

## 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 federal court of appeals opinions announced between September 17, 2010 and March 1, 2011. 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.

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## FIRST CIRCUIT

***Chico Serv. Station, Inc. v. SOL P.R. Ltd.*, No. 10-1200, 2011 U.S. App. LEXIS 1568, 633 F.3d 20 (1st Cir. 2011)**

**QUESTION:** Whether the *Burford* abstention doctrine, *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), applies to federal Resource Conservation and Recovery Act (RCRA) citizen suits and requires the district court to abstain from hearing the suit. *Id.* at \*2.

**ANALYSIS:** The court began its analysis noting “the *Burford* doctrine counsels abstention in situations where a federal suit will interfere with a state administrative agency’s resolution of difficult and consequential questions of state law or policy.” *Id.* at \*12 n.9. The court observed that although “the propriety of abstention from a RCRA citizen suit is a matter of first impression in” the 1st Circuit, “[t]he majority of courts to have considered it have found abstention . . . under *Burford* . . . to be improper.” *Id.* at \*23. The court recognized “the strong presumption in favor of the exercise of jurisdiction,” and it said that the “*Burford* abstention must only apply in ‘unusual circumstances,’ when federal review risks having the district court become the ‘regulatory decision-making center.’” *Id.* at \*22. In considering the doctrine’s propriety here, the court considered “three factors: (1) the availability of timely and adequate state-court review, (2) the potential that federal court jurisdiction over the suit will interfere with state administrative policymaking, and (3) whether conflict with state proceedings can be avoided by careful management of the federal case.” *Id.* at \*28. The court had “significant concerns . . . about the timeliness of review offered by commonwealth courts[.]” *Id.* at \*29. The court proceeded, however, with its analysis of the second and third factors and concluded that abstention was inappropriate because the “threat that federal courts will usurp the role of state administrative agencies . . .” does not exist in this case. *Id.* at \*30–31.

**CONCLUSION:** In light of the “intertwined state and federal interests implicated by RCRA[.]” and the unlikelihood of conflict with state proceedings, the 1st Circuit found “this case to be an improper candidate for *Burford* abstention.” *Id.* at \*30–33.

***Godin v. Schencks*, 629 F.3d 79 (1st Cir. 2010)**

**QUESTION:** Whether the Erie Doctrine allows a federal court to enforce state anti-SLAPP (strategic litigation against public participation) statutes in federal proceedings. *Id.* at 81.

**ANALYSIS:** The court first stated that generally, federal courts sitting in diversity jurisdiction apply state substantive law and federal procedural rules. *Id.* at 85. The court then observed that anti-SLAPP statutes create a process by which a defendant can move to dismiss a claim arising from the defendant's exercise of his or her right to petition with as little delay as possible. *Id.* at 81–82. In instances where statutes govern both procedure and substance, courts must ask whether the federal rule being replaced is sufficiently broad to control the issue in front of the court. *Id.* Applying this analysis here, the court reasoned Federal Rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure, which govern motions to dismiss and motions for summary judgment, are not broad enough to cover the issues within the scope of state anti-SLAPP statutes. *Id.* at 88. The court said that Rules 12 and 56 were not intended to occupy the entire field of pretrial procedure aimed at eliminating meritless claims. *Id.* at 91. The court reasoned that because neither Rule 12 nor Rule 56 “attempt to answer the same question” or “address the same subject” as anti-SLAPP statutes, they can coexist. *Id.* at 88. The court further observed the “dual aims of Erie: ‘discouragement of forum-shopping and avoidance of inequitable administration of laws[]’ . . . are best served by enforcement of [the state anti-SLAPP statute] in federal court.” *Id.* at 87 (citation omitted).

**CONCLUSION:** The 1st Circuit held that federal courts sitting in diversity jurisdiction must apply the state anti-SLAPP statute at issue. *Id.* at 81.

***Tasker v. DHL Ret. Sav. Plan*, 621 F.3d 34 (1st Cir. 2010)**

**QUESTION:** Whether a retirement plan and its administrators “violated the anti-cutback rule when they eliminated [plaintiff’s] unexercised option to transfer funds from [plaintiff’s] profit-sharing plan account to [plaintiff’s] retirement plan.” *Id.* at 36.

**ANALYSIS:** The court analyzed the Employee Retirement Income Security Act (ERISA) anti-cutback rule, 29 U.S.C. § 1054(g), and stated that the Treasury Department “has carved a number of exceptions out of the rule[]” under authority from Congress. *Id.* at 39. The court said the regulations included “a clear grant of safe passage for plan amendments that eliminate transfer options (even when the elimination may have the incidental effect of reducing benefits).” *Id.* The court afforded “an appreciable measure of judicial deference” to the Treasury regulations. *Id.* The court declined to subscribe to petitioner’s interpretation of other regulations within ERISA, finding that the exception was a “highly specific regulation that clearly and unambiguously permits the elimination of a transfer option . . . .” *Id.* at 43.

**CONCLUSION:** The 1st Circuit held “that the challenged plan amendments were permissible and, therefore, the elimination of the transfer options did not violate ERISA’s anti-cutback rule.” *Id.* at 44.

***United States v. S. Union Co.*, 630 F.3d 17 (1st Cir. 2010)**

**QUESTION ONE:** “[W]hether federal criminal enforcement may be used under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928(d), where certain federally approved state regulations as to hazardous waste storage [covering more actors than corresponding federal laws] have been violated.” *Id.* at 21.

**ANALYSIS:** The court first explained that the RCRA § 6926 allows the Environmental Protection Agency (EPA) to authorize state hazardous waste programs in place of the federal program, so long as the state program is “‘equivalent to’ and ‘consistent with’ the baseline federal program[.]” which allows for federal enforcement of these state plans. *Id.* at 25. It then observed, however, that parts of a state program greater in scope than the federally required minimum are not considered part of the federally approved program. *Id.* The court first said that “the EPA has a statutory duty to approve state programs to the extent they meet the statutory and regulatory criteria.” *Id.* at 28. The court went on to reject the argument that the rule portion at issue is “a mere unenforceable preamble[.]” noting that the rule is not divided into separate preamble and rule sections. *Id.* Next, the court rejected the argument that “since the baseline federal program does not require [certain parties] to obtain hazardous waste storage permits, the United States cannot enforce state rules that do[.]”; this, the court said, “vitiates the clear distinction between ‘more stringent’ and ‘greater in scope,’ collapsing the two terms into one.” *Id.* at 29. Finally, the court did not agree that the rule at issue was irrationally inconsistent with prior pronouncements by the EPA, pointing out that these prior pronouncements were “internal guidance documents[.]” which were not “promulgated through notice-and-comment rulemaking, and therefore cannot trump the agency’s formal regulatory promulgations.” *Id.* at 30.

**CONCLUSION:** The 1st Circuit held that state regulations which go beyond the requirements of the federal baseline program under RCRA are federally enforceable. *Id.* at 31.

**QUESTION TWO:** Whether the Supreme Court’s decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), requiring that any fact besides that of a prior conviction must be given to a jury if the fact increases the penalty above the mandated statutory maximum, applies to criminal fines. *Id.* at 32–33.

**ANALYSIS:** In assessing whether the *Apprendi* decision applies to criminal fines, the court relied on the Supreme Court's decision in *Oregon v. Ice*, 555 U.S. 160 (2009), which stated, in dicta, that *Apprendi* should not extend to criminal fines. *Id.* at 34. In *Ice*, the Court stated that the *Apprendi* decision aimed at curtailing any "legislative attempt to remove from the [province of the] jury the determination of facts that warrant punishment for a specific statutory offense." *Id.* at 33 (internal quotation marks omitted). The Court in *Ice* gave weight to the role of judges at the time of America's founding, when there was unfettered judicial discretion to decide the specific criminal sanction at issue in the case. *Id.* The Court in *Ice* further found that *Apprendi* was limited to "the specific facts of the particular case." *Id.* at 34 (internal quotation marks omitted). *Ice* used this analysis when it stated that "[i]ntruding *Apprendi*'s rule into decisions such as the imposition of statutorily prescribed fines . . . surely would cut the rule loose from its moorings." *Id.* at 35 (internal quotation marks omitted).

**CONCLUSION:** The 1st Circuit agreed with the dicta in *Oregon v. Ice*, and held "*Apprendi* does not apply to criminal fines." *Id.* at 34.

## SECOND CIRCUIT

***Hess v. Cohen & Slamowitz LLP*, No. 10-424, 2011 U.S. App. LEXIS 3512 (2d Cir. Feb. 23, 2011)**

**QUESTION:** Whether a debt collector violates the Fair Debt Collection Practices Act's (FDCPA) "judicial district" requirement by bringing an action against a consumer in a city court with no jurisdiction because the "consumer does not reside in that city or a town contiguous thereto[.]" but also where the larger state-county court would have jurisdiction to hear the matter. *Id.* at \*3.

**ANALYSIS:** The court initially said the FDCPA requires debt collectors to bring an action only in the "judicial district . . . (A) in which such consumer signed the contract sued upon; or (B) in which such consumer resides at the commencement of the action." *Id.* at \*7. After finding no guidance in the statute's plain language, the court looked to the legal dictionaries at the time of the FDCPA's enactment, defining "judicial district" as "[o]ne of the circuits or precincts into which a state is commonly divided for judicial purposes . . . ." *Id.* at \*8-9. The court continued by noting that it is clear that Congress intended "judicial district" to refer to the "territorial subdivision of the courts," but there is no indication that Congress intended the term to refer to the federal court system if a suit is brought in state court. *Id.* at \*9-10.

**CONCLUSION:** The 2nd Circuit held that “the term ‘judicial district,’ as applied to state-court debt collection actions, must be defined in accordance with the judicial system of the state in which the debt collection action is brought” and that here, it “extends no farther than the boundaries of the city containing that court and the towns within the same county that are contiguous by land thereto.” *Id.* at \*10–11, \*15.

***Mullins v. City of New York*, 626 F.3d 47 (2d Cir. 2010)**

**QUESTION:** Whether “hearsay evidence may be considered by a district court in determining whether to grant a preliminary injunction.” *Id.* at 52.

**ANALYSIS:** The 2nd Circuit stated that its sister circuits and lower courts routinely consider hearsay evidence when determining whether to grant a preliminary injunction. *Id.* Citing the Federal Rules of Evidence, the court said that, “[t]he admissibility of hearsay . . . goes to weight, not preclusion, at the preliminary injunction stage[]” and that “[t]o hold otherwise would be at odds with the summary nature of the remedy and would undermine the ability of courts to provide timely provisional relief.” *Id.*

**CONCLUSION:** The 2nd Circuit held that a district court may consider hearsay evidence in determining whether to grant a preliminary injunction. *Id.*

***Parmalat Capital Fin. Ltd. v. Bank of Am. Corp.*, 632 F.3d 71 (2d Cir. 2011)**

**QUESTION:** What the proper standard is for determining “timely adjudication” under 28 U.S.C. § 1334(c)(2), which confers jurisdiction in certain bankruptcy cases and proceedings. *Id.* at 79.

**ANALYSIS:** The court said that under 28 U.S.C. § 1334(c)(2) a district court must abstain from exercising jurisdiction over liquidation proceedings when the state court can adjudicate the claims in a timely manner. *Id.* at 78. The court found that timeliness cannot be limited to a fixed period of time; rather, it is specific to the case and situation and should be viewed as the reasonable timeframe in which the respective federal and state courts may resolve a given claim. *Id.* at 78–79. The court stated “[a] court should therefore consider the backlog of the state court’s calendar (if any) relative to the federal court’s calendar.” *Id.* at 79. In addition, the court stated that timeliness is determined by the expertise of the court and the complexity of the issues involved. *Id.* The court further reasoned that a court with greater legal expertise would not necessarily always be the proper choice for timely adjudication, especially if the case involved highly complex facts; instead, the court

with better familiarity of the record would adjudicate the claims more quickly. *Id.* The court determined that the nature of the underlying bankruptcy proceeding is also relevant, because the level of urgency differs depending on the interests involved. *Id.* Finally, the court found “[a] matter cannot be timely adjudicated in state court if abstention and remand of the state law claims will unduly prolong the administration [or liquidation] of the estate.” *Id.*

**CONCLUSION:** The 2nd Circuit held that timeliness under 28 U.S.C. § 1334(c)(2) is determined by four factors: (1) the respective courts’ calendar backlog; (2) the complexity of issues and respective expertise of the state and federal court; (3) the progression of the case; and (4) the risk of prolonging the liquidation of the estate involved. *Id.* at 78.

***United States v. Brown*, 623 F.3d 104 (2d Cir. 2010)**

**QUESTION:** What is the proper procedure “when a claim of ineffective assistance of counsel is first raised in the district court prior to the judgment of conviction.” *Id.* at 113.

**ANALYSIS:** The court determined that “[w]hen such a claim is raised on direct appeal [a court] may choose to: (1) decline to hear the claim, permitting the appellant to raise the issue as part of a subsequent 28 U.S.C. § 2255 petition; (2) remand the claim to the district for necessary fact-finding; or (3) decide the claim on the record before [the court].” *Id.* at 112–13. The court observed that when this claim is first raised on direct review of conviction, “it is often preferable for the court to decline to consider the claim, awaiting its presentation in a collateral proceeding.” *Id.* at 112. The court reasoned that collateral review generally provides a better opportunity for the court to evaluate an ineffective assistance of counsel claim than direct review because the factual record can be developed by the district court. *Id.* The court was “perplexed by the assertion” that the district court must “require a defendant to use his one § 2255 motion to raise an ineffective assistance of counsel claim post-judgment, particularly when the district court is in a position to take evidence, if required, and to decide the issue pre-judgment.” *Id.* at 113. The court further reasoned that “[t]he decision to interrupt the prejudgment proceedings to inquire into the merits of an ineffective assistance of counsel claim may depend on, among other things, whether the court need to relieve the defendant’s attorney, or in any event, to appoint new counsel in order to properly adjudicate the merits of the claim.” *Id.*

**CONCLUSION:** The 2nd Circuit held that a district court may, and at times must, consider an ineffective assistance of counsel claim prior to the judgment of conviction. *Id.*

### THIRD CIRCUIT

***Delgado-Sobalvarro v. Attorney General of the U.S.*, 625 F.3d 782 (3d Cir. 2010)**

**QUESTION:** Whether “conditional parole under § 236 [of the Immigration and Nationality Act] constitute[s] parole into the United States for the purposes of adjustment of status [to that of lawfully admitted permanent resident] under § 245.” *Id.* at 786.

**ANALYSIS:** The court began its analysis with a case with “substantially similar facts” heard before the Board of Immigration Appeals (BIA), holding “‘conditional parole’ under [§] 236(a)(2)(B) is a distinct and different procedure from ‘parole’ under [§] 212(d)(5)(A) and that the respondent is not eligible to adjust his status under [§] 245(a) based on his conditional parole.” *Id.* The court first “analyze[d] the BIA’s interpretation of the statutes for reasonableness[.]” “[b]ecause there is no clear, unambiguously expressed intent of Congress that speaks directly . . . to the precise question at issue.” *Id.* The court said that “the language of the adjustment provision in § 245(a) refers specifically to ‘parole[d] into the United States[.]’” and “[i]t is reasonable to interpret the statute to allow aliens to adjust status if they were ‘parole[d] in the United States’ . . . but *not* if they were released on ‘conditional parole.’” *Id.* The court then explained that “the history of the statute suggests that Congress sought to limit the universe of those who could adjust status to aliens whose admission was ‘for urgent humanitarian reasons or significant public benefit’ as set forth in § 212(d)(5)(A).” *Id.* The court reasoned “[t]o allow aliens released on conditional parole under § 236 to adjust status under § 245 would frustrate Congress’s intention to limit eligibility to refugees whose admission provides a public benefit or serves an urgent humanitarian purpose.” *Id.* at 787.

**CONCLUSION:** The 3rd Circuit held that the “examination of the statute confirms the BIA’s interpretation – ‘parole into the United States’ is not the same as ‘conditional parole,’” and thus aliens “are not eligible to adjust status under § 245 because of their § 236 conditional parole.” *Id.* at 786, 787.



***Kelly v. Borough of Carlisle*, 622 F.3d 248 (3d Cir. 2010)**

**QUESTION:** Whether a police officer's reliance on legal advice from an assistant district attorney prior to making an arrest entitles the officer to qualified immunity in civil suits. *Id.* at 251.

**ANALYSIS:** The court began its analysis by stating that "[t]he qualified immunity standard gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law." *Id.* at 254 (internal quotation marks omitted). The court explained, although no precedent existed that was directly on point, the Supreme Court had "considered a police officer's entitlement to qualified immunity when he applied for an arrest warrant that was approved by a magistrate but later found to lack probable cause." *Id.* The Supreme Court held that the issuance of a warrant "did not automatically shield the officer[.]" and that if "no reasonably competent officer would have concluded that a warrant should issue[.]" there would be no immunity. *Id.* This court drew a parallel between an officer seeking issuance of an arrest warrant and an officer requesting legal advice prior to making an arrest. *Id.* at 255.

**CONCLUSION:** The 3rd Circuit held "that a police officer who relies in good faith on a prosecutor's legal opinion that the arrest is warranted under the law is presumptively entitled to qualified immunity from Fourth Amendment claims premised on a lack of probable cause[.]" but the officer's reliance must be objectively reasonable and a plaintiff may rebut the presumption by showing no reasonable officer would have relied on the legal advice under the circumstances. *Id.* at 255–56.

***Noel v. Boeing Co.*, No. 08-3877, 2010 U.S. App. LEXIS 20217, 622 F.3d 266 (3d Cir. 2010)**

**QUESTION:** "[W]hether, under the [Fair Pay Act (FPA)], a failure-to-promote claim constitutes 'discrimination in compensation.'" *Id.* at \*15.

**ANALYSIS:** The court reasoned "Congress' motivation for enacting the FPA was to overturn the perceived harshness of [*Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007)] and to provide greater protection against wage discrimination but not other types of employment discrimination." *Id.* at \*17. The court explained that this intention was evident based on "Congress' use of the term 'compensation,' repeated five times throughout the Act, indicating that the driving force behind the FPA was remedying wage discrimination." *Id.* The court further reasoned that the FPA states that "[f]or purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this subchapter, when a

discriminatory compensation decision or other practice is adopted.” *Id.* at \*18. The court said the textual analysis was “reinforced by [its] treatment of compensation-related claims and failure-to-promote claims as distinct grievances that are not coextensive.” *Id.*

**CONCLUSION:** The 3rd Circuit held that a “failure-to-promote claim is not a discrimination-in-compensation charge within the meaning of the FPA[.]” *Id.* at \*23.

***United States v. Manzo*, No. 10-2489, 2011 U.S. App. LEXIS 3113 (3d Cir. Feb. 17, 2011)**

**QUESTION:** “[W]hether an unsuccessful candidate for public office can attempt or conspire to obtain property from another with that person’s consent induced under color of official right within meaning of the Hobbs Act.” *Id.* at \*7.

**ANALYSIS:** The court first looked to the plain language of the Hobbs Act, but determined that the scope of the phrase “under color of official right” was not apparent from the plain language of the statute. *Id.* at \*9–10. The court then determined that, under the common law, the phrase “‘under color of official right’ . . . encompassed only the actions of public officials.” *Id.* at \*12. The court reasoned that this interpretation was consistent with congressional intent since Congress was concerned with the coercive power inherent in public officials. *Id.* at \*19. From there, the court concluded that acting “under color of official right” is a prerequisite element of a violation of the Hobbs Act, regardless of whether the offense was inchoate or substantive. *Id.* at \*23–24. Since candidates for public office are not public officials, the court reasoned that such a candidate cannot act “under color of official right.” *Id.* at \*32.

**CONCLUSION:** The 3rd Circuit held that an action “under color of official right” is a prerequisite to liability for extortion under the Hobbs Act, regardless of whether the alleged offense is inchoate or substantive, and conduct by an unsuccessful candidate for public office does not satisfy the prerequisite and therefore cannot be the basis for liability under the Hobbs Act. *Id.* at \*32–33.

***United States v. Rebelo*, 394 F. App’x 850 (3d Cir. 2010)**

**QUESTION:** Whether a “civil denaturalization action is time-barred by the catch-all statute of limitations of 28 U.S.C. § 2462,” which caps the initiation of enforcement proceedings and penalties at five years. *Id.* at 852.

**ANALYSIS:** The court explained that because the Immigration and Nationality Act (INA) does not impose a statute of limitations on the

government to initiate denaturalization proceedings, 28 U.S.C. § 2462 may be applicable if denaturalization is deemed a “penalty . . . or forfeiture” within the purview of § 2462. *Id.* For guidance, the court looked to precedent interpreting 28 U.S.C. § 791, § 2462’s predecessor, noting this provision was substantially similar. *Id.* at 853. The court reasoned that in order for § 2462 to apply, the government has to seek to enforce a “penalty or forfeiture,” which has been defined by the Supreme Court as “something imposed in a *punitive* way for an infraction of public law.” *Id.* (internal quotation marks and citations omitted). Here, the court found that denaturalization served “as a remedy for citizenship fraudulently obtained” and, therefore, is “regarded not as punishment but as a necessary part of regulating naturalization of aliens.” *Id.* (internal quotation marks omitted).

**CONCLUSION:** The 3rd Circuit held that civil denaturalization is not time-barred by the catch-all clause of 28 U.S.C. § 2462. *Id.*

#### FOURTH CIRCUIT

***United States v. Clay*, 627 F.3d 959 (4th Cir. 2010)**

**QUESTION:** Whether “walk-away escape from an unsecured facility constitutes a qualifying crime of violence under [the U.S. Sentencing Guidelines Manual] § 4B1.2(a)(2)’s Otherwise Clause[.]” *Id.* at 968.

**ANALYSIS:** The court first stated that the Armed Career Criminal Act (the ACCA) and § 4B1.2(a)(2) defined “violent felony” in substantively identical ways. *Id.* at 965. The court defined a “walk-away escape” as an escape from an unsecured facility, without physically removing any restraints or breaking any kind of security to escape. *Id.* at 969. The court then considered its sister courts’ holdings that a “walk-away escape from an unsecured facility is a distinct form of generic conduct that does not involve purposeful, violent, and aggressive conduct that is roughly similar, in kind as well as in degree of risk posed . . . to the enumerated crimes of burglary of a dwelling, arson, extortion, or crimes involving the use of explosives, and therefore, does not fall within the Otherwise Clause . . .” of the ACCA or USSG § 4B1.2(a)(2). *Id.* (internal quotation marks and citations omitted). Finally, the court also considered the Supreme Court’s holding that a failure to return to custody is not violence under the ACCA, and it similarly reasoned that a “walk-away escape from an unsecured facility is a far cry from the type of conduct associated with the enumerated crimes . . .” in the ACCA. *Id.* (internal quotation marks omitted).

**CONCLUSION:** The 4th Circuit held that “the generic crime of walk-away escape from an unsecured facility does not qualify as a crime of violence under 4B1.2(a)(2)’s Otherwise Clause.” *Id.*

***Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 2011 U.S. App. LEXIS 2889 (4th Cir. Feb. 15, 2011)**

**QUESTION:** Whether the meaning of the term “compensation” in the Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. § 922 (“LHWCA”) includes voluntary payments by an employer for medical services provided to an employee. *Id.* at \*7, 8.

**ANALYSIS:** In resolving the issue of whether the term “compensation” within Section 22 of the LHWCA should be interpreted to include “medical payments,” the court looked initially to the language of the LHWCA itself. *Id.* at \*8. The court said that the plain language “does not clearly indicate that ‘compensation’ either includes or excludes medical payments.” *Id.* at \*9. In contrast, the court found that “other provisions of the [LHWCA], by their text or structure, do clearly reflect that the payment of medical benefits may, or may not, constitute ‘compensation.’” *Id.* Thus, the court concluded that the meaning of “compensation” in Section 22 is ambiguous; therefore, the court “must find the interpretation . . . most fairly . . . imbedded in the statute, in the sense of being most harmonious with its scheme and the general purposes that Congress manifested.” *Id.* at \*13 (internal quotation marks omitted). The court reasoned that it “must interpret Section 22 in a way so as to maintain the provision’s ‘extraordinarily broad’ modification procedure . . . while still giving effect to the one-year limitations period it contains.” *Id.* at \*15 (citation omitted). The court emphasized that “the legislative history of Section 22 reflects Congress’s attempt to strike such a balance, and also supports the conclusion that ‘compensation’ in Section 22 does not include payment of medical benefits.” *Id.* at 15–16.

**CONCLUSION:** The 4th Circuit concluded that “interpreting ‘payment of compensation’ in Section 22 to exclude an employer’s payment of medical benefits is most harmonious with the purpose of both the statute’s limitations period and the [LHWCA] as a whole.” *Id.* at 22.

## FIFTH CIRCUIT

***Matthis v. Cain*, 627 F.3d 1001 (5th Cir. 2010)**

**QUESTION:** Whether “the overturning and subsequent reinstatement of a conviction on state post-conviction review destroys the finality of a judgment for purposes of [28 U.S.C.] § 2244(d)(1)(A)[.]” *Id.* at 1003.

**ANALYSIS:** The court explained that “[t]he language of § 2244(d)(1)(A) plainly refers to the date on which the ‘judgment became final by the *conclusion of direct review* or the expiration of time for seeking such review.’” *Id.* at 1003. The court reasoned that when the language of a statute is plain, it must be enforced according to that plain language. *Id.* The court determined that the language of the statute distinguishes between direct review and post conviction review. *Id.*

**CONCLUSION:** The 5th Circuit held that there must be a conviction that is overturned on direct review, and not on post-conviction review, to destroy the finality of judgment. *Id.*

***T.B. v. Bryan Indep. Sch. Dist.*, 628 F.3d 240 (5th Cir. 2010)**

**QUESTION:** “Whether a parent of a child not yet determined to be a ‘child with a disability’ can recover attorneys’ fees under the [Individuals with Disabilities Education Act (IDEA).]” *Id.* at 243.

**ANALYSIS:** The court reasoned that “the plain language of the IDEA’s fee-shifting provision limits recovery of attorneys’ fees to the parent of a ‘child with a disability.’” *Id.* at 245. The court said that “just because Congress has specifically extended some protections to children not yet determined to meet the definition of ‘child with a disability’ does not mean that it has extended all protections.” *Id.* The court further reasoned that “regardless of the policy considerations and even if an alternate version of the statute would better serve the goals of the IDEA, that is a decision appropriately left to Congress, not to this court.” *Id.* at 246.

**CONCLUSION:** The 5th Circuit held that “attorneys’ fees are only available in IDEA proceedings to a parent of a ‘child with a disability[.]’” *Id.* at 245.

***United States v. Dickson*, 632 F.3d 186 (5th Cir. 2011)**

**QUESTION:** “Whether copying images to another device constitutes ‘production’ of child pornography for purposes of 18 U.S.C. § 2251(a).” *Id.* at 189.

**ANALYSIS:** The court first looked to the broad definition of “production” in the statute, 18 U.S.C. § 2256(3), which includes “producing, directing, manufacturing, issuing, publishing, or advertising.” *Id.* The court reasoned that the use of the word “producing,” as well as other similar words in the definition, demonstrates that Congress intended the statute to “cover a wider range of conduct than merely initial production.” *Id.* The court next addressed whether copying images fits within “reproduce” as contemplated in 18 U.S.C. § 2252(a)(2), rather than “produce” as used in §§ 2252(a)(3) and (4). *Id.* at 190. The court explained that § 2252(a)(2) addresses one who receives child pornography, while the other two sections address selling and possessing child pornography. *Id.* The court furthered “[o]ne who sells or possesses images may also produce them and thus could continue to produce copies, but one who merely receives pornography could not have been the original producer and thus may only reproduce.” *Id.* Finally, the court stated the statute is not ambiguous and the rule of lenity does not apply. *Id.*

**CONCLUSION:** The 5th Circuit held that copying images to another device constitutes production of child pornography under § 2251(a). *Id.*

***United States v. Hampton*, No. 10-10035, 2011 U.S. App. LEXIS 2427, 633 F.3d 334 (5th Cir. Jan. 6, 2011)**

**QUESTION:** “[W]hether the phrase ‘term of supervised release authorized by statute’ at the beginning of [18 U.S.C.]§ 3583(e)(3) caps the aggregate amount of revocation imprisonment at the amount of supervised release authorized by § 3583(b).” *Id.* at \*7.

**ANALYSIS:** The court first stated “[§] 3583(e)(3) allows a court to ‘revoke a term of supervised release,’ and therefore, refers to one particular revocation.” *Id.* at \*8–9. The court then said the provision “does not explicitly require the sentencing court to consider any previous revocation imprisonment, and the only reference to a previous term of supervised release is an instruction not to credit ‘time previously served on postrelease supervision’ against the term of revocation imprisonment.” *Id.* at \*9. The court reasoned it would comport with the rest of the statute and the provision’s history to hold that the language “does not require aggregation of revocation imprisonment.” *Id.* at \*9–14. Finally, the court stated that the rule of lenity would not apply because the language of the statute is not ambiguous. *Id.* at \*20.

**CONCLUSION:** The 5th Circuit held that the “language at the beginning of § 3583(e)(3) . . . does not require that court to credit the defendant for prior terms of revocation imprisonment.” *Id.* at \*8.

***United States v. Houston*, 625 F.3d 871 (5th Cir. 2010)**

**QUESTION:** “Whether the ‘except’ clause [of 18 U.S.C. § 924(c)(1)(A)(i)] also covers a ‘greater minimum sentence’ for possession of the same firearm during a subsequent crime committed later in the same day.” *Id.* at 873.

**ANALYSIS:** The court first described a 2nd Circuit opinion addressing a similar issue, the relationship between § 924(c) and an additional consecutive sentence for possession of crack cocaine on two separate occasions. *Id.* at 873–74. The court rejected the 2nd Circuit’s “same transaction” test, which finds that the “except” clause of § 924(c) applies only to “conduct arising from the same criminal transaction or set of operative facts as the crime yielding the greater mandatory minimum sentence.” *Id.* at 874, 873. The court reasoned that this approach inaccurately equates the statutory language “during” and “in furtherance of a crime of violence or drug trafficking offense[.]” with “same transaction” and “set of operative facts[.]” *Id.* at 874. Instead, the court found that the statutory language “[more] reasonably refers only to another, greater sentence for firearm possession, . . . so too does it most reasonably refer only to a greater mandatory minimum sentence for *that specific crime* of firearm possession.” *Id.*

**CONCLUSION:** The 5th Circuit held that “§ 924(c)(1)(A)(i)’s reference to a ‘greater mandatory minimum sentence’ refers only to a greater mandatory minimum for *that specific offense*.” *Id.* at 875.

***United States v. Jasso*, 634 F.3d 305 (5th Cir. 2011)**

**QUESTION:** Whether district courts have the discretion to treat the U.S. Sentencing Guidelines Manual as advisory when calculating criminal history points. *Id.* at 308.

**ANALYSIS:** The court first stated that the Sentencing Guidelines contain a safety valve provision, which permits sentencing judges to treat minimum prison terms as advisory for certain low-level defendants, provided that such defendants do not have more than one criminal history point. *Id.* at 307–08. The court then reasoned that the language of the Sentencing Guidelines does not give the sentencing court the power to add or subtract criminal history points from the defendant’s record. *Id.* at 308. The court further reasoned that a defendant with two or more criminal history points is not eligible for relief under the safety valve provision of the Sentencing Guidelines. *Id.* The court also found support by noting that “every court of appeals that has addressed this argument” has held district courts do not have discretion to treat the guidelines as advisory for this purpose. *Id.*

**CONCLUSION:** The 5th Circuit held that district courts do not have discretion to override the requirement of the U.S. Sentencing Guidelines Manual that defendants “not have more than [one] criminal history point . . .” as a necessary condition for safety valve relief. *Id.* (internal quotation marks omitted).

***United States v. Jefferson*, 623 F.3d 227 (5th Cir. 2010)**

**QUESTION:** Whether a district court is instantly divested of jurisdiction in favor of a court of appeals under 18 U.S.C. § 3731 when a timely appeal accompanied by the certification of the United States Attorney “is not taken for purpose of delay and that the evidence is substantial proof of a fact material in the proceeding.” *Id.* at 230 (internal quotation marks omitted).

**ANALYSIS:** The court first considered Supreme Court precedent stating that the purpose of 18 U.S.C. § 3731 was “to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit.” *Id.* (internal quotation marks omitted). The court also stated that the statute specifically provides it should be “liberally construed to effectuate its purposes.” *Id.* (internal quotation marks omitted). Furthermore, the court observed that the plain language of 18 U.S.C. § 3731 limits it to evidentiary rulings that are “substantial proof of a fact material in the proceeding” and not, as the district court had found, rulings that involve elements of the charged offense. *Id.* at 230–31 (internal quotation marks omitted). Finally, the court reasoned “the evaluation as to whether the evidence excluded by the district court ‘is substantial proof of a fact material in the proceeding’ is to be made by the United States Attorney, not the district court.” *Id.* at 231.

**CONCLUSION:** The 5th Circuit held that a United States Attorney’s certification stating that the appeal is not taken for the purpose of delay and “that the evidence is substantial proof of a fact material in the proceeding” is adequate to establish appellate jurisdiction under 18 U.S.C. § 3731. *Id.* at 231–32 (internal quotation marks omitted).

***United States v. Johnson*, 632 F.3d 912 (5th Cir. 2011)**

**QUESTION:** Whether the Sex Offender Registration and Notification Act (SORNA), 18 U.S.C. § 2250(a), violates the Tenth Amendment of the United States Constitution “by requiring state officials to administer federal law.” *Id.* at 918.

**ANALYSIS:** The court stated that, under the Tenth Amendment, “Congress cannot compel the states to enact or enforce a federal regulatory program.” *Id.* at 920. The court observed that SORNA places restrictions on sex offenders, but it does not require states to



comply with these restrictions. *Id.* Instead, under SORNA, Congress permits a jurisdiction to comply with its requirements at its discretion, but if it chooses not to do so then the jurisdiction will lose ten percent of the federal funding allocated to criminal justice assistance. *Id.* The court explained that the Tenth Amendment permits Congress to condition federal funding on whether a state chooses to implement a federal program. *Id.*

**CONCLUSION:** The 5th Circuit held that SORNA did not violate the Tenth Amendment because it is “a valid exercise of Congress’s spending power.” *Id.*

***United States v. Radley*, 632 F.3d 177 (5th Cir. 2011)**

**QUESTION:** Whether the terms “agreements and transactions” as set forth in the Commodities Exchange Act (CEA) encompass more than just enforceable contracts so as to exclude them from the CEA. *Id.* at 182.

**ANALYSIS:** The court began by reiterating the plain language of the statute, which articulates an exception for “agreements (including transactions . . . commonly known to the trade as . . . [a] ‘bid’ or ‘offer[.]’)” *Id.* (internal quotation marks omitted). The court reasoned that although this was not a precise definition, it was sufficient for the court to find that “agreements and transactions cover more than enforceable contracts.” *Id.* The court further stated that the statute’s reference to “transactions *involving* contracts” makes clear that transactions and contracts are separate terms, and therefore suggests that “transaction” does not merely refer to enforceable contracts. *Id.* (internal quotation marks omitted). The court then looked to the ordinary meaning of the word “transaction,” which is “[t]he act or an instance of conducting business or other dealings; esp., the formation, performance, or discharge of a contract.” *Id.* at 183 (citation omitted).

**CONCLUSION:** The 5th Circuit held that the term “transaction” under the CEA was not limited to completed and enforceable contracts. *Id.* at 182.

***United States v. Sanchez-Ledezma*, 630 F.3d 447 (5th Cir. 2011)**

**QUESTION:** Whether the “crime of evading arrest with a motor vehicle . . .” under Texas Penal Code § 38.04(b)(1) is a “crime of violence” and therefore subject to an aggravated felony enhancement pursuant to U.S. Sentencing Guidelines Manual § 2L1.2(b)(1)(C). *Id.* at 448.

**ANALYSIS:** The court first stated that a prior decision analyzing § 38.04 as a “violent felony” under another statute was informative to the

present issue. *Id.* In that case, the court determined “that fleeing by vehicle is purposeful, violent, and aggressive.” *Id.* at 450. The court reasoned the crime “require[d] intentional conduct[,]” “require[d] disregarding an officer’s lawful order,” and “will typically lead to a confrontation with the officer being disobeyed, a confrontation fraught with risk of violence.” *Id.* at 450–51.

**CONCLUSION:** The 5th Circuit held that “evading arrest with a motor vehicle is . . . a ‘crime of violence’ . . . and therefore an ‘aggravated felony’ . . .” to which the enhancement guideline properly applies. *Id.* at 451.

### SIXTH CIRCUIT

#### *United States v. Baird*, 403 F. App’x 57 (6th Cir. 2010)

**QUESTION:** Whether in order to convict under 18 U.S.C. § 659, the government must prove that the defendant “knew the goods . . . received, purchased, or possessed were transiting in interstate commerce.” *Id.* at 63.

**ANALYSIS:** The court first stated 7th Circuit precedent on the issue: “Congress designed the interstate commerce element of 18 U.S.C. § 659 merely to justify federal authority over the crime.” *Id.* The court followed the 7th Circuit’s logic further: “[a] defendant does not need to know that the stolen property that he received was stolen from an interstate shipment[;]” rather, the defendant “need only know that the property he received was stolen.” *Id.* Finding that the 2nd and 11th Circuits also agreed with this reasoning, the court adopted this approach. *Id.*

**CONCLUSION:** The 6th Circuit held that “[a] substantive violation of 18 U.S.C. [§] 659 does not require knowledge of the interstate or foreign character of the goods.” *Id.* (internal quotation marks omitted).

#### *United States v. Contents of Accounts*, 629 F.3d 601 (6th Cir. 2011)

**QUESTION:** “[W]hether the exercise of preliminary injunctive relief under [Federal Rules of Civil Procedure Rule 65] to order the release of seized property would be ‘inconsistent’ with the procedure set out in [Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions Supplemental Rule G] for the release of seized property, namely, a petition for release under [the Civil Asset Forfeiture Reform Act (CAFRA), 18 U.S.C.] § 983(f).” *Id.* at 606.

**ANALYSIS:** The court stated as a threshold matter that injunctive relief in civil forfeiture actions under CAFRA is “governed by the Supplemental Rules and, to the extent they are not ‘inconsistent,’ the Federal Rules of Civil Procedure.” *Id.* The court listed four factors under Rule 65 that courts must consider when deciding whether to grant injunctive relief. *Id.* The court then outlined the requirements that civil claimants must demonstrate for release of seized property under CAFRA. *Id.* at 607. Rejecting the argument that the Supplemental Rules or § 983(f) “expressly incorporate the Civil Rules,” the court stated that § 983(f) and Rule 65 are inconsistent for three reasons. *Id.* at 607–08. First, § 983(f) is narrower; the factors of Rule 65 “not only differ from those required under § 983(f), but are also merely factors to be balanced, not prerequisites that must be met.” *Id.* at 608 (internal quotation marks omitted). Second, the language of Supplemental Rule A states that Supplemental Rule G “applies exclusively to [forfeiture actions, and] it is only where [Supplemental Rule G] does not address an issue that the Civil Rules set the procedure. . . .” *Id.* Finally, the legislative history refutes the argument that § 983(f) merely supplements Rule 65. *Id.* at 608–09.

**CONCLUSION:** The 6th Circuit held that Rule 65 was inconsistent with, and inapplicable to a petition for release under, § 983; therefore, preliminary injunctive relief under Rule 65 is not available to civil forfeiture claimants. *Id.* at 609.

***United States v. Holcomb*, 625 F.3d 287 (6th Cir. 2010)**

**QUESTION:** Whether an escapee’s willingness to cooperate in connection with the possibility of imminent arrest constitutes an escapee’s “voluntary return” so as to entitle him to a downward departure in his offense level under U.S. Sentencing Guidelines Manual § 2P1.1(b)(2). *Id.* at 291.

**ANALYSIS:** The court began by looking at the language of the application note stating that “‘returned voluntarily’ includes voluntarily returning to the institution or turning one’s self in to a law enforcement authority as an escapee (not in connection with an arrest or other charges).” *Id.* The court then reviewed decisions of the 7th, 8th, and 9th Circuits that decided the issue, all of which decided that the risk of imminent arrest renders an escapee’s return to be involuntary. *Id.* at 291–92.

**CONCLUSION:** The 6th Circuit held that “a willingness to cooperate arising in connection with the possibility of imminent arrest is not the type of voluntary behavior that U.S.S.G. § 2P1.1(b)(2)’s . . . downward departure is intended to reward.” *Id.* at 292.

***United States v. LHC Group, Inc.*, 623 F.3d 287 (6th Cir. 2010)**

**QUESTION:** “[W]hether a violation of the sealing provisions applicable to *qui tam* relators under the [False Claims Act (FCA)] precludes recovery by the relator.” *Id.* at 296.

**ANALYSIS:** The court reasoned that in setting the FCA’s procedural requirements, Congress “clearly identified the factors it found relevant and considered the tension between them . . . .” *Id.* The court explained that the purposes of *qui tam* actions “are balanced with law enforcement needs . . . .” *Id.* The court further reasoned that since “the very existence of the *qui tam* right to bring suit in the name of the Government is created by statute, it is particularly appropriate to have the right exist in a given case only with the preconditions that Congress deemed necessary for the purpose of safeguarding the Government’s interests.” *Id.* at 298.

**CONCLUSION:** The 6th Circuit held that “violations of the procedural requirements imposed on *qui tam* plaintiffs under the False Claims Act preclude such plaintiffs from asserting *qui tam* status.” *Id.* at 296.

***United States v. McNerney*, No. 09-4011, 2011 U.S. App. LEXIS 3870 (6th Cir. Mar. 1, 2011)**

**QUESTION:** Whether “only unique digital images, not duplicate digital images, should be counted in computing an enhancement” under U.S.S.G § 2G2.2(b)(7) of the Sentencing Guidelines. *Id.* at \*6.

**ANALYSIS:** The court initially observed “§ 2G2.2(b)(7) was properly enacted pursuant to explicit congressional mandate, and congressional will should be considered in construing its parameters.” *Id.* at \*16. It then stated “that congressional directives regarding sentencing for child pornography have consistently increased penalties . . . [and] that although Congress has explicitly expressed its desire to enhance punishments for child pornography offenses, Congress has not differentiated between digital images and hard copy images for the purposes of § 2G2.2(b)(7) image enumeration.” *Id.* at \*16–17. The court finally reasoned “[l]ike the congressional directive itself, the Application Note to § 2G2.2(b)(7) is similarly devoid of any indication that § 2G2.2(b)(7) differentiates between digital images and hard copy images.” *Id.* at \*17.

**CONCLUSION:** The 6th Circuit concluded “duplicate digital images, like duplicate hard copy images, should be counted separately for purposes of calculating a sentence enhancement pursuant to § 2G2.2(b)(7).” *Id.* at \*23.

## SEVENTH CIRCUIT

***Joren v. Napolitano*, No. 10-1017, 2011 U.S. App. LEXIS 2332 (7th Cir. Feb. 7, 2011)**

**QUESTION:** Whether “the [Aviation and Transportation Security Act (ATSA)] prohibit[s] security screeners from successfully bringing discrimination claims against the TSA under the Rehabilitation Act[.]” *Id.* at \*5.

**ANALYSIS:** The court explained that each circuit to address this question, including the 2nd, 11th, and Federal Circuits, has concluded “the plain language of the ATSA preempts application of the Rehabilitation Act to security screeners.” *Id.* at \*5–6. The court highlighted the use of the word “notwithstanding” in the ATSA with respect to its employment provisions, and it pointed out the Supreme Court’s recognition of this language as a signal of “Congressional intent to supersede conflicting provisions of . . . other statute[s].” *Id.* at 6. The court then observed other circuits’ application of this logic and their conclusion that Congress therefore intended to enhance the flexibility in hiring screeners “without regard to the prohibitions against disability discrimination in the Rehabilitation Act.” *Id.* at \*6–7.

**CONCLUSION:** The 7th Circuit agreed with other circuits and held that the ATSA preempts security screeners from successfully bringing discrimination claims against the TSA under the Rehabilitation Act. *Id.* at \*5–7.

***SEC v. Wealth Mgmt.*, 628 F.3d 323 (7th Cir. 2010)**

**QUESTION:** Whether a district court’s order affirming a receiver’s asset distribution plan is reviewable on interlocutory appeal under the collateral-order doctrine. *Id.* at 330.

**ANALYSIS:** The 7th Circuit explained that the collateral-order doctrine permits interlocutory review of orders that “conclusively determine the disputed question, resolve an important issue completely separate from the merits of the underlying action, and [are] effectively unreviewable on appeal from a final judgment.” *Id.* The 7th Circuit determined that the order affirming the receiver’s asset distribution plan met all three criteria because “it conclusively determine[d] how the recovered assets in the receivership [would] be distributed[.]” “it [was] important to the defrauded investors and [was] independent of the merits of the underlying . . . enforcement action[.]” and it was “effectively unreviewable after the court enter[ed] a final judgment because the assets [would] have been distributed by that point.” *Id.* at 330–31. The court

also stated that the 5th and 6th Circuits “have held that the collateral-order doctrine permits interlocutory review of a district-court order approving a receiver’s plan of distribution.” *Id.* at 330.

**CONCLUSION:** The 7th Circuit held a receiver’s asset distribution plan is reviewable on interlocutory appeal under the collateral-order doctrine. *Id.*

### EIGHTH CIRCUIT

#### ***Puc-Ruiz v. Holder*, 629 F.3d 771 (8th Cir. 2010)**

**QUESTION:** Whether evidence of a foreign national’s alienage and lack of lawful status in the United States, obtained as a result of arrest without probable cause, should be suppressed as an “egregious” violation of the Fourth Amendment. *Id.* at 778.

**ANALYSIS:** Relying on the Supreme Court’s opinion in *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), the court said that in civil deportation cases, evidence of one’s alienage must have been obtained by an “egregious” Fourth Amendment violation in order for the exclusionary rule to apply. *Id.* at 777–78. The court stated that “[w]hile ‘egregious’ violations are not limited to those of physical brutality . . . *Lopez-Mendoza* requires more than a violation to justify exclusion.” *Id.* at 778 (citation omitted). The court remarked that the Supreme Court had found that “brutal conduct, which shocks the conscience and offend[s] the community’s sense of fair play and decency, constitutes an egregious constitutional violation.” *Id.* (internal quotation marks omitted). An allegation of arrest without probable cause, the court stated, does not satisfy the “egregious” standard for evidentiary exclusion in civil deportation cases under *Lopez-Mendoza* if there is no further misconduct. *Id.* at 779.

**CONCLUSION:** The 8th Circuit held that obtaining information as to a person’s alienage and immigration status without evidence of misconduct beyond an arrest without probable cause does not rise to an egregious violation of the Fourth Amendment, and therefore the information need not be excluded from evidence. *Id.*

#### ***United States v. Nash*, 627 F.3d 693 (8th Cir. 2010)**

**QUESTION:** Whether an adjudication under Minnesota’s Extended Juvenile Jurisdiction (EJJ) “followed by the revocation of probation and execution of an adult sentence is a predicate conviction . . .” under the Armed Career Criminal Act (ACCA). *Id.* at 695, 696.

**ANALYSIS:** The court stated that a conviction is determined under state law and that Minnesota courts have ruled that an adjudication under the EJJ is a conviction. *Id.* The court said it is a conviction for purposes of sentencing guidelines, and for mandatory minimum sentence statutes. *Id.*

**CONCLUSION:** The 8th Circuit held that an “EJJ adjudication is an adult conviction of a violent felony and thus is a predicate offense under the ACCA.” *Id.*

#### NINTH CIRCUIT

***Am. Cargo Transp., Inc. v. United States*, 625 F.3d 1176 (9th Cir. 2010)**

**QUESTION:** “Whether the United States has waived sovereign immunity in connection with shipping under the Food for Peace program . . . .” *Id.* at 1181.

**ANALYSIS:** The court began by noting “the waiver of sovereign immunity applies only where a private party would be liable under admiralty law for the same conduct.” *Id.* The court then looked at the alleged wrong, which was that the government wrongfully refused a bid in violation of the laws that regulate government conduct. *Id.* As these acts only regulate government conduct, a private party could not be liable under them. *Id.*

**CONCLUSION:** The 9th Circuit held that the government had not waived sovereign immunity because a private party is not regulated by, and would not be liable under, laws that control only government actions. *Id.* at 1182.

***Battle Ground Plaza, LLC v. Ray*, 624 F.3d 1124 (9th Cir. 2010)**

**QUESTION:** “[W]hether a bankruptcy court retains jurisdiction over a collateral attack—based on a state breach of contract theory—on its previous sale order, having already approved a Chapter 11 Plan, including the sale of real property, closed the case, overseen payment of creditors, and discharged the debtor.” *Id.* at 1127.

**ANALYSIS:** The court first looked to the language of 28 U.S.C. §§ 157(a) and 1334, stating that the jurisdiction granted to bankruptcy courts is very broad “but the exercise of their jurisdiction to enter any final order or judgment is limited to” (1) cases “arising under” title 11; (2) core bankruptcy proceedings “arising under” the Bankruptcy Code or in a case under the Code; or (3) “cases in which all interested parties

‘consent’ to the Bankruptcy court having final jurisdiction . . . .” *Id.* at 1130. Additionally, the court stated that bankruptcy courts retain jurisdiction in “(1) ‘non-core’ proceedings that either ‘arise under’ the Bankruptcy Code, ‘arise in’ a case under the Code, or ‘relate to’ a case under the Code . . . ; or (2) ‘core’ proceedings that ‘relate to’ a case under the Bankruptcy Code, but neither ‘arise under’ the Code nor ‘arise in’ a case under the Code[.]” *Id.* Finally, the court said that a bankruptcy court has ancillary jurisdiction, even without the “arising under” element, where it is necessary (1) for a single court to decide factually interdependent claims, or (2) to enable the bankruptcy court “to vindicate its authority and effectuate its decrees.” *Id.* The court reasoned that the “arise under” or “arise in” test requires that the matter be unique to the Bankruptcy Code and cannot exist “outside of bankruptcy and could not be brought in another forum,” and is therefore not satisfied by breach of contract claims. *Id.* at 1131. Next, applying the “related to” standard, the court determined that this inquiry is broader but still requires a finding of “close nexus” between the matter and the bankruptcy proceeding, and it is therefore similarly not satisfied by a contract dispute. *Id.* at 1134–35. Finally, the court analyzed the breach of contract claim to determine if there was ancillary jurisdiction and concluded that the bankruptcy proceedings were entirely foreclosed. *Id.* at 1136.

**CONCLUSION:** The 9th Circuit held that a bankruptcy court does not retain jurisdiction over a collateral attack based on a state law breach of contract claim. *Id.*

***Collins v. Gee W. Seattle L.L.C.*, 631 F.3d 1001 (9th Cir. 2011)**

**QUESTION:** Whether an employee is considered to have “voluntarily departed” within the meaning of the Worker Adjustment and Retraining Notification (“WARN”) Act when the employee leaves a job because a business is closing. *Id.* at 1002–03.

**ANALYSIS:** The court first stated that the employers’ argument, that employees who voluntarily left their jobs because of the closing of the business did not experience “employment loss,” is “inconsistent with the basic structure of the WARN Act and frustrates its purposes.” *Id.* at 1005. The court then referenced the Department of Labor’s interpretation that an employer’s duties under the WARN Act should extend to employees whom the employer can logically expect “to experience an employment loss.” *Id.* at 1006. The court further reasoned “unless there is some evidence of imminent departure for reasons other than the shutdown, it is unreasonable to conclude that



employees voluntarily departed after receiving notice of the upcoming closure.” *Id.*

**CONCLUSION:** The 9th Circuit held that “an employee departing a business because that business was closing[] has not ‘voluntarily departed’ within the meaning of the [WARN] Act.” *Id.* at 1008.

***Gaeta v. Perrigo Pharms. Co.*, 630 F.3d 1225 (9th Cir. 2011)**

**QUESTION:** Whether, in light of the Supreme Court’s holding in *Wyeth v. Levine*, 129 S. Ct. 1187 (2009), “applicable [Food and Drug Administration (FDA)] regulations preempt state tort law claims for inadequate labeling against generic—as opposed to brand name—manufacturers.” *Id.* at 1228.

**ANALYSIS:** The court first stated the Supreme Court’s decision in *Levine* held “that the federal regulatory regime governing pharmaceuticals does not preempt state law failure-to-warn claims against brand name manufacturers.” *Id.* at 1228–30. In order to determine whether *Levine* extended to generic drugs, the court conducted a conflict preemption analysis. *Id.* at 1230–31. The court concluded that “[c]ompliance with both state and federal law was not ‘impossible[.]’” because “the [Food, Drug, and Cosmetic Act (FDCA)] provide[d] generic manufacturers with at least three separate mechanisms by which they can discharge their state-law duty to warn of additional risks associated with their products.” *Id.* at 1231, 1239. The court next found that the defendant “failed to present clear evidence that the FDA would have rejected the specific . . . warnings proposed by the [plaintiffs].” *Id.* at 1239. Finally, the court reasoned that “[a]dditional warnings would not stand as an obstacle to the accomplishment of purposes and objectives of Congress.” *Id.*

**CONCLUSION:** The 9th Circuit held that *Levine* “extends with equal force to claims against generic manufacturers[,]” and thus “[t]he state law duty to warn by an appropriate label on the generic . . . drug was not preempted by federal law.” *Id.* at 1230, 1238–39.

***Gonzales v. United States Dist. Court (In re Gonzales)*, 623 F.3d 1242 (9th Cir. 2010)**

**QUESTION:** Whether “a capital habeas petitioner in district court whose claims are entirely legal or record-based [and “can benefit from communication between client and counsel”] is [therefore] entitled to a stay pending a competency determination . . . .” *Id.* at 1244, 1247.

**ANALYSIS:** The 9th Circuit reasoned that its prior decision in *Nash v. Ryan*, 581 F.3d 1048 (9th Cir. 2009) governed this issue. *Id.* at 1244. In *Nash*, the court held “the prosecution of a habeas appeal that is record-

based and resolvable as a matter of law can benefit from communication between client and counsel.” *Id.* It also found “the inquiry should be whether rational communication with the [client] is essential to counsel’s ability to meaningfully prosecute a capital habeas claim.” *Id.* at 1245 (internal quotation marks omitted). The court said that, in this case, “communication with [the client] is essential . . . .” *Id.*

**CONCLUSION:** The 9th Circuit held that claims of a capital habeas petitioner in district court that are completely legal or record-based can benefit from communication between the petitioner and counsel, and thus a petitioner is “entitled to a stay pending a competency determination.” *Id.* at 1244.

***MDY Indus., LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928 (9th Cir. 2010)**

**QUESTION:** Whether “tortious interference with contract is preempted by the Copyright Act . . . .” *Id.* at 957.

**ANALYSIS:** The court said that “because contractual rights are not equivalent to the exclusive rights of copyright, the Copyright Act’s preemption clause usually does not affect private contracts.” *Id.* The court reasoned that a party may seek to “enforce contractual rights that are not equivalent to any of its exclusive rights of copyright.” *Id.* The court explained that its conclusion comports with decisions made in the 4th, 5th, and 8th Circuits. *Id.*

**CONCLUSION:** The 9th Circuit held that a “tortious interference claim . . . is not preempted by the Copyright Act.” *Id.*

***Owner-Operator Indep. Drivers Ass’n v. Swift Transp. Co.*, 632 F.3d 1111 (9th Cir. 2011)**

**QUESTION:** Whether the disclosure and documentation requirements of 49 C.F.R. § 376.12(h) require large carriers to disclose “the complete methods by which such charges are calculated, including documentation of their costs to third parties and profits realized.” *Id.* at 1116.

**ANALYSIS:** The court declared that the purpose of the regulation is “to ensure that owner-operators have fair notice of any fees they will be required to pay.” *Id.* at 1118. The court reasoned that “[d]isclosure of the amounts owner-operators will be charged furthers this purpose of fair notice . . . .” *Id.* The court observed a “complete disclosure of profits and third-party costs is unnecessary to reach this goal.” *Id.* The court finally stated the “controlling principle is that carriers must provide sufficient information such that lessors can determine in advance what their final costs will be.” *Id.* at 1120.

**CONCLUSION:** The 9th Circuit held that that, for variable fees that “can be determined without disclosing . . . actual costs of profits . . . the regulation does not require disclosure of how each component of the price is calculated, except to the extent they are necessary to determine the final price.” *Id.*

***Parth v. Pomona Valley Hosp. Med. Ctr.*, 630 F.3d 794 (9th Cir. 2010)**

**QUESTION:** Whether it is a violation of the Fair Labor Standards Act (FLSA) to change an employee’s schedule to accommodate preferences while reducing the employee’s pay wage to that of the former schedule. *Id.* at 797.

**ANALYSIS:** The court followed the Supreme Court’s precedent on pre-FLSA pay plan alterations. *Id.* at 801. Citing the Supreme Court, the court said that nothing in the FLSA prevents employers from contracting with employees to pay them their previous wage rates, “so long as the new rate equals or exceeds the minimum rate required by the FLSA.” *Id.* (internal quotation marks omitted). Additionally, the court looked to the purpose of the FLSA, which is “to ensure that each [covered] employee . . . would receive [a] fair day’s pay for a fair day’s work and would be protected from the evil of overwork as well as underpay.” *Id.* (internal quotation marks omitted).

**CONCLUSION:** In finding that an employer can change the shift schedule so as to accommodate employee preference, the 9th Circuit held that an employer can reduce employee pay wages so that employees receive the same wages they received under their former schedules; however, the employer cannot reduce the rates to evade FLSA provisions, including overtime pay. *Id.* at 797.

***Saavedra-Figueroa v. Holder*, 625 F.3d 621 (9th Cir. 2010)**

**QUESTION:** Whether misdemeanor false imprisonment under California Penal Code § 236 is a categorical crime of moral turpitude. *Id.* at 626.

**ANALYSIS:** The court began by contrasting misdemeanor false imprisonment with felony false imprisonment, noting that misdemeanor false imprisonment is a general intent crime and does not require intent to harm the victim. *Id.* at 625–26. The court then stated that the federal generic definition of a crime of moral turpitude is “a crime involving fraud or conduct that (1) is vile, base, or depraved and (2) violates accepted moral standards.” *Id.* at 626. The court referred to its own past decisions holding misdemeanor simple assault and simple driving under the influence were not crimes of moral turpitude because of their absence of intent. *Id.* at 626–27. The court also stated that California law

requires a violation of another's personal liberty to contain the elements of violence, menace, fraud, or deceit in order to be considered a crime of moral turpitude. *Id.* at 627.

**CONCLUSION:** The 9th Circuit held that misdemeanor false imprisonment is not a categorical crime of moral turpitude because it does not require the defendant to have possessed an intent that would make the crime "base, vile, or depraved." *Id.* at 626.

***United States v. Bush*, 626 F.3d 527 (9th Cir. 2010)**

**QUESTION:** Whether the Supreme Court's ruling in *United States v. Santos*, 553 U.S. 507 (2008), defining "proceeds" for purposes of 18 U.S.C. § 1956, also "applies to a [§] 1957 transactional-money-laundering conviction." *Id.* at 529.

**ANALYSIS:** The court first reasoned that "[§§] 1956 and 1957 contain different elements, but have a common genesis[.]" and that the discrepancies between the two sections do not "concern the usage or meaning of 'proceeds[.]'" *Id.* at 536. The court stated that "[b]oth sections make explicit use of the word 'proceeds,' and since they were enacted together in the Money Laundering Control Act, [it would] follow the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Id.* (internal quotation marks omitted). The court continued by noting that "*Santos* and its progeny are less an examination of money-laundering statutes and more an inquiry into the predicate crimes which generate funds to be laundered." *Id.* at 537. Finally, the court found that because § 1957, unlike § 1956, lacks a knowledge requirement, limiting the *Santos* decision might "allow the government to sidestep [the *Santos*] holding by charging money laundering under [§] 1957." *Id.*

**CONCLUSION:** The 9th Circuit held that "*Santos* applies with equal force to transactions prosecuted under [§] 1957." *Id.* at 536.

***United States v. Diaz-Lopez*, 625 F.3d 1198 (9th Cir. 2010)**

**QUESTION:** Whether "testimony that a search of a computer database revealed no record of a matter violates the best evidence rule when it is offered without the production of an 'original' printout showing the search results." *Id.* at 1201.

**ANALYSIS:** The court first stated the best evidence rule requires the production of an original document instead of a copy. *Id.* The court then examined the standard under Federal Rules of Evidence § 1002, which states that "[t]o prove the content of a writing, recording, or photograph, the original writing, recording or photograph is required, except as otherwise provided . . . ." *Id.* (internal quotation marks omitted). The

court found that the Computer Linked Application Information Management System (“CLAIMS”) database falls within the scope of the best evidence rule because it is a writing or recording. *Id.* at 1202. The court then looked to “whether the evidence was introduced ‘[t]o prove the content of a writing, recording or photograph.’” *Id.* Because the agent testified that the search returned no record, the court found that the evidence was not introduced to prove its contents. *Id.*

**CONCLUSION:** The 9th Circuit held the best evidence rule is inapplicable to testimony regarding the search of a computer database that revealed no record of a matter. *Id.* at 1203.

***United States v. George, 625 F.3d 1124 (9th Cir. 2010)***

**QUESTION:** “[W]hether an applicable state’s failure to implement [the Sex Offender Registration and Notification Act (SORNA)] precludes a federal prosecution for failure to register as a sex offender in that state . . . .” *Id.* at 1128.

**ANALYSIS:** The court explained that “SORNA requires states to implement sex offender registries which comply with SORNA requirements by July 2009 or lose part of their federal funding.” *Id.* The court then stated that SORNA establishes a criminal offense for sex offenders who do not register or update their registration. *Id.* The court articulated that SORNA creates a “federal duty” on sex offenders to register apart from any state obligations imposed on sex offenders and irrespective of whether the state has adopted SORNA. *Id.*

**CONCLUSION:** The 9th Circuit held that “without regard to whether SORNA is implemented by [this] or any other state, registration under it is required[.]” and a state’s failure to implement SORNA will not preclude a federal prosecution for lack of registration. *Id.*  
***United States v. Vela, 624 F.3d 1148 (9th Cir. 2010)***

**QUESTION:** Whether the court has appellate jurisdiction to review cases in which a defendant is found not guilty by reason of insanity. *Id.* at 1151.

**ANALYSIS:** The court reasoned that appellate jurisdiction exists when the trial court has rendered its “final judgment.” *Id.* at 1150–51. The court said “finality coincides with the termination of the criminal proceedings” and occurs when nothing is left “for the court to do but execute the judgment.” *Id.* at 1151 (internal quotation marks omitted). The court reasoned that generally “when a criminal defendant is found guilty . . . it is only at sentencing that the criminal action terminates . . . .” *Id.* The court concluded that when, as here, a jury finds a criminal defendant not guilty by reason of insanity, “the docketing of the verdict

amounts to a final judgment because the criminal proceeding has come to an end and no criminal sentence will follow.” *Id.*

**CONCLUSION:** The 9th Circuit held that the court retains its appellate jurisdiction to review cases in which a criminal defendant is found not guilty by reason of insanity. *Id.* at 1152.

## TENTH CIRCUIT

### ***Chavez v. N.M. Pub. Educ. Dep’t*, 621 F.3d 1275 (10th Cir. 2010)**

**QUESTION:** Whether, under the Individuals with Disabilities Education Act (IDEA), a state education agency (“SEA”) must directly provide a free appropriate public education (“FAPE”) to a student who has been “home-schooled for a significant period of time because of behaviors stemming from his autism and *dropped from school rolls*[]” when the local educational agency (“LEA”) is not providing one. *Id.* at 1284–90.

**ANALYSIS:** The court construed the language of 20 U.S.C. § 1413(h) of the IDEA, which mandates an SEA to intervene and use funds that would otherwise go to the LEA to directly provide a FAPE in four situations. *Id.* at 1285. The court determined that none of the situations applied to the facts of the case. *Id.* at 1286. The court found that the SEA was not on notice of non-compliance at the local level and therefore was not required “to take over education for the LEA . . . .” *Id.* at 1289. Although the court conceded that “the IDEA centralizes responsibility for assuring that the requirements of the Act are met in the SEA . . . the IDEA is primarily a funding statute and the SEA controls some of the purse strings.” *Id.* at 1287. If the SEA determines an LEA does not deserve funds, it may not “simply yank funding” without giving an LEA notice and a hearing. *Id.* at 1287–88. Finally, the court stated that the SEA is not entirely free from culpability, as it is potentially financially responsible for an LEA’s failure to comply with its responsibilities, within the broad discretion of a district court. *Id.* at 1289.

**CONCLUSION:** The 10th Circuit held “that [the SEA] was not required by the IDEA to provide educational services directly . . .” to a student who was home-schooled for a lengthy period of time and removed from school rolls. *Id.*

***Thomas v. Metro. Life Ins. Co.*, 631 F.3d 1153 (10th Cir. 2011)**

**QUESTION:** Whether the broker-dealer exemption of the Investment Advisers Act of 1940 (“IAA”) applies to representatives who sell a life insurance policy, or more generally, the application of the broker-dealer exemption of the IAA. *Id.* at 1157–58.

**ANALYSIS:** The court stated that “the IAA imposes fiduciary duties on ‘investment advisers’” and that “[i]nvestment advisers’ include, in relevant part, any person who, for compensation, engages in the business of advising others . . . as to the advisability of investing in, purchasing, or selling securities.” *Id.* at 1160 (internal quotation marks omitted). The court further stated that “[a]lthough the general definition of ‘investment adviser’ is broad, it contains several specific exemptions.” *Id.* The court found relevant in this case the “broker-dealer exemption,” which “exempts brokers and dealers who give investment advice so long as (1) the advice is solely incidental to their conduct as brokers or dealers, and (2) they receive no special compensation for that advice.” *Id.* The court explained: “[t]he two requirements are conjunctive; in order to be exempted, broker-dealers must satisfy both.” *Id.* at 1160–61. Ultimately, the court found “that the phrase ‘solely incidental to’ means ‘solely attendant to’ or ‘solely in connection with,’ as opposed to ‘solely a minor part of’ or ‘solely an insignificant part of.’” *Id.* at 1161. Thus, “the applicability of the exemption depends not on the quantum or importance of the broker-dealer’s advice, but rather on whether the broker-dealer gives advice in connection with the sale of a product.” *Id.* (internal citations omitted). The court further said that this interpretation comports with the language of the statute, the “legislative history and the position taken by the [Securities and Exchange Commission].” *Id.*

**CONCLUSION:** The 10th Circuit held that “the IAA excludes a broker-dealer who provides advice that is attendant to, or given in connection with, the broker-dealer’s conduct as a broker or dealer, so long as he does not receive compensation that is (1) received specifically in exchange for the investment advice, as opposed to for the sale of the product, and (2) distinct from a commission or analogous transaction-based form of compensation for the sale of a product.” *Id.* at 1166.

**ELEVENTH CIRCUIT*****Owen v. I.C. Sys., Inc.*, 629 F.3d 1263 (11th Cir. 2011)**

**QUESTION:** “What procedures are sufficient to show that a debt collector maintained procedures reasonably adapted to avoid errors that

violate the [Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692]?” *Id.* at 1273.

**ANALYSIS:** In considering whether the defendant-debt collector presented sufficient evidence for the third prong of the “bona fide error defense” pursuant to the FDCPA, the court articulated the two-step analysis for the “procedures” component of the defense: first, “whether the debt collector maintained . . . procedures to avoid errors[,]” and second, “whether the procedures were reasonably adapted to avoid the specific error at issue.” *Id.* at 1273–74 (internal citations and quotation marks omitted). Next, the court rejected a “definitive list of procedures, or even universally applicable parameters[]” and found a question of procedure to be a “fact sensitive inquiry.” *Id.* at 1274 (internal quotation marks omitted). The court continued to discuss the particular facts of the case, and concluded the procedures component is a “uniquely fact-bound inquiry[;]” therefore, the court “refrain[ed] from . . . sweeping generalizations about what procedures would be enough for a debt collector to effectively assert the defense.” *Id.* at 1277.

**CONCLUSION:** The 11th Circuit held that questions of whether a debt collector maintained procedure adapted to avoid errors are to be resolved on a “case-by-case basis.” *Id.*

***Owner-Operator Indep. Drivers Ass’n v. Landstar Sys. Inc.*, 622 F.3d 1307 (11th Cir. 2010)**

**QUESTION:** Whether motor carriers can include administrative fees “to make profits on charge-backs[]” without violating the Truth-in-Leasing regulations, 49 C.F.R. § 376.1 et seq. *Id.* at 1310, 1318.

**ANALYSIS:** The court reasoned that the “Truth-in-Leasing regulations are silent regarding a motor carrier’s ability to profit on charge-backs.” *Id.* at 1318. The court stated “if a statute is silent or ambiguous with respect to the question at issue, [the] longstanding practice is to defer to the executive department’s construction of a statutory scheme it is entrusted to administer, unless the legislative history of the enactment shows with sufficient clarity that the agency construction is contrary to the will of Congress.” *Id.* The court further reasoned that the Interstate Commerce Commission (“ICC”) previously “considered a prohibition on profits from charge-backs . . . but ultimately rejected making it part of the final regulation. *Id.* at 1319.

**CONCLUSION:** The 11th Circuit held that motor carriers “can profit from charge-back items.” *Id.*



***Tazoe v. Airbus S.A.S.*, 631 F.3d 1321 (11th Cir. 2011)**

**QUESTION:** Whether the district court abused its discretion in dismissing, sua sponte, a party's complaint without first affording notice or an opportunity to be heard. *Id.* at 1328.

**ANALYSIS:** The court reasoned that a district court can dismiss an action sua sponte only if "the procedure employed is fair[.]" meaning it provides the party with "notice of its intent to dismiss or an opportunity to respond." *Id.* at 1336 (internal quotation marks omitted). The court explained that there is an exception if reversal would be futile, such as a complaint being unlikely to survive a motion to dismiss based on forum non conveniens. *Id.* The court, relying on precedent regarding sua sponte transfers, said it recognizes a "long-approved practice of permitting a court to transfer a case sua sponte under the doctrine of forum non conveniens . . . but only so long as the parties are first given the opportunity to present their views on the issue." *Id.* (internal quotation marks omitted). The court reasoned that notice is required despite district courts having greater discretion to transfer than to dismiss on grounds of forum non conveniens. *Id.*

**CONCLUSION:** The 11th Circuit held that the district court abused its discretion because it failed to provide notice of its intent to dismiss or an opportunity to be heard. *Id.*

***United States v. Forey-Quintero*, 626 F.3d 1323 (11th Cir. 2010)**

**QUESTION:** "[W]hether the phrase 'begins to reside permanently in the United States while under the age of eighteen years' in former [§] 321(a)(5) of the [Immigration and Nationality Act (INA)] allows an alien to derive citizenship while in a status other than lawful permanent resident status." *Id.* at 1326.

**ANALYSIS:** The court reasoned that the phrase "includes an implied requirement that the [alien's] residence be lawful." *Id.* at 1327 (internal quotation marks omitted). The court declared "a dwelling place cannot be 'permanent' under the immigration laws if it is unauthorized." *Id.* The court stated "requiring anything less than the status of lawful permanent resident would essentially render the first clause of subsection 5 'mere surplusage.'" *Id.* The court's logic comported with holdings from the Board of Immigration Appeals and the 9th Circuit. *Id.*

**CONCLUSION:** The 11th Circuit held that former § 321(a)(5) of the INA allows an alien to derive citizenship only if the alien is a lawful permanent resident. *Id.*

***United States v. Jerchow*, 631 F.3d 1181 (11th Cir. 2011)**

**QUESTION:** Whether Amendment 732 to the commentary of U.S. Sentencing Guidelines Manual § 2G1.3(b)(2)(B) was a clarification requiring retroactive application or a substantive change requiring prospective application only. *Id.* at 1184.

**ANALYSIS:** The court said the guidelines originally applied to those who “unduly influenced a minor to engage in prohibited sexual conduct[.]” but Amendment 732 provided that “the undue influence enhancement does not apply in a case in which the only minor . . . involved in the offense is an undercover law enforcement officer.” and *Id.* at 1183, 1184 (internal quotation marks omitted). The court stated that several factors are relevant to whether an amendment enacts a substantive change or simply clarifies the existing text. *Id.* at 1185. The court said that “[a]n amendment that alters the text of the Guideline itself suggests a substantive change[.]” while an amendment to the commentary “suggests a clarification.” *Id.* at 1185. The court also stated that the Sentencing Commission’s description of the amendment’s purpose and the amendment’s inclusion on a list of retroactive amendments should be considered. *Id.* Finally, the court observed that an amendment that overturns existing circuit precedent suggests a substantive change. *Id.* The court explained that the Sentencing Commission enacted Amendment 732 to address a circuit split. *Id.* at 1186. The court also stated that the amendment only altered the commentary. *Id.* at 1187.

**CONCLUSION:** The 11th Circuit held that Amendment 732 was a clarifying amendment and should be applied retroactively. *Id.*

**FEDERAL CIRCUIT*****Preminger v. Sec’y of Veterans Affairs*, No. 2009-7044, 2011 U.S. App. LEXIS 1559, 632 F.3d 1345 (Fed. Cir. 2011)**

**QUESTION:** “Whether [38 U.S.C.] § 502 confers jurisdiction on the court to review a *denial* by Secretary of a petition for rulemaking[.]” *Id.* at \*2.

**ANALYSIS:** The court first observed that § 502 subjects the actions of the Secretary, when dealing within § 553(e) under the Administrative Procedure Act (APA), to judicial review. *Id.* at \*6–7. The court said that the APA governs the procedures agencies must follow for rule making, and it focused on the “notice-and-comment” requirements. *Id.* at \*7–8. The court then stated that an “[a]gency’s failure to comply with notice-

and-comment procedures, when required, is grounds for invalidating a rule.” *Id.* at \*11–12. The court expressed concern that with judicial power to ensure procedural compliance but no power for review of the decision, a remedial gap would result; this could not have been Congress’s intent. *Id.* at \*17–19.

**CONCLUSION:** The Federal Circuit held that “§ 502 vests [the court] with jurisdiction to review the Secretary’s denial of a request for rulemaking made pursuant to § 553(e).” *Id.* at \*18.