First Impressions

The following pages contain brief summaries, drafted by the members of the *Seton Hall Circuit Review*, of issues of first impression identified by a federal court of appeals opinion announced between October 9, 2008 and March 13, 2009. 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 the list, it means that the editors did not identify any cases from the circuit for the specified time period that presented an issue of First Impression.

FIRST CIRCUIT

United States v. Caraballo, 552 F.3d 6 (1st Cir. 2008)

QUESTION: Whether the Sentencing Commission's 2007 amendment to the drug quantity table offers a remedy to a defendant who, "although convicted of a drug-trafficking offense involving crack cocaine, was ultimately sentenced as a career offender." *Id.* at 7.

ANALYSIS: The court recognized that Amendment 706 of the Sentencing Guidelines "adjusts downward by two levels the base offense level ascribed to various quantities of crack cocaine . . . thereby shrinking the guideline disparity between crack cocaine offenses and powdered cocaine offenses." *Id.* at 9. However, because Defendant was a career offender, his sentence fell under an alternate sentencing table as well. *Id.* at 8. "If the offense level for a career offender . . . is greater than the offense level otherwise applicable, the offense level from the [career offender] table . . . shall apply." *Id.* at 9–10.

CONCLUSION: The 1st Circuit rejected Defendant's argument that Amendment 706 lowered his actual sentencing range and held that his "actual sentencing range was produced by [the career offender guideline]." *Id.* at 11.

Fantini v. Salem State College, 557 F.3d 22 (1st Cir. 2009)

QUESTION: "[W]hether Title VII by including in the definition of employer, 'any agent of such a person,' intended for said 'agents' to be subject to liability for engaging in proscribed discriminatory acts?" *Id.* at 29.

ANALYSIS: The 1st Circuit had declined in previous cases to discuss this issue; however it noted that the majority of circuits hold that agents cannot be held personally liable under Title VII. *Id.* The court quoted the 9th Circuit's decision in *Miller v. Maxwell's Intern. Inc.*, which states that the "statutory scheme itself indicates that Congress did not intend to impose individual liability on employees." *Id.* The 1st Circuit joined the reasoning of the 7th Circuit in holding that the "1991 amendments to Title VII further bolster our conclusion that individuals are not liable under that Act" because the amendments made no reference to the amount of damages an individual would be accountable. *Id.* at 30–31.

CONCLUSION: Thus, the 1st Circuit was persuaded by its sister circuits and concluded that "there is no individual employee liability under Title VII." *Id.* at 31.

***Mejia-Rodriguez v. Holder,* 2009 U.S. App. LEXIS 3718 (1st Cir. Feb. 25, 2009)**

QUESTION: Whether "the Board of Immigration Appeals ("BIA") erred in finding that (1) [petitioner] was not eligible for an exception to the inadmissibility rules for those who have committed certain crimes and that (2) he was ineligible for discretionary relief from removal by the Attorney General. The petition does involve one issue which this court has not addressed before: whether the term 'maximum penalty possible,' under 8 U.S.C. § 1182(a)(2)(A)(ii)(II), is determined by the federal Sentencing Guidelines range or the relevant statutory range of imprisonment." *Id.* at *1–2.

ANALYSIS: The Court noted that 8 U.S.C. § 1182(a)(2)(A)(ii)(II) "makes no reference to the Sentencing Guidelines. The language of the statute plainly refers to the 'maximum penalty possible' and that maximum is set by statute. That maximum possible punishment is for 'the crime of which the alien was convicted,' a reference again to the statute of conviction." *Id.* at *8.

CONCLUSION: The 1st Circuit held that "the term 'maximum penalty possible' is determined in reference to the relevant statutory range of imprisonment and not the federal Sentencing Guidelines range." *Id.* at *1–2.

***Segarra-Miranda v. Acosta-Rivera,* 557 F.3d 8 (1st Cir. 2009)**

QUESTION: Whether, under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") the bankruptcy court may enter an order excusing non-disclosure after the time for filing the required information has expired. *Id*. at 9.

ANALYSIS: The court reviewed the automatic dismissal provision of BAPCPA, which states that "when a debtor fails to file all the information required by section 521(a)(1)(B) within the prescribed period of" 45 days, "the case shall be automatically dismissed." *Id*. at 10. However, the court considered the term "automatic" a misnomer because the dismissal only takes place at the insistence of a party in interest. *Id*. at 12. The court looked to 11 U.S.C. § 521(a)(1)(B), which provides that the debtor "'shall . . . file'" the required disclosures "unless the court orders otherwise." *Id*. at 14. The court found that because the bankruptcy

court had the flexibility to waive non-disclosure before the passage of BAPCPA and considering that BAPCPA did not expressly curtail that power, the bankruptcy court can use its discretion to excuse detailed disclosure and determine when such information becomes "irrelevant or extraneous." *Id*. at 12. The court noted that a grant of judicial power to "order otherwise" predated BAPCPA, and when Congress updated section 521 it left that language intact. *Id*. at 12.

CONCLUSION: The 1st Circuit held, "that the great divide in section 521 is between information that is required and information that is not. . . . The [BAPCPA] allows courts to do the sifting suggested by that divide without rigid adherence to the forty-five-day deadline." *Id.*

Northeastern Land Servs. v. NLRB, No. 08-1878, 2009 U.S. App. LEXIS 5267 (1st Cir. Mar. 13, 2009)

QUESTION: Whether a two-member panel of the National Labor Relations Board ("Board") constitutes a quorum under Section 3(b) of the NLRA, 29 U.S.C. § 153(b). *Id*. at *2.

ANALYSIS: The court first indicated that the Board can lawfully delegate its power to a two-member panel pursuant to the "plain text" of Section 3(b). *Id*. at *12–13. The court noted that the statute authorizes the Board to delegate its power to a three-member panel. *Id*. at *13. The court then observed that Section 3(b) specifically provides that any Board vacancy "shall not impair the right of the remaining members to exercise all of the powers of the Board." *Id*. The court thus recognized that a vacancy in a three-member panel cannot impair the right of the remaining two members to exercise the full powers of the Board. *Id*.

CONCLUSION: The court concluded that a two-member panel of the Board constitutes a quorum. *Id*.

SECOND CIRCUIT

In re County of Erie, 546 F.3d 222 (2d Cir. 2008)

QUESTION: Whether "communications passing between a government attorney without policy-making authority and a public official are protected by the attorney-client privilege when the communications evaluate the policies' legality and propose alternatives." *Id.* at 225.

ANALYSIS: The court reasoned that "[c]ourts have found waiver by implication when a client testifies concerning portions of the attorney-client communication, when a client places the attorney-client relationship directly at issue, and when a client asserts reliance on an attorney's advice as an element of a claim or defense." *Id.* at 228. The court noted that the key to finding implied waiver in the third scenario is "some showing by the party arguing for a waiver that the opposing party relies on the privileged communication as a claim or defense or as an element of a claim or defense." *Id.* The court further reasoned that the notion of unfairness underlies any determination that a privilege should be forfeited. *Id.* at 229.

CONCLUSION: The 2nd Circuit held that communications between a government attorney and a public official are not protected by the attorney-client privilege when the party asserting the privilege has relied on the advice of his counsel to make his claim or defense. *Id.* at 229.

Overbaugh v. Household Bank N.A. (In re Overbaugh), 2009 U.S. App. LEXIS 5101 (2d Cir. Mar. 11, 2009)

QUESTION: Whether a Chapter 13 trustee has standing to object to a motion to reclassify a claim from secured to un-secured. *Id.* at *12.

ANALYSIS: The 2nd Circuit determined that because 11 U.S.C. § 1302 requires a trustee to properly disburse all claims, "a trustee has standing to object to the motion of a debtor to reclassify a secured creditor's claims." *Id.* The court then reasoned that "[b]ecause a trustee must be able to verify that secured claims are, in fact, secured, it necessarily follows that a trustee has standing to object when a debtor attempts to reclassify a secured claim as an unsecured claim." *Id*. Following the approach taken by the 5th and 9th Circuits, the 2nd Circuit found that "when considering similar challenges to the authority of a Chapter 13 trustee, that the primary purpose of the Chapter 13 trustee is not just to serve the interests of the unsecured creditors, but rather, to serve the interests of all creditors." *Id.*

CONCLUSION: The 2nd Circuit held that "a Chapter 13 trustee—who is charged with assuring that claims are properly disbursed [under] 11 U.S.C. § 1302(b)(3)—has standing to object to a motion to reclassify a claim." *Id.* at *3.

THIRD CIRCUIT

United States v. Grape, 549 F.3d 591 (3d Cir. 2008)

QUESTION: Whether the appropriate standard of review for appealing the first two factors of a *Sell* order to involuntarily medicate a defendant to render him competent for trial is de novo or clear error review. *Id.* at 598.

ANALYSIS: The 3rd Circuit noted that their "sister circuits have specified standards of review for each factor of the *Sell* test." *Id.* In accordance with their sister circuits, the 3rd Circuit agreed that the first factor of a *Sell* order, "whether the Government has advanced sufficiently important interests to justify forcible medication," presents a legal question subject to de novo review. *Id.* The 3rd Circuit stated that the second factor of a *Sell* order, "whether involuntary medication is substantially likely to restore Grape to competency," is a factual question subject to clear error review. *Id.* The court reasoned that "[d]etermining whether involuntary medication will significantly further [the proffered] state interests, including the medication's likely effect on a defendant and his ability to stand trial and help prepare for it, requires us to resolve a factual question." *Id.* Furthermore, the court held that the "Government bears the burden of proof on factual questions by clear and convincing evidence." *Id.*

CONCLUSION: The 3rd Circuit held that "[b]ecause we agree that the first issue presents a legal question, we will review the first *Sell* factor . . . de novo" and because the second factor presents a factual question, "[w]e therefore review the second *Sell* factor for clear error." *Id.*

Johnson v. Tennis, 549 F.3d 296 (3d Cir. 2008)

QUESTION: Whether the rule of *Bruton v. United States*, holding that in a joint criminal jury trial, "a defendant's Sixth Amendment right of confrontation is violated by admitting a confession of a non-testifying codefendant that implicates the defendant, regardless of any limiting instruction given to the jury," applies to "the incriminating confession of a non-testifying codefendant in a joint bench trial." *Id*. at 298.

ANALYSIS: The court noted that *Bruton* was concerned with the "limitations of a jury that it would or could not follow instructions to disregard the prejudicial statements of a codefendant at a joint trial." *Id*.

at 299. The court recognized that the "the risks inherent in the jury system of which the *Bruton* Court was so concerned would seemingly not exist when a judge is sitting as a trier of fact." *Id*. The court further noted that the Supreme Court's "stated rationale . . . limited [the rule's] application only to jury trials in criminal cases." *Id*. at 300. The court observed that other appellate courts have addressed the scope of *Bruton* and limited the rule's application to jury trials. *Id*.

CONCLUSION: The court concluded that the "*Bruton* rule . . . applies solely to jury trials" and is thus "inapplicable to the incriminating confession of a non-testifying codefendant in a joint bench trial." *Id*.

Shubert v. Lucent Tech, Inc. (In re Winstar Communs., Inc.) 554 F.3d 382 (3d Cir. 2009)

QUESTION: Whether "a creditor can be considered a non-statutory insider for purposes of extending the time for recovery of preferential payments" under the Bankruptcy Code when the insider does not have actual control. *Id.* at 388, 396.

ANALYSIS: The 3rd Circuit rejected the appellant's contention that "in order for a creditor to constitute an insider [that creditor] . . . must exercise actual managerial control over the debtor's day to day operations." *Id*. at 395. The court stated that instead of control, the relevant legal inquiry "is whether there is a close relationship [between the debtor and creditor] and . . . anything other than closeness to suggest that any transactions were not conducted at arm's length." *Id*. at 396.

CONCLUSION: The 3rd Circuit concluded that it is "not necessary that a non-statutory insider have actual control" for purposes of extending the time for recovery of preferential payments under the Bankruptcy Code. *Id*.

FOURTH CIRCUIT

Hutson v. E.I. du Pont de Nemours & Co. (In re Nat'l Gas Distribs., LLC), 556 F.3d 247 (4th Cir. 2009)

QUESTION: Whether commodity forward agreements must be traded on exchanges or in financial markets. *Id.* at 255.

ANALYSIS: The 4th Circuit first noted that the word "agreement" is a more general term than "contract," and thus every contract is an agreement, but not every agreement is a contract. *Id.* Further, since

forward contracts need not be traded on exchanges or in financial markets, it follows that some forward agreements need not be traded on exchanges or in financial markets. *Id*. at 256–57.

CONCLUSION: The 4th Circuit thus held that commodity forward agreements do not need to be traded on exchanges or in financial markets. *Id*. at 257.

***Palisades Collections L.L.C. v. Shorts*, 552 F.3d 327 (4th Cir. 2008)**

QUESTION: "[W]hether a party joined as a defendant to a counterclaim (the 'additional counter-defendant') may remove [a] case to federal court solely because the counterclaim satisfies the jurisdictional requirements of the Class Action Fairness Act of 2005 ("CAFA")." *Id.* at 328.

ANALYSIS: The 4th Circuit first noted that the general removal statute, 28 U.S.C.A. § 1441, only permits "the defendant or defendants" to remove a case to federal court. *Id*. at 331. The court further observed that CAFA conferred federal jurisdiction over civil actions in which the "matter in controversy exceeds the sum or value of $5,000,000." *Id*. The 4th Circuit examined the Supreme Court's decision in *Shamrock Oil,* where the Supreme Court held that the original plaintiff was not authorized to remove a case to federal court. *Id.* at 332–33. Other courts, the 4th Circuit noted, have interpreted *Shamrock Oil* to mean that only the original defendants in a suit may file removal. *Id*. The 4th Circuit then agreed with the 6th Circuit's reasoning that the wording in section 1441, stating "defendant or defendants," refers only to the original parties against whom the original plaintiff asserted the claim, and not to third-party defendants. *Id.* Furthermore, the 4th Circuit reasoned that if Congress had intended to allow additional counter-defendants to remove a case to federal court, then it would have so indicated in the statute. *Id*. at 333–34.

CONCLUSION: The 4th Circuit thus held that additional counter-defendants may not remove a case to federal court. *Id*. at 328–29.

***United States v. Wofford*, 2009 U.S. App. LEXIS 3519 (5th Cir. Feb. 18, 2009)**

QUESTION: Whether an employee retirement pension plan ("plan") that fails to satisfy the requirements of § 401(a) for qualification at the relevant times is still a plan "subject to any provision of Title I" of ERISA for the purposes of § 664. *Id*. at *15.

ANALYSIS: The court noted that they previously held in the bankruptcy context that a plan's failure to remain tax qualified does not render ERISA's Title I anti-alienation provisions inapplicable. *Id*. at *15. The court also reviewed another prior decision where the court held that tax qualification is not a prerequisite to ERISA qualification. *Id.* at *17–18. Reviewing that earlier decision, the court noted that "[n]owhere in ERISA . . . is there a requirement that, to be an ERISA plan and thus be governed by ERISA, a plan must be tax qualified." *Id*. at *19.

CONCLUSION: The court found that given the earlier precedents in the bankruptcy context, the district court correctly deemed tax qualification irrelevant to the issue of whether a plan was subject to any provision of Title I of ERISA. *Id*. at *22.

Castellanos-Contreras v. Decatur Hotels LLC, 2009 U.S. App. LEXIS 4796 (5th Cir. Feb. 11, 2009)

QUESTION: Whether, under the Fair Labor Standards Act ("FLSA"), "an employer must reimburse guest workers for (1) recruitment expenses, (2) transportation expenses, or (3) visa expenses, which the guest workers incurred before relocating to the employer's location." *Id.* at *3.

ANALYSIS: The 5th Circuit first noted that an employer must reimburse employees for "kick-backs." *Id.* at *13–14. Further, a necessary condition of a "kick-back" is that it is primarily for the benefit of the employer. *Id*. at *14. Thus, finding that neither recruitment expenses, transportation expenses, nor visa expenses are primarily for the benefit of the employer, the court did not consider those expenses to be "kick-backs" and as such did not need to be reimbursed by the employer. *Id.* at *15–24.

CONCLUSION: The court held that the FLSA does not require an employer to "reimburse its guest workers for the recruitment fees, transportation costs, or visa fees that they incurred before relocating to the United States." *Id*. at *24.

SIXTH CIRCUIT

LPP Mortgage, Ltd. v. Brinley, 547 F.3d 643 (6th Cir. 2008)

QUESTION: Whether, in bankruptcy cases, technical abandonment of property of the estate under 11 U.S.C. § 544 is revocable. *Id.* at 648.

ANALYSIS: The 6th Circuit agreed with the limited discretion approach, that courts should have limited discretion in determining when technical abandonment can be revoked, that was taken by the bankruptcy court. *Id.* at 649 (noting the bankruptcy court's reliance on the 10th Circuit's decision in *In re Woods*, 173 F.3d 770 (10th Cir. 1999)). The court found that "the question of whether abandonment is revocable is to be determined by applying the guidelines of Federal Rule of Civil Procedure 60(b), made applicable to bankruptcy matters by Federal Rule of Bankruptcy Procedure 9024." *Id.* The court concurred with the bankruptcy court's finding that this approach promoted finality, debtor protection, due diligence, and flexibility. *Id.*

CONCLUSION: The court held that technical abandonment is revocable, finding that "[t]he application of Fed. R. Civ. P. 60(b) strikes the appropriate balance between promoting finality and allowing courts to grant relief in limited circumstances." *Id.*

***Groeneveld Transport Efficiency v. Eisses,* 297 Fed. Appx. 508 (6th Cir. Oct. 20, 2008)**

QUESTION: Whether the plaintiffs may appeal the district court's order, which temporarily stayed the district court action based on the doctrine of international abstention. *Id.* at 510.

ANALYSIS: The 6th Circuit agreed with the 8th Circuit and held that a stay based on international abstention is not a final order. *Id.* The court relied on the 8th Circuit's reasoning that since there was a lack of complete overlap in the U.S. and foreign litigation, and because the district court explicitly contemplated the possibility for further litigation in the U.S., the district court's order was not final. *Id.* The court noted that in issuing its ruling, "the district court was not attempting to dispose of the case. Rather, recognizing the difficulty of trying a case with substantially similar parties and similar disputes in two fora, the district court decided to temporarily stay the action while the Canadian case proceeded." *Id.* at 511. Thus, the court concluded that the district court's stay cannot be considered a final order because the district court clearly based its ruling on the international abstention doctrine; and because the district court asked the plaintiffs to instruct the district court on whether the action should be "fully restored" in federal court after foreign resolution. *Id.*

CONCLUSION: The 6th Circuit concluded that a stay based on international abstention is not a final order.

***Redmon v. Sud-Chemie Inc. Ret. Plan for Union Employees.*, 547 F.3d 531 (6th Cir. 2008)**

QUESTION: Whether the "Kentucky statute of limitations is most analogous to a claim for benefits under [29 U.S.C.] §1132(a)(1)(B)" of the Employee Retirement Income Security Act ("ERISA"). *Id.* at 536 n.8.

ANALYSIS: The 6th Circuit noted that since ERISA "does not provide a statute of limitations for a claim of benefits under §1132(a)(1)(B) . . . the court [will] apply the most analogous state law statute of limitations." *Id.* at 534. The court stated that a statute of limitations for breach of contract is most analogous where "no provision comparable to KRS §413.120(2) [the statutory liability provision] was before the court." *Id.* at 535. However, the court explained that since appellant claimed that signature of waiver on the Designation of Form of Benefit Payments ("DFBP") was obtained in violation of ERISA, this cause of action did not arise from an independent contract but "more specifically from ERISA's statutory provisions." *Id.* at 537. Therefore, the court recognized that KRS §413.120(2), which affixes a five-year statute of limitations, was applicable to defendant's claim, not the state statute of limitations for breach of contract. *Id.*

The court further reasoned that this finding was in accord with Kentucky case law, which held that KRS §413.120(2) was appropriate where a statute creates a new theory of liability unknown at common law such as the Worker's Compensation scheme. *Id.* Because "ERISA is more akin to a statutory scheme such as Workers' Compensation than to any common law cause of action," the court found that the statutory liability provision [of Kentucky law] is the most analogous statute of limitations" for this claim. *Id.* at 538.

CONCLUSION: The court held that KRS §413.120(2), the five-year statute of limitations, is the most analogous statute of limitations for a claim of benefits under [29 U.S.C.S.] §1132(a)(1)(B) ERISA. *Id.* at 537.

***Pickens v. Howes,* 549 F.3d 377 (6th Cir. 2008)**

QUESTION: Whether a defendant who pleads to an illegal sentence should be allowed to withdraw his plea even if a new sentence is ordered which is "both legal and gives him the entire benefit of the original plea." *Id.* at 381.

ANALYSIS: Generally, a defendant may withdraw a plea bargain calling for an illegal sentence. *Id.* at 381. "The court found that defendant's Due Process rights were not violated when the illegal sentence was modified to comply with both the law and the sentencing terms of the plea agreement*." Id.* Allowing the defendant to withdraw his plea and requiring the state to retry the case would have been both unnecessary and unfair. *Id.* at 381–82.

CONCLUSION: "[W]hen a sentence is modified to make it consistent with state law and to give the defendant the benefit of his original plea agreement, the Constitution does not require the withdrawal of a once-illegal plea." *Id*.

***United States v. Sanders,* 301 Fed. Appx. 503 (6th Cir. Nov. 24, 2008)**

QUESTION: Whether "aggravated riot," an offense not specifically identified as a crime of violence under the U.S. Sentencing Guidelines, U.S.S.G. § 4B1.2(a), can be considered a violent offense for the purposes of sentencing enhancement. *Id.* at 506.

ANALYSIS: After reviewing the statutory language at issue, the court recognized "that offenses that qualify as 'aggravated riot' in Ohio [do not] necessarily qualify as 'crimes of violence' under U.S.S.G. § 4B1.2(a)(1)." *Id.* The court then considered "whether aggravated riot is a crime of violence under U.S.S.G. § 4B1.2(a)(2) because it 'presents a serious potential risk of physical injury to another.'" *Id.* In considering this question, the court recognized "that the relevant inquiry must focus 'on whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another.'" *Id.* 507. "Because the statute in question here contains elements that expressly distinguish conduct with a risk of violence under [the Ohio statute] subsections (A)(2) and (3) from other kinds of disorderly conduct committed in the course of non-violent felonies under subsection (A)(1), aggravated riot does not appear to be a crime of violence in all cases." *Id.* The court recognized that it was "not restricted to a mere examination of the statutory language but [it was] permitted to look at the charging documents and jury instructions to determine the actual elements of the crime committed." *Id.* at *11. The court opined that "the language of the indictment is identical to the statutory language, revealing that [the defendant's] prior conviction was undoubtedly for a violation of either subsection (A)(2) or (A)(3) of the Ohio aggravated-riot statue, both of which are crimes of violence . . . ." *Id.*

CONCLUSION: "Although 'aggravated riot' is not necessarily a crime of violence pursuant to statutory language alone, [the court's]

review of [the defendant's] indictment establishe[d] that he was charged and convicted of an offense that, under a subsection of Ohio's aggravated riot statute, constitutes a crime of violence for federal sentencing purposes." *Id.*

***Answers in Genesis of Ky., Inc. v. Creation Ministries Int'l, Ltd.,* 556 F.3d 459 (6th Cir. 2009)**

QUESTION: Whether a federal court should abstain from exercising jurisdiction over a motion to compel arbitration because of international comity concerns. *Id.* at 465.

ANALYSIS: The 6th Circuit looked to the Supreme Court's holding in *Colorado River Water Conservation Dist. v. United States* to determine the proper factors to consider when making the decision to abstain from exercising jurisdiction when international comity is a concern. *Id.* at 467. In *Colorado River*, the Supreme Court noted that the most important factor in an abstention decision is "whether there exists a 'clear federal policy evince[ing] . . . the avoidance of piecemeal adjudication.'" *Id.* "How far the parallel proceeding has advanced in the other sovereign's courts, the number of defendants and complexity of the proceeding, the convenience of the parties, and whether a foreign sovereign is participating in the suit" were other factors considered by the Supreme Court. *Id*. The 6th Circuit noted that the Federal Arbitration Act ("FAA"), which applies to the dispute between the parties, did not promote the avoidance of piecemeal adjudication. *Id.* 468. In fact, the FAA recognized that piecemeal adjudication may be necessary to "'enforce private agreements into which parties had entered.'" *Id*. Further, the court noted that the foreign litigation was only in the beginning stages and convenience is not a factor because the parties are located in two different countries to begin with so either location will be inconvenient for half of the parties involved. *Id.* 469.

CONCLUSION: The 6th Circuit held that it would not abstain from exercising jurisdiction over a motion to compel arbitration because of international comity concerns after carefully considering the factors laid out by the Supreme Court in *Colorado River. Id.*

***United States v. Shafer,* 557 F.3d 440 (6th Cir. Mar. 3, 2009)**

QUESTION: Whether the term "sexual contact" in 18 U.S.C. § 2246(3) includes self-masturbation. *Id.* at 444.

ANALYSIS: The 6th Circuit emphasized that "a matter requiring statutory interpretation is a question of law requiring de novo review, and

the starting point for interpretation is the language of the statute itself." *Id.* at 445. The court pointed out that absent clear legislative intent to the contrary, the statutory wording is generally conclusive. *Id.* Section 2246(3) defines "sexual contact" as "the intentional touching . . . of any person . . . ." *Id.* Given the definition, the court found that the text of section 2246(3) does not support a holding that more than one person is required for "sexual contact" to occur. However, the court said that "simply because the statute does not specifically state that self-masturbation qualifies as 'sexual contact' does not mean that Congress intended for such an act to be excluded, especially when self-masturbation falls squarely within the plain language of [section] 2246(3)." *Id.* at 445–46.

CONCLUSION: The 6th Circuit held that a clear reading of section 2246(3) requires a holding "that 'sexual contact,' as defined by [section] 2246(3), includes self-masturbation." *Id.* at 446.

SEVENTH CIRCUIT

Jimenez v. Mukasey, 548 F.3d 557 (7th Cir. 2008)

QUESTION: Whether criminal recklessness constitutes a crime of violence under 18 U.S.C. § 16(b). *Id.* at 558.

ANALYSIS: The court recognized that the Supreme Court, after examining the scope of section 16(b) and holding that a conviction for drunk driving did not constitute a crime of violence, reasoned that accidental or negligent conduct should not fall under the definition of a crime of violence. *Id.* at 560. The court then recognized that five other circuits (the 3rd, 4th, 6th, 9th, and 10th) have held that reckless crimes cannot be crimes of violence under section 16(b). *Id.* The court adopted the 3rd Circuit's interpretation of the Supreme Court's ruling that the concept of physical force necessary to constitute a crime of violence "naturally suggests a higher degree of intent than negligent or merely accidental conduct." *Id.* In the present case, the crime of criminal recklessness in Indiana for which the respondent was convicted encompasses both accidental and aggressive conduct. It therefore is not a crime of violence which requires a higher level of "intent to use force" than criminal recklessness requires. *Id.* at 562.

CONCLUSION: The 7th Circuit joined its sister circuits in holding that reckless crimes are not crimes of violence under 18 U.S.C. § 16(b). *Id.* at 560.

EIGHTH CIRCUIT

UnitedHealth Group Inc. v. Wilmington Trust Co., 548 F.3d 1124 (8th Cir. 2008)

QUESTION: Whether the plain language of Section 504(i) of the indenture in question, or the manifest purposes of the parties "imposes an independent obligation on the company to file timely SEC reports . . . and within fifteen days afterwards, to forward copies of such reports to the trustee." *Id.* at 1128.

ANALYSIS: The court first noted that "the plain language of [section] 504(i) makes clear that any duty actually to file the reports is imposed 'pursuant to Section 13 or 15(d) of the Exchange Act' and *not* pursuant to the indenture itself," and thus the "provision does not incorporate the Exchange Act," but "merely refers to it in order to establish which reports must be forwarded." *Id.* at 1128–29. The court rejected the argument that the purpose of the provision was to impose an independent filing obligation. *Id.* at 1130.

The court noted that the "clear and unambiguous language of the indenture provision" at issue imposed nothing more than the ministerial duty to forward copies of certain reports . . . within fifteen days of actually filing the reports with the SEC." *Id.* at 1130.

CONCLUSION: The 8th Circuit thus held that "[b]ased on the plain meaning of [section] 504(i) . . . the indenture imposes no independent obligation to file timely SEC reports." *Id.*

H&R Block, Inc., v. Am. Int'l Specialty Lines Ins. Co., 546 F.3d 937 (8th Cir. 2008)

QUESTION: "[W]hether class actions filed against nationwide tax preparer H&R Block ('Block') asserting a variety of statutory and common law claims arising out of Block's Refund Anticipation Loan ("RAL") program are excluded from 'prior acts' coverage under professional liability 'claims made' insurance policies because other class actions asserting similar claims were filed prior to the policy periods." *Id.* at 938.

ANALYSIS: The 8th Circuit noted that "the very purpose of insurance is to protect against the risk of unknown but not unexpected

loss." *Id.* at 941. The court indicated that the provisions at issue provided coverage for "'claims based on a wrongful act that occurred before the effective date of the policy'" as long as the insurer "'had no knowledge of the prior wrongful act on the effective date'" of the policy, "nor any reasonable way to foresee that a claim might be brought." *Id.* at 942. The court stated that in order for plaintiffs to have class action standing, they "must allege and undertake to prove that each class member was injured by the same wrongful act or acts." *Id.* The court further found that when a service is sold nationwide, claims premised on the RAL program put the insurer on "reasonable notice that other clients will assert the same claims alleging that the same 'wrongful acts' infected their individual transactions." *Id.*

CONCLUSION: The 8th Circuit held that where class action lawsuits have already been filed against the insured for prior acts, and before the policy periods begin, these suits give the insured both the required knowledge of its prior wrongful acts as well as a reasonable opportunity to foresee that such may be brought in the future. *Id.* at 943.

Solis v. Summit Contrs., Inc., 2009 U.S. App. LEXIS 3755 (8th Cir. Jan. 17, 2008)

QUESTION: Whether 29 C.F.R. § 1910.12(a) was unambiguous in that it did not preclude OSHA from issuing citations to general contractors when their subcontractors caused a condition exposing their employees to danger. *Id.* at *16.

ANALYSIS: Summit argued that: "the regulation requires the employer to protect only 'his employees.' Because creating employer, correcting employer, and controlling employer citation policies permit OSHA to issue citations to employers when their own employees are not exposed to the hazard, Summit's reading of § 1910.12(a) effectively precludes these policies and only permits the exposing employer citation policy. Although part (1) may support this interpretation, part (2) must provide something different to avoid being superfluous to part (1). Summit argues that part (2) requires the employer to protect only his employees at their places of employment." *Id.* at *22–23. The court found that Summit's position on 29 C.F.R. § 1910.12(a) presented two problems: "First, Summit's interpretation is contrary to the grammatical construction of the sentence because it requires the term 'each of his employees' to be the object of the sentence, rather than a prepositional phrase that modifies the actual objects of the sentence. Second, Summit's interpretation would make the term 'places of employment' redundant of the term 'employment' and, therefore, superfluous. Under Summit's

interpretation, part (2) provides nothing different from or in addition to part (1); instead, it makes the term 'places of employment' a subset of the term 'employment.'" *Id.* at *23. The court further found that even if it agreed with Summit's position, it would have to defer to the Secretary's interpretation. *Id.* at *24.

CONCLUSION: The court held that the OSHRC's finding that OSHA could not fine general contractors under 29 C.F.R. § 1910.12(a) for the acts of its subcontractors to be "contrary to law." *Id.* at *37.

NINTH CIRCUIT

United States v. Weyhrauch, 548 F.3d 1237 (9th Cir. 2008)

QUESTION: "[W]hether a federal honest services mail fraud prosecution under 18 U.S.C. § 1341 and § 1346 requires proof that the conduct at issue also violated an applicable state law." *Id.* at 1239.

ANALYSIS: The 9th Circuit first noted that the language of 18 U.S.C. § 1341 "criminalizes the use of the postal services in carrying out a 'scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representatives, or promises.'" *Id.* at 1243. The court then stated that Congress clarified for purposes of section 1341 that "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." *Id.* However, the court acknowledged that Congress did not define the concept of "honest services," creating confusion over the reach of section 1341. *Id.* The 9th Circuit declined to adopt the 5th Circuit's "'state law limiting principle,' which requires the government to prove that a public official violated an independent state law to support an honest services mail fraud conviction," because prior case law does not support the proposition that the federal fraud statute derives its content solely from state law. *Id.* at 1243–45. Rather, the statutory text, legislative history, and cases' "[b]road characterization of . . . duty, without reference to any underlying state law duty, suggests that public officials' duty of honesty is uniform rather than variable by state." *Id.* at 1245–46. The court also noted that "[f]ederal action based on a valid constitutional grant of authority is not improper simply because it intrudes on state interests." *Id.* at 1246.

CONCLUSION: The 9th Circuit rejected the principle that a state law violation is required for prosecution of federal honest services mail fraud under 18 U.S.C. 1341 and ultimately recognized that the "two core categories of conduct by public officials . . . that support an honest

services conviction" [are] (1) taking a bribe or otherwise being paid for a decision while purporting to be exercising independent discretion and (2) nondisclosure of material information." *Id.* at 1247.

***Ahmed v. Mukasey*, 548 F.3d 768 (9th Cir. 2008)**

QUESTION: Whether the Department of Homeland Security can unilaterally block or veto a motion to reopen the proceedings for an adjustment of immigration status in an immigration proceeding. *Id.* at 772.

ANALYSIS: The Board of Immigration Appeals initially denied the plaintiff's motion to reopen her immigration proceedings merely because the Department of Homeland Security objected to it. *Id.* at 770. The court found that the Department of Homeland Security does not have automatic veto power when objecting to a motion to reopen immigration proceedings. *Id.* at 772. Instead, the Board of Immigration Appeals may consider the Department's objection, but does not have to. *Id.*

CONCLUSION: When the Department of Homeland Security opposes a motion to reopen immigration proceedings for adjustment of status, the Board of Immigration Appeals may consider the objection, but may not deny the motion based solely on the fact of the Department's objection. *Id.*

***United States v. Contreras-Cisneros*, 297 Fed. Appx. 659 (9th Cir. 2008)**

QUESTION: Whether a double jeopardy claim can provide for an exception to the rule permitting successive state and federal prosecutions. *Id.* at 661.

ANALYSIS: The 9th Circuit emphasized that a "double jeopardy claim must fail unless it falls within an exception to the rule permitting successive state and federal prosecutions." *Id.* The court pointed out that although a state prosecution might serve the interests of the federal government in maintaining secrecy in an ongoing DEA investigation, "these circumstances do not justify the conclusion that the state prosecution was '*merely* a tool of the federal authorities' such that the initial prosecution was '*in essential fact* another federal prosecution.'" *Id*. The court added that the exception would not apply if "the state remained an independent sovereign pursuing its own sovereign interests throughout the state prosecution." *Id.*

CONCLUSION: The 9th Circuit held "that in theory [a 'tool' or 'cover'] exception does exist. As a practical matter, however . . . it is

extremely difficult and highly unusual to prove that a prosecution by one government is a tool, a sham, or a cover for the other government." *Id*.

***Delgado v. Mukasey*, 546 F.3d 1017 (9th Cir. 2008)**

QUESTION: Whether 8 U.S.C. § 1231(b)(3)(B) grants the Attorney General the authority to "determine a crime to be particularly serious regardless of the penalty *or its designation or non-designation as an aggravated felony*." *Id.* at 1020.

ANALYSIS: The court began by noting that an alien is not eligible for withholding of removal if the Attorney General determines the alien committed a "particularly serious crime." *Id.* at 1019–20. The court explained that under § 1231(b)(3)(B) aggravated felonies are "particularly serious crimes." *Id.* at 1019. Although aggravated felonies constitute "particularly serious crimes" per se, the court found that the Attorney General is not precluded from deciding "on a case-by-case basis, that *any* other crime is also 'particularly serious.'" *Id.* at 1019, 1021. First, the court analyzed the legislative history of section 1231(b)(3)(B) and concluded that "[n]othing in the text or history . . . suggests that Congress intended . . . to divest the Attorney General of his authority to determine, on a case-by-case basis, that other crimes were 'particularly serious,' depending on the circumstances of [the alien's] commission, among other things." *Id.* at 1021. Accordingly, the court deferred to the Board of Immigration Appeals ("BIA"), stating the "BIA's interpretation of the statute [was] reasonable." *Id.* at 1022.

CONCLUSION: The 9th Circuit held that the Attorney General has "discretion to determine that, under the circumstances presented by an individual case, a crime was 'particularly serious,' whether or not the crime was an aggravated felony." *Id.*

***United States v. Blixt*, 548 F.3d 882 (9th Cir. 2008)**

QUESTION: "Whether the use of another's signature constitutes a "means of identification" for purposes of the Aggravated Identity Theft statute," codified as 18 U.S.C. § 1028A. *Id.* at 886.

ANALYSIS: The 9th Circuit considered the language of the statute to determine whether a signature qualifies as a "means of identification." *Id.* at 887. The court noted the "Aggravated Identity Theft statute defines the term 'means of identification' in a way that makes reasonably clear that forging another's signature on a check constitutes the use of a means of identification." *Id*. The court stated that the "definition includes the use of a name, alone or in conjunction with *any other* information, as

constituting the use of a means of identification so long as the information taken as a whole identifies a specific individual." *Id.* "By using the word 'any' to qualify the term 'name,' the statute reflects Congress's intention to construct an expansive definition." *Id.* The court found that "categorically carving out a signature from this definition" would "impermissibly narrow the definition of 'name' in the statute." *Id.*

CONCLUSION: The 9th Circuit held that "forging another's signature constitutes the use of that person's name and thus qualifies as a 'means of identification' under 18 U.S.C. § 1028A." *Id.* at 886.

***Fones4all Corp. v. FCC*, 550 F.3d 811 (9th Cir. 2008)**

QUESTION: Whether the FCC may backdate an order explaining a denial of a "petition for forbearance from the application of an FCC regulation" to the date of an earlier press release announcing said decision. *Id.* at 813.

ANALYSIS: The court interpreted 47 U.S.C. § 405 as requiring a party challenging the FCC's practice of backdating a Memorandum Opinion in order to comply with the timeliness requirements of 47 U.S.C. § 160(c) to first present their argument to the Commission before seeking judicial relief. *Id.* at 817. The court reasoned that the specific language of 47 U.S.C. § 405 "explicitly mandate[s] that the FCC have the 'opportunity to pass' on the merits of any challenges to its orders before review may be sought in the Courts of Appeals." *Id.* at 818. The court noted that the D.C. Circuit had already "twice encountered a similar set of facts involving backdating," and in both cases held that the court could not claim jurisdiction until the petitioners exhausted the administrative remedy of presenting their argument to the FCC. *Id.* at 817. The court further noted that the Supreme Court has held that such "exhaustion 'serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency.'" *Id.* at 817–18.

CONCLUSION: The 9th Circuit joined with the D.C. Circuit in holding that 47 U.S.C. § 405 requires a petitioner to afford the FCC the opportunity to pass on questions involving the backdating of FCC orders before the petitioner may seek judicial relief. *Id.* at 818.

***United States v. Youssef*, 547 F.3d 1090 (9th Cir. 2008)**

QUESTION: Whether 18 U.S.C. § 1015(a), which imposes fines and/or imprisonment for knowingly making false statements "relating to naturalization, citizenship, or registry of aliens," includes a materiality requirement as an element of the offense. *Id.* at 1092–93.

ANALYSIS: The 9th Circuit first analyzed the plain language of the statute. *Id.* at 1093. The court followed the 4th Circuit and held that the plain text of 18 U.S.C. § 1015(a) does not require the false statements to be material. *Id.* at 1093–94. Next, the court addressed whether the language used in 18 U.S.C. § 1015(a) has a "settled meaning at common law requiring proof of materiality." *Id.* at 1094. The court determined that "[n]one of the words used in 18 U.S.C. § 1015(a) have an established meaning at common law that includes a materiality requirement." *Id.* Furthermore, the court noted that "[w]here Congress has intended to criminalize the making of material false statements, it has expressly done so." *Id.* Therefore, the court reasoned that Congress did not intend to impose a materiality requirement as an element of 18 U.S.C. § 1015(a) and, consequently, the court would not read such a requirement into the statute. *Id.*

CONCLUSION: The court held that 18 U.S.C. § 1015(a) does not impose a materiality requirement for false statements made "under oath, in any case, proceeding, or matter relating to, or under, or by virtue of any law of the United States relating to naturalization, citizenship, or registry of aliens." *Id.* at 1093–94.

Video Software Dealers Assoc. v. Schwarzenegger, 556 F.3d 950 (9th Cir. 2009)

QUESTION: Whether courts should apply a strict level of scrutiny when reviewing video games for minors that include violent material or apply the "variable obscenity." *Id.* at 958.

ANALYSIS: The Supreme Court previously held that the standard for reviewing acts that deal with "obscenity as to minors" is akin to the rational basis standard. *Id.* at 959. The 9th Circuit thus addressed whether they should use such a standard when reviewing video games for minors that include violent material. *Id.* at 958. The 9th Circuit discussed the resistance by the 6th, 7th, and 8th Circuits in broadening the term obscenity "to include violent material, as well as sexually explicit material." *Id.* at 959. These circuits did not extend their obscenity jurisprudence to violent material because the two were "distinct categories of objectionable depiction." *Id.* at 959.

CONCLUSION: The 9th Circuit thus "declined the State's invitation to apply the *Ginsberg* rationale to materials depicting violence, and [held] that strict scrutiny remains the applicable review standard." *Id.* at 961.

***United States v. James*, 556 F.3d 1062 (9th Cir. 2009)**

QUESTION: Whether "the Federal Juvenile Delinquency Act ("FJDA") requires every charge brought against a juvenile tried as an adult to be the subject of a juvenile transfer hearing." *Id.* at 1065.

ANALYSIS: The defendant argued that the FJDA "does not allow the trial of a juvenile as an adult on charges that have not been the subject of a transfer hearing." *Id.* at 1065. The court began its analysis by looking at the text of the statute and found that "[o]nce the court has determined that a juvenile should be tried as an adult, requiring an additional hearing to determine whether related charges added later meet the same standards would serve little purpose." *Id.* at 1066. The court further reasoned that no hearing was required "to identify the newly added offenses or to ascertain the juvenile's age, both currently and at the time he allegedly committed the offenses." *Id*. The court set forth the standards for the district court to considering, including "the individual characteristics of the juvenile himself rather than the details of the offenses, and those characteristics were already the subject of the first hearing. If the added charges arise from the same series of acts as the original charges . . . the interest of justice analysis should remain unchanged." *Id.* at 1066 (internal quotation marks omitted).

CONCLUSION: The court held that "the FJDA . . . does not require that charges added after a juvenile has been transferred to adult status be the subject of an additional juvenile transfer hearing." *Id.* at 1063.

TENTH CIRCUIT

***Vallario v. Vandehey*, 554 F.3d 1259 (10th Cir. 2009)**

QUESTION: The applicable standard of review for an appellate court when determining whether to grant a petition for permission to appeal from an order granting or denying class action certification under Fed. R. Civ. P. 23(f). *Id.* at 1261–62.

ANALYSIS: The court stated that while appellate courts have "limited capacity" to consider such interlocutory appeals, "certain instances exist . . . in which interlocutory review of a district court's class certification decision is appropriate." *Id*. at 1263. As there is "no rigid test" governing the "exercise of [the court's] discretion to grant a petition of interlocutory review," the 10th Circuit proffered a set of principles

"useful in evaluating the merits of a Rule 23(f) petition." *Id*. The court enumerated three situations where interlocutory review of a district court's class certification order is appropriate: (1) "death knell cases," referring to situations in which a questionable class certification order "is likely to force either a plaintiff or defendant to resolve the case based on considerations independent of the merits;" (2) when there is "an interest in facilitating the development of the law," and (3) whether the district court's decision is "manifestly erroneous." *Id*. The 10th Circuit reasoned that while most cases "ripe for consideration under Rule 23(f) will normally fall into one of these three categories," appellate courts have broad discretion to review such petitions, and therefore a "rule that would clearly delineate every instance" of interlocutory review is inappropriate. *Id*. at 1264.

CONCLUSION: The 10th Circuit held that when determining whether to grant a petition for permission to appeal an order granting or denying class action certification pursuant to Fed. R. Civ. P. 23(f), appellate courts have broad discretion in granting or denying petitions for interlocutory review, and must "exercise their best judgment" in making such decisions rather than strictly adhering to the three categories of cases. *Id*.

***Brown v. Day*, 555 F.3d 882 (10th Cir. 2009)**

QUESTION: The appropriate test for determining "whether a state proceeding is remedial or coercive," so as to qualify as an ongoing state proceeding that is "due the deference accorded by *Younger* abstention" in deciding "whether a federal district court must abstain" from hearing a case where the "federal plaintiff has previously requested a hearing and received a final order regarding an agency's decision to terminate benefits." *Id.* at 887–88.

ANALYSIS: The 10th Circuit referred to the test set forth by the 1st Circuit for deciding whether the type of proceeding is remedial or coercive. *Id.* at 889. The 1st Circuit test involves differentiating between (1) "whether the federal plaintiff initiated the state proceeding of her own volition to right a wrong inflicted by the state (a remedial proceeding) or whether the state initiated the proceeding against her, making her participation mandatory (a coercive proceeding)" and (2) "where the federal plaintiff contends that the state proceeding is unlawful (coercive) from cases where the federal plaintiff seeks a remedy for some other state-inflicted wrong (remedial)." *Id.*

CONCLUSION: The 10th Circuit held that Brown's court administrative proceedings were "not the type of proceeding entitled to

Younger deference" because Brown initiated the proceeding after her benefits were terminated and there was no compulsion by the state to participate in the proceedings. *Id.*

***United States v. Poe*, 556 F. 3d 1113 (10th Cir. 2009)**

QUESTION: Whether bounty hunters constitute state actors for purposes of the Fourth Amendment when they conduct a search in the course of seeking out a bail-jumper. *Id.* at 1117.

ANALYSIS: The 10th Circuit confirmed that the Fourth Amendment protects against "unreasonable searches and seizures by state actors." *Id.* at 1123. The court held, however, that "[w]hen a private individual conducts a search not acting as, or in concert with, a government agent, the Fourth Amendment is not implicated, no matter how unreasonable the search." *Id.* The court reasoned that there might be some instances where a search by a private citizen transforms into a governmental search thereby implicating the Fourth Amendment. *Id.*

The court applied a two-prong approach "to decide if a search by a private individual constitutes state action" under the Fourth Amendment. *Id.* The first prong asks "whether the government knew of and acquiesced in the [individual's] intrusive conduct." *Id.* The second prong considers "whether the party performing the search intended to assist law enforcement efforts or to further his own ends." *Id.* The court insisted that both prongs must be satisfied "considering the totality of the circumstances" for the private search to be transformed into a government search. *Id.*

The 10th Circuit reasoned that if the government agent is involved "merely as a witness . . . the after-the-fact involvement of the police does not implicate the Fourth Amendment." *Id.* at 1124. Furthermore, "involvement in the bail bonds industry is insufficient to satisfy this inquiry." *Id.* The court required "knowledge of or acquiescence in the challenged search." *Id.* Finally, the court reasoned that private conduct will not amount to state action if the bounty hunters "had a 'legitimate, independent motivation' to conduct the search," such as financial gain. *Id.*

CONCLUSION: The 10th Circuit held that "bounty hunters do not qualify as state actors when . . . they act without the assistance of law enforcement and for their own pecuniary interests." *Id.* at 1117.

***United States v. Dozier*, 555 F.3d 1136 (10th Cir. 2009)**

QUESTION: Whether "the sentence imposed following the revocation of a defendant's probation is a prior sentence within the meaning of U.S.S.G. § 4A1.1," when "the conduct resulting in the revocation of his probation is the same conduct that forms the basis of the instant offense." *Id.* at 1139 (internal quotation marks omitted).

ANALYSIS: The 10th Circuit first noted that "incarceration resulting from a probation revocation is punishment for the original offense." *Id.* at 1140. Further, **"**[w]here probation is revoked based on the same conduct forming the basis of a federal offense, the imposition of the original sentence is attributable to the original act of conviction, [and] not the act underlying the revocation." *Id*. at 1141.

CONCLUSION: Thus, the court held that the sentence imposed following the revocation of a defendant's probation is a prior sentence under U.S.S.G. § 4A1.1, even when the conduct which leads to the revocation of the defendant's probation is the same conduct that forms the basis of the instant offense. *Id.*

***Teton Millwork Sales v. Schlossberg*, 2009 U.S. App. LEXIS 2578 (10th Cir. Feb. 10, 2009)**

QUESTION: Whether the *Barton* doctrine applies to deny a federal court jurisdiction to hear a claim against a court appointed receiver where the appointing court has not given permission and the plaintiff alleges that a receiver wrongfully seized his or her assets. *Id.* at *6.

ANALYSIS: The general rule under the *Barton* doctrine states "that before suit is brought against a receiver[,] leave of the court by which [the receiver] was appointed must be obtained." *Id*. However, "if, by mistake or wrongfully, the receiver takes possession of property belonging to another, such person may bring suit therefor against him personally as a matter of right; for in such case the receiver would be acting [outside the scope of her duties]." *Id.* When a plaintiff alleges that a receiver wrongfully seized his or her assets, a federal court has jurisdiction without permission from the appointing court. *Id.* at *5–6.

CONCLUSION: Thus the 10th Circuit held that if a plaintiff alleges that a receiver wrongfully seized his or her assets, the *Barton* doctrine does not bar federal jurisdiction, even without permission from the appointing court. *Id.* at *6–7.

ELEVENTH CIRCUIT

Hemispherx Biopharma Inc. v. Johannesburg Consolidated Investments, 553 F.3d 1351 (11th Cir. 2008)

QUESTION: "Whether individuals or entities without a beneficial ownership interest in a company's securities can nonetheless become members of a 'group' within the meaning of [the Securities and Exchange Act of 1934] section 13(d)(3)" and thus are required to comply with the reporting requirements of section 13(d)(1). *Id*. at 1361.

ANALYSIS: Section 13(d) requires persons owning more than five percent of the stock of a publicly traded company, to "disclose certain information to the issuer of the stock, the exchanges on which the stock is traded and the SEC." *Id*. at 1361. Section 13(d)(3) provides that partnerships and other groups are considered a "person" under section 13(d), but the statute is silent on "whether beneficial ownership of stock is required for group membership within the meaning of paragraph (d)(3)." *Id*. at 1363. The 11th Circuit concluded that the purpose of section 13(d)(3) "is to prevent persons who already have attained beneficial ownership of some amount of an issuer's securities from combining to control over five percent of a class of securities, yet ducking the reporting requirement in section 13(d)(1)." *Id* at 1364.

CONCLUSION: The 11th Circuit concluded that, "a beneficial ownership interest in securities is necessary to become a member of a group within the meaning of section 13(d)(3) of the Exchange Act." *Id*. at 1366.

Singh v. Attorney General, 2009 U.S. App. LEXIS 5248 (11th Cir. Mar. 10, 2009)

QUESTION: Whether a state's conviction of a minor in adult court is considered a conviction for purposes of deportation under the Immigration and Nationality Act ("INA"). *Id*. at *6.

ANALYSIS: The 11th Circuit examined the plain language of INA § 101(a)(48)(A), which requires that "an alien who is convicted of an aggravated felony, such as burglary, at any time after admission is deportable." *Id*. The statute defines a "conviction" as a "formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where a judge or jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt." *Id*. In following the 1st, 2nd and 9th

Circuits, the 11th Circuit determined that "because the INA's definition of conviction [is] clear and unambiguous," the court is "bound by the state court's determination to adjudicate the petitioner as an adult." *Id*. at *7. The court noted that Immigration and Naturalization Services need not be bound by the Federal Juvenile Delinquency Act, which does not allow for an individual to be transferred to adult court if he committed a non-violent crime and that "if Congress had wanted the INS to follow the [Federal Juvenile Delinquency Act] at all times, it would have so stated." *Id*.

CONCLUSION: The 11th Circuit held that an alien's conviction as an "adult in court is a conviction for immigration purposes, even though he was a minor at the time." *Id*. at *8.

United States v. Harrison, 2009 U.S. App. LEXIS 3014 (11th Cir. Feb. 19, 2009)

QUESTION: "[W]hether a § 316.1935(2) conviction qualifie[d] as a violent felony for purposes of" U.S.S.G. § 4B1.4(b)(3)(B) ("Armed Career Criminal Act"). *Id*. at *4 (internal quotation marks omitted).

ANALYSIS: The court described the behavior ordinarily underlying § 316.1935(2) as: "(1) a law enforcement vehicle, with its siren and lights activated, signal[ing] the motorist to stop and (2) the motorist willfully refus[ing] or fail[ing] to stop the vehicle." *Id*. at *38. The court noted that such a crime did "not involve the same high level of risk" as the crimes enumerated in the residual clause of § 924(e)(2)(B)(ii). *Id*. at *41. Furthermore, the court held that to be similar in kind to the enumerated offenses, conduct underlying § 316.1935(2) had to be purposeful, violent, and aggressive. *Id*. at *45. The court, in comparison, held that disobeying an officer's signal and continuing to drive without more, such as "high speed or reckless conduct, [was] not sufficiently aggressive and violent enough to be" similar in kind to the enumerated Armed Career Crimes Act crimes. *Id*. at *45–46.

CONCLUSION: Thus, the court ruled that a § 316.1935(2) crime did not qualify as a violent felony for the purposes of the Armed Career Criminal Act. *Id*. at *47.

Belanger v. Salvation Army, 556 F.3d 1153 (11th Cir. 2009)

QUESTION: Whether a corporation constitutes a person "permitted to be a lawful beneficiary of a pay-on-death account under section 655.82 of the Florida Statutes." *Id*. at *2.

ANALYSIS: The 11th Circuit interpreted section 655.82 in accordance with its plain language, and because it does not include a definition of the word person, the court looked to "related statutory provisions" that provide such a definition. *Id*. at *5–6. The court found that the definition of the term person in section 1.01(3) of the Florida Statutes includes corporations, and therefore a beneficiary of a pay-on-death account may be a corporation. *Id*. at *6–7.

CONCLUSION: The 11th Circuit held that because the context of section 655.82 permits the use of the word "person" as defined in section 1.01(3) to include corporations, "a beneficiary of a pay-on-death account may be a corporation." *Id*. at *7.

McCloud v. Hooks, 2009 U.S. App. LEXIS 4125 (11th Cir. Mar. 2, 2009)

QUESTION: "[W]hether multiple charges consolidated under Alabama Rule of Criminal Procedure 13.3 remain consolidated on appeal when a defendant pleads guilty to one charge, is convicted by a jury on another charge, and two separate judgments are entered against the defendant." *Id.* at *14.

ANALYSIS: The court first noted that the state trial court sentenced McCloud separately for both of his convictions. *Id.* at *15. Because of these separate sentences, the 11th Circuit found that the later sentencing was not a "resentencing," but related only to the second conviction. *Id.* at *15–16. The court concluded that the state trial court effectively severed the consolidated cases as a matter of law. *Id.* at *16. Therefore, because the judgments were severed, the tolling periods were similarly served as to each charge. *Id.*

CONCLUSION: The 11th Circuit concluded that the convictions were severed as a matter of law upon sentencing and the statute of limitations period begins tolling on the date of each charge's respective conviction. *Id.*

United States v. Louis, 2009 U.S. App. LEXIS 5066 (11th Cir. Feb. 27, 2009)

QUESTION: "[W]hether a federally licensed firearms dealer who sells a firearm to a convicted felon is subject to a sentence enhancement for abusing a position of public trust." *Id.* at *1.

ANALYSIS: The court first analyzed the requirements of a position of public trust under the sentencing guidelines statute. *Id.* at *9. The court then applied the three factors required for a position of public trust

to a federally licensed firearms dealer: "professional judgment, discretion, and deference." *Id.* at *17–18. First, the court found that to grant a license, the federal government does not review or warrant the professional judgment of a prospective licensee. *Id.* at *17. Second, the court noted that the government "has no discretion to deny a license" if an application meets the statutory requirements. *Id.* Finally, the court found that firearms dealers have "little, if any, professional deference" as to who they can sell firearms to. *Id.* at *18.

CONCLUSION: The 11th Circuit held that because none of the factors required for a "position of public trust" pertain to a federally licensed firearms dealer, there should be no sentencing enhancement. *Id.* at *19.