluding that [defendant] failed to comply within the time period specified in the award." *Id.* at 1197. The court further found that, "[b]ecause the award in this case expressly provided a time for compliance, the relevant authority supports the July 3, 2004, accrual date and substantiates the district judge's dismissal." *Id.* "Therefore, the

district judge correctly determined that [plaintiff's] cause of action accrued when [defendant] refused to provide back pay by the date stated for compliance in the arbitrator's award. Because [plaintiff] waited more than two years after that date to file its petition, the district judge properly dismissed [plaintiff's] enforcement action as barred by the two-year statute of limitations." *Id.* at 1196–97.

CONCLUSION: The Eleventh Circuit affirmed the district court, which properly dismissed the union's enforcement action because its petition was outside the two-year, statutory limitations period. *Id.* at 1192. The Court also held that Plaintiff's interpretation request did not toll the running of the statute of limitations. *Id.* at 1200.

Makro Capital of America, Inc. v. United States, 543 F.3d 1254 (11th Cir. 2008)

QUESTION: Whether Federal Rule of Civil Procedure 15(c) permits a plaintiff to file an amended complaint involving a qui tam claim and have it relate back to the filing of the original complaint which was a non qui tam claim alleged on the same factual basis as the amended complaint. *Id.*

ANALYSIS: The court concluded that the procedural limitations under the False Claims Act ("FCA") would be defeated if relation back was permitted in this instance. *Id.* at 1260. The court based its decision on two factors: (1) the government's ability to refuse to prosecute at all; and (2) the requirement that only one suit should be brought on behalf of the government. *Id.* The court refused to allow the amended complaint to relate back, reasoning that applying the "relation back" doctrine of Rule 15 to Plaintiff's amended complaint, thus permitting the court to exercise subject matter jurisdiction despite the FCA's statutory bar, would not have comported with either the purpose behind or the statutory text of Rule 15. *Id.*

CONCLUSION: The 11th Circuit held that the amended complaint could not relate back to the filing date of the original complaint because there were intrinsic differences between the original complaint and the amended complaint which prevented the defendant from being on notice that it may be a party to a qui tam claim. *Id.*

Sierra Club v. Johnson, 541 F.3d 1257 (11th Cir. 2008)

QUESTION: Whether the Clean Air Act grants the EPA Administrator discretion "not to object to a permit when the evidence of

noncompliance was merely an agency issued violation notice and a related civil complaint." *Id.* at 1263.

ANALYSIS: In determining the level of discretion the statute grants to the EPA Administrator, the court noted that its decision will not "define precisely" petitioner's required burden of proof under 42 U.S.C. § 7661d(b)(2). *Id.* at 1266. The court further posited that with each dispute, the burden will differ depending on the facts, suggesting that the burden required will vary with each set of circumstances. *Id*.

CONCLUSION: The court concluded that "§ 7661d(b)(2) is ambiguous when it comes to defining the type of demonstration required to trigger the Administrator's duty to object," thus the court was "willing to defer to a reasonable interpretation by the agency as to when a petitioner has sufficiently demonstrated noncompliance with PSH requirements." *Id.* at 1267. The court further noted that "where a petition successfully demonstrates noncompliance, an objection by the Administrator must ensue." *Id.*

***Owner-Operator Indep. Drivers Ass'n v. Landstar Sys.*, 541 F.3d 1278 (11th Cir. 2008)**

Editor's Note: this case presents two issues of first impression concerning 49 C.F.R. § 376.12(h).

QUESTION ONE: Whether a motor carrier lessor may make a profit from charge-back items utilized by a truck owner-operator lessee under 49 C.F.R § 376.12(h), the Truth-in-Leasing Regulations. *Id.* at 1289.

ANALYSIS: The 11th Circuit first defined charge-back items as purchases by the truck owner-operator lessees from the lessor motor carrier through pre-compensation advances and deductions. *Id.* at 1282. The court noted that since the language of § 376.12(h) did not address the present issue, it would "defer to the executive department's construction . . . unless the legislative history of the enactment shows with sufficient clarity that the agency construction is contrary to the will of Congress." *Id.* at 1289. The court then examined the latest regulation offered by the Interstate Commerce Commission and concluded that the adopted rule did not prohibit motor carriers from profiting from charge-back items. *Id.* at 1289–90. The court further stated that this finding was supported by the decisions of other courts to have considered the question. *Id.* at 1290.

CONCLUSION: The 11th Circuit held that 49 C.F.R. §376.12(h), the Truth-in-Leasing Regulations, did not prohibit the motor carrier lessor

from making a profit from charge-back items utilized by the truck owner-operator lessee. *Id.* at 1290.

QUESTION TWO: Whether 49 C.F.R. §376.12(h) requires the motor carrier lessor to provide additional documents to the owner-operator lessees than copies of settlement statements that do not list how the charge backs are computed where the lessor charges a flat fee for the charge-backs. *Id.* at 1291.

ANALYSIS: The 11th Circuit used the interpretative framework of the first issue to analyze this second question. *Id.* at 1291. Finding that the regulation was "silent regarding a motor carrier's ability to profit on charge-backs," the court deferred to the comments offered by the Interstate Commerce Commission. *Id.* The court then found that those regulations "require[d] the lease to list the items subject to charge-backs and to provide access to the documents so that the owner-operators can determine how those fees were computed." *Id.* The court continued, "[n]othing in the[se] comments or the language of the regulation carves-out an exception for flat-fee charges." *Id.* The court also found that its holding in this case was symmetrical to the conclusion of other district courts. *Id.*

CONCLUSION: The 11th Circuit held that 49 C.F.R. §376.12(h) required the motor carrier lessor to provide documents to the owner-operator lessee which listed how the charge-backs were computed, even where the lessor charges a flat fee. *Id.* at 1293.

In re Barrett, 543 F.3d 1239 (11th Cir. 2008)

QUESTION: "[W]hether a Chapter 13 [bankruptcy] debtor's surrender of a '910 vehicle' (*i.e.*, a vehicle purchased for personal use within 910 days before filing for bankruptcy) fully satisfies a creditor's claim secured by the vehicle and prevents the creditor from filing an unsecured claim for any remaining deficiency." *Id.* at 1241.

ANALYSIS: The court noted that § 506 of the Bankruptcy Code says that a creditor may "seek payment of any deficiency as an unsecured creditor" regardless of whether the debtor surrendered or retained the vehicle. *Id.* at 1242. The court's plain reading of Chapter 3 of the federal Bankruptcy Code indicated that Congress intended to make § 506 inapplicable to a 910 vehicle. *Id.* at 1246. Therefore, the court found that the parties are left to their contractual obligations and applicable state laws. *Id.*

CONCLUSION: Joining the 4th, 7th, 8th, and 10th Circuits, the 11th Circuit held that "a creditor may pursue an unsecured deficiency claim

when the debtor surrenders a 910 vehicle," thus recovering any amount due over the value of the vehicle. *Id.* at 1247.

***Wright v. Emerson*, 543 F.3d 649 (11th Cir. 2008)**

QUESTION: Whether a preparer of tax returns, "who is not an attorney, CPA, enrolled agent, or enrolled actuary, but who is 'any other person permitted to represent the taxpayer' as described by 26 U.S.C. § 7521(b) and (c), is permitted to represent taxpayers before the IRS." *Id.* at 654.

ANALYSIS: The court noted that "a non-practitioner may represent a taxpayer before the IRS in certain circumstances, if he provides satisfactory identification and proof of his authority to represent the taxpayer." *Id.* at 655. However, this right is not absolute. *Id.* "[U]nless otherwise prescribed by regulation or notice, this right does not permit such an individual to represent the taxpayer, regardless of the circumstances requiring representation, before appeals officers, revenue officers, Counsel or similar officers or employees of the Internal Revenue Service or the Department of Treasury." *Id.*

CONCLUSION: "[A]n unenrolled representative, is not authorized to represent taxpayers before the IRS if he did prepare their tax returns and may not represent taxpayers whose tax returns he prepared when they are engaged in dealings with the IRS on matters other than examinations of the tax returns which he prepared." *Id.* at 657.

***Lanfear v. Home Depot, Inc.*, 536 F.3d 1217 (11th Cir. 2008)**

QUESTION: "[W]hether a complaint for breach of fiduciary duty regarding the diminution of value of a defined contribution retirement plan states a claim for benefits under the Employment Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001–1461." *Id.* at 1219.

ANALYSIS: The court rejected the 5th Circuit interpretation that a claim for benefits is an allegation of wrongly computed benefits, while a claim for damages is a claim that "seeks recover[y] for the trust of an unascertainable amount." *Id.* at 1222. Instead, the court adopted the approach of the 3rd, 6th and 7th Circuits and concluded that a claim that seeks an unascertainable amount for relief is not necessarily a claim for damages. *Id.* Relying on *Harezewski v. Guidant*, the court reasoned that a claim for benefits is one that seeks "'whatever is in the retirement account when the employee retires or whatever would have been there had the plan honored the employee's entitlement.'" *Id.* at 1222–23.

CONCLUSION: A complaint for breach of fiduciary duty as a result of a decrease in value of a defined contribution plan is for benefits, not damages "because it is limited to the benefits actually received and the benefits that would have been received if the plan management had fulfilled its statutory obligations." *Id.* at 1223.

Bailey v. Janssen Pharmaceutical, Inc., 536 F.3d 1201 (11th Cir. 2008)

QUESTION: "[W]hether, in multi-defendant litigation, the limitations period for removal expires upon thirty days from service on the first-served or last-served defendant under 29 U.S.C. § 1446(b)." *Id.* at 1203.

ANALYSIS: The court first noted that "the recent case law favors the last-served defendant rule." *Id.* at 1205. This rule, the court observed, produces an inequitable result in cases where the last-served defendants are served more than thirty days after the first defendant is served because the period of limitations to seek removal will have expired before the last-served defendant is a party to the litigation. *Id.* at 1206–07. Further, the court agreed with the 6th Circuit that, "as a matter of statutory construction," the first-served defendant rule "would require [the court] to insert 'first' before 'defendant' in the language of the statute." *Id.* at 1207. Lastly, the court disagreed with the proposition that the last-served rule was inconsistent with the "unanimity rule" because the last-served rule allows the earlier-served defendants to join the later-served defendant's motion. *Id.*

CONCLUSION: The 11th Circuit adopted the "last-served" defendant rule, which entitles each defendant thirty days to file a notice of removal. *Id.* at 1207–08.

Liquidation Comm'n of Banco Intercontinental, S.A. v. Renta, 530 F.3d 1339 (11th Cir. 2008)

QUESTION: Whether RICO applies to extraterritorial conduct. *Id.* at 1351.

ANALYSIS: The court recognized the split of authority over whether RICO applies extraterritorially. *Id.* The court observed that some courts hold that RICO does not apply extraterritorially, "essentially because Congress made no explicit statement to that effect." *Id.* The court then noted the "more widely accepted view," which states that "RICO may apply extraterritorially if conduct material to the completion of the

racketeering occurs in the United States, or if significant effects of the racketeering are felt here." *Id.* at 1351–52.

Adopting the view that RICO may apply extraterritorially, the court then examined whether the conduct at issue satisfied the "effects test." *Id.* Finding that the "effects test is not satisfied here [because] . . . [t]he effects were felt predominantly in the Dominican Republic," the court then stated that "extraterritorial jurisdiction, if it exists, must derive from the conduct test." *Id.* at 1352. The court emphasized that "use of the conduct tests to assert extraterritorial RICO jurisdiction must be undertaken with particular care." *Id.* As such, the court noted that extraterritorial jurisdiction may not be appropriate "if the conduct occurring in the United States is preparatory or far removed from the consummation of the fraud" or "when conduct occurring in or directed at the United States is not central to consummation of the racketeering." *Id.*

CONCLUSION: The court held that RICO applies extraterritorially, when the conduct central to the consummation of racketeering occurs in the United States. *Id.*

***Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, Kings & Stevens, P.A.*, 525 F.3d 1107 (11th Cir. 2008)**

QUESTION: Whether the permissible uses in § 2721(b) of the Driver's Privacy Protection Act ("DPPA") "constitute affirmative defenses for which the defendants carry the burden of proof." *Id*. at 1110.

ANALYSIS: The DPPA regulates the disclosure of "personal information from a motor vehicle record." *Id*. at 1109. Despite the DPPA's overwhelming prohibition against the disclosure of personal information, the DPPA enumerates fourteen permissible uses for a private individual. *Id*. To answer this question, the court compared the enumeration of permissible uses of private individuals to an alternate provision in the DPPA, § 2724(a). *Id.* Section 2724(a) addresses governmental responsibility and states no personal information shall be disclosed "*except as provided in subsection (b) of this section.*" *Id*. at 1113 (emphasis added). Whereas § 2721(b) contains enumerated permissible uses, § 2724(a) emphasized any permissible uses as exceptions, intentionally shifting the burden of proof to the defendant. *Id*. Moreover, the court dismissed plaintiff's concern that the burden of proof was more appropriately situated upon the defendant. *Id*. at 1113–14. The court reasoned that plaintiff had the disposal of proper discovery tools to perfect its argument. *Id*. at 1114.

CONCLUSION: The 11th Circuit held where Congress does not directly address the question of burden of proof, "where the statute's

structure and language do not suggest a shift of the burden to the defendant . . . and where plaintiffs are not peculiarly at a disadvantage in the discovery of necessary facts, we will not shift the burden of proof . . . to the defendant." *Id*. at 1114.

D.C. CIRCUIT

Karsner v. Lothian, 382 U.S. App. D.C. 275 (D.C. Cir. 2008)

QUESTION: Whether, pursuant to Fed. R. Civ. P. 24(a)(2), the federal district court had subject matter jurisdiction over the defendant's petition to confirm the stipulated award in an arbitration agreement. *Id.* at 281.

ANALYSIS: Based on 28 U.S.C. § 1332(a)(1), a district court has original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000 and is between citizens of different States. *Id.* While the parties' diversity of citizenship was clear, the amount in controversy requirement compelled the court to consider this question as one of first impression in the D.C Circuit. *Id.* The court held that whether an arbitration proceeding meets the amount in controversy requirement should be determined by the amount sought in the arbitration (the "demand approach") rather than the amount awarded (the "award approach"). *Id.* The demand approach avoids the potential pitfall of the award approach where the court could compel arbitration but then lack jurisdiction to review the arbitration it ordered. *Id.* at 282. "Further, unlike the award approach, the demand approach permits the district court to exercise jurisdiction coextensive with the diversity jurisdiction that would have been otherwise present if the case had been litigated rather than arbitrated." *Id.* at 283.

CONCLUSION: The D.C Circuit adopted the demand approach for determining the amount in controversy requirement and held that, because the plaintiff sought $104,638.00 plus punitive damages, fees, and costs in arbitration, the $75,000-plus threshold for diversity jurisdiction was met. *Id.*

United States v. E-Gold, Ltd.*, 521 F.3d 411 (D.C. Cir. 2008*)

Editor's Note: This case resolves two issues of first impression.

QUESTION ONE: Whether a civil seizure warrant is an injunction under 28 U.S.C. § 1292(a)(1) thereby providing the circuit court with jurisdiction for the interlocutory appeal. *Id.* at 414.

ANALYSIS: The Circuit of the District of Columbia reasoned, "formal denomination of the court's order, either in the rules or in the order itself, is not dispositive." *Id*. at 414. Moreover, the "'definition of an injunction under § 1292(a)(1) is broad: it is any order directed to a party, enforceable by contempt, and designated to accord or protect some or all of the substantive relief sought by a complaint in more than preliminary fashion.'" *Id*. at 415.

CONCLUSION: Since the order in question was enforceable and non-compliance would be subject to penalty by contempt, the court concluded that the order was an injunction as contemplated by § 1292(a)(1) and thus subject to interlocutory appeal. *Id.*

QUESTION TWO: Whether "seizure of [appellant's] assets upon indictment without an opportunity for adversary hearing constitutes a violation of their due process rights under the Fifth Amendment." *Id*. at 415.

ANALYSIS: The court first found that there were "extraordinary circumstances" for the postponement of the due process hearing in satisfaction of the three-prong test announced by the Supreme Court in *Fuentes v. Shevin*. The court then undertook the three-part analysis of *Matthews v. Eldridge* to determine whether the Constitution requires a "post-deprivation hearing to invasions of constitutionally protected interests occurring pretrial where circumstances may compel protective seizure before merits adjudication." *Id. Matthews* instructs courts to consider the following elements: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id*.

The court found that the first element weighs heavily in favor of the defendant because access to the seized assets not only affects his ability to use his property as he sees fit, but, more importantly, affects his ability

to exercise his Sixth Amendment right to employ his counsel of choice. *Id*. at 417–418. Next, the court found that the second element militates in favor of a post-seizure, pre-trial hearing because the defendant is entitled the procedural safeguard to adduce the evidence against him, and must be afforded the opportunity to be heard at a meaningful time. *Id*. at 418. Finally, the court recognized that there is a legitimate and compelling government interest in keeping grand jury proceedings secret. *Id*. at 419.

CONCLUSION: The Circuit of the District of Columbia joined the 2nd Circuit in holding that the "defendants have a right to an adversary post-restraint, pretrial hearing for the purpose of establishing whether there was probable cause 'as to the defendant[s'] guilt and the forfeitability of the specified assets needed for a meaningful exercise of their right to counsel." *Id*.

Free Enter. Fund v. Public Co. Accounting Oversight Bd., 537 F.3d 667 (D.C. Cir. 2008)

QUESTION: Whether "Title I of the Sarbanes-Oxley Act of 2002 ("the Act"), 15 U.S.C. §§ 7211–19, violates . . . separation of powers because it does not permit adequate Presidential control of the Public Company Accounting Oversight Board ("the Board")." *Id*. at 668.

ANALYSIS: The D.C. Circuit first found that "by statutory design the Board is composed of inferior officers who are entirely subordinate to the [Securities and Exchange Commission] and whose powers are governed by the Commission." *Id*. at 681, n.9. Appellant argued that "the Act constitutes an excessive attenuation of Presidential control over the Board" because "the double for-cause limitation on removal makes it impossible for the President to perform his duties," and therefore violated separation of powers under the Constitution. *Id*. at 679. The D.C. Circuit found that appellant's argument "conflicts with the Supreme Court's case-specific reasoning in [*Morrison v. Olson*], which emphasizes that there are 'several means of supervising or controlling [Presidential] powers,'" and that "the removal power . . . is one of several criteria relevant to assessing limits on the President's ability to exercise Executive power." *Id*. The D.C. Circuit recognized that "[a]lthough the President does not directly select or supervise the Board's members, the President possesses significant influence over the Commission, which in turn possesses comprehensive control over the Board." *Id*. at 681. Moreover, "the President is not . . . 'completely stripped' of his ability to remove Board members" because "[l]ike-minded Commissioners can be appointed . . . and removed by the

President for cause, and Board members can be appointed and removed for cause by the Commissioners." *Id*. at 682.

CONCLUSION: The court held "that the for-cause limitations on the Commission's power to remove Board members and the President's power to remove Commissioners do not strip the President of sufficient power to influence the Board and thus do not contravene separation of powers, as that principle embraces independent agencies like the Commission and their exercise of broad authority over their subordinates." *Id*. at 669.

FEDERAL CIRCUIT

Impresa Construzioni Geom. Domenico Garufi v. United States, 531 F.3d 1367 (Fed. Cir. 2008)

QUESTION: Whether the 30-day filing period under the Equal Access to Justice Act ("EAJA") begins to accrue after the time to appeal has expired for all parties when a petitioner enters a final judgment on voluntary dismissal. *Id.* at 1369.

ANALYSIS: The Federal Circuit first determined that the EAJA requires submission of an application within 30 days of final judgment in the action and that the final judgment, as defined by the 1985 amendment, is one that is "not appealable." *Id.* The court then determined that a "judgment is 'not appealable' in EAJA terms after the time for filing an appeal has elapsed." *Id.* In examining whether a "final judgment entered on an unopposed motion for dismissal is amenable to appeal," the Federal Circuit looked toward Supreme Court precedent and the Federal Rules, though both are silent on the matter, and toward the circuits, which have "answered in the affirmative." *Id.* Following the other circuits, the Federal Circuit reasoned that the "better procedure is to avoid preliminary litigation of time periods for EAJA filings when there has been a voluntary dismissal, at least where the order of dismissal does not specifically prohibit appeal." *Id.* at 1371. Finally, the court reasoned that "a clear rule better serves the interests of litigants and the courts, rather than encouraging, as here, satellite litigation on 'functional' premises, adding cost and delay while not yet reaching the merits." *Id.* at 1372.

CONCLUSION: The Federal Circuit "adopt[ed] a uniform rule for EAJA petitions in the Court of Federal Claims, whereby appeal rights from voluntary dismissals are presumed unless expressly disclaimed or

specifically prohibited," and therefore the court found that the expiration of the 90-day period for filing a petition for certiorari started the defendant's period for filing its EAJA application. *Id*.

***Salmon Spawning & Recovery Alliance v. United States Customs & Border Prot.,* 532 F.3d 1338 (Fed. Cir. 2008)**

QUESTION: Whether plaintiff's § 7 claim under the Endangered Species Act ("ESA"), which alleged that the defendants violated their duties under the ESA by allowing the importation of ESA-listed salmon without completing the consultation required by the statute, falls within the Court of International Trade's exclusive jurisdiction. *Id.* at 1351.

ANALYSIS: This issue raised novel concerns over the scope of the Court of International Trade's jurisdiction. *Id.* In order for the Court of International Trade to have jurisdiction over the action, a § 7 claim must fall within the court's exclusive jurisdiction under 28 U.S.C. § 1581. *Id.* Two possible sources of jurisdiction for the claim include: (1) § 1581(i)(3), which provides the court with exclusive jurisdiction over civil actions that arise out of any law of the United States providing for embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or (2) § 1581(i)(4), which provides the court with exclusive jurisdiction over civil actions arising from administration and enforcement with respect to the matters referred to in § 1581(i)(3). *Id.* at 1350. The Federal Circuit decided that it would be best to remand the case to the Court of International Trade to determine whether the claim falls within its exclusive jurisdiction by taking into consideration the aforementioned sources of such jurisdiction. *Id.* at 1351. The court held that if the Court of International Trade determines that the claim does not fall within its jurisdiction, it should transfer the case back to the district court; however, if it does have jurisdiction, it should carry on with further proceedings consistent with the circuit court's opinion. *Id.*

CONCLUSION: If the Court of International Trade determines that it has exclusive jurisdiction over the § 7 claim, it should carry on with further proceedings consistent with the Federal Circuit's opinion. *Id.* at 1352.

***In re Swanson,* 540 F.3d 1368 (Fed. Cir. 2008)**

QUESTION: Whether Congress intended 35 U.S.C. § 303(a) to prevent the United States Patent and Trademark Office ("PTO") from raising a substantial new question of patentability with regard to an issue

not yet considered by the PTO, but already considered in district court litigation. *Id*. at 1376.

ANALYSIS: The court first noted that the statute itself fails to define the scope of a substantial new question and that the legislative history reveals little consideration of the issue. *Id*. at 1376–77. The court then examined the purposes underlying PTO re-examination and concluded that re-examination serves primarily to correct errors in PTO examination proceedings. *Id*. at 1378. The court found PTO proceedings to differ in "standards, parties, purposes, and outcomes" from that of civil litigation and concluded that an issue litigated in a "district court is not equivalent to the PTO having had the opportunity to consider it." *Id*. at 1376–77.

CONCLUSION: The court held that due to the distinct nature of the two underlying proceedings, a new question of patentability not yet addressed by the PTO could proceed as a "substantial new question of patentability" pursuant to 35 U.S.C. § 303(a). *Id*. at 1379.

***Impresa Construzioni Geom. Domenico Garufi v. United States*, 531 F.3d 1367 (Fed. Cir. 2008)**

QUESTION: Whether the 30-day filing period under the Equal Access to Justice Act ("EAJA") begins to accrue after the time to appeal has expired for all parties when a petitioner enters a final judgment on voluntary dismissal. *Id.* at 1369.

ANALYSIS: The Federal Circuit first determined that the EAJA requires submission of an application within 30 days of final judgment in the action and that the final judgment, as defined by the 1985 amendment, is one that is "not appealable." *Id.* The court then determined that a "judgment is 'not appealable' in EAJA terms after the time for filing an appeal has elapsed." *Id.* In examining whether a "final judgment entered on an unopposed motion for dismissal is amenable to appeal," the Federal Circuit looked toward Supreme Court precedent and the Federal Rules, though both are silent on the matter, and toward the circuits, which have "answered in the affirmative." *Id.* Following the other circuits, the Federal Circuit reasoned that the "better procedure is to avoid preliminary litigation of time periods for EAJA filings when there has been a voluntary dismissal, at least where the order of dismissal does not specifically prohibit appeal." *Id.* at 1371. Finally, the court reasoned that "a clear rule better serves the interests of litigants and the courts, rather than encouraging, as here, satellite litigation on 'functional' premises, adding cost and delay while not yet reaching the merits." *Id.* at 1372.

CONCLUSION: The Federal Circuit "adopt[ed] a uniform rule for EAJA petitions in the Court of Federal Claims, whereby appeal rights from voluntary dismissals are presumed unless expressly disclaimed or specifically prohibited," and therefore the court found that the expiration of the 90-day period for filing a petition for certiorari started the defendant's period for filing its EAJA application. *Id*.