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 October 2009 and March 2010. 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.

[No D.C. Circuit cases]

FIRST CIRCUIT

***Howe v. Townsend*, 588 F.3d 24 (1st Cir. 2009)**

QUESTION ONE: Whether "settlement agreements in class actions may establish cy pres funds." *Id.* at 33.

ANALYSIS: The court explained that courts have approved the creation of cy pres funds in class actions "to be used for a charitable purpose related the class plaintiffs' injury, when it is difficult for all class members to receive individual shares of the recovery and, as a result, some or all of the recovery remains." *Id.* The court stated that courts have approved cy pres funds "when it is economically infeasible to distribute money to class members," and "when money remained from the defendant's payout after money for damages had been distributed to class members." *Id.* The court explained that as a solution to unclaimed payout, courts have approved giving money to "charities related to the plaintiffs' injuries." *Id.*

CONCLUSION: The 1st Circuit held that settlement agreements in class actions may establish cy pres funds. *Id.*

QUESTION TWO: Whether incorporating by reference prior class certification orders, instead of explaining and justifying a certification decision for an expanded class, satisfies F. R. CIV. P. 23(c)(1)(B). *Id.* at 38.

ANALYSIS: The court noted that rule 23(c)(1)(B) "explains the contents of a certification order: the order must clarify and detail the identity of a class and the class claims, issues, or defenses in a class action." *Id.* at 39. The court further noted that rules 23(c)(1)(A) and (C) "contemplate district courts issuing an order certifying a class and detailing the class composition and the case's issues and claims, an order the court can amend before final judgment." *Id.* The court indicated that while Rule 23(c)(1) "does not explain whether 23(c)(1)(B)'s substantive requirements apply to amended orders issued under 23(c)(1)(C), . . . 23(c)(1)(B)'s text appears to apply to any order certifying a class, including orders certifying an amended class." *Id.* (emphasis added). The court reasoned that "[t]he depth of explanation courts should provide in amended certification orders depends on the circumstances," especially in light of the 2003 amendments to Rule 23(c)(1) that "put greater emphasis on understanding and articulating the 'contours' of the class action throughout the litigation." *Id.*

CONCLUSION: The 1st Circuit held that a "court could incorporate its prior orders by reference when certifying the expanded class." *Id.* at 40.

***United States v. Dyer*, 589 F.3d 520 (1st Cir. 2009)**

QUESTION: Whether there is intent to traffic child pornography under U.S.S.G. § 2G2.4(c)(2) when the petitioner downloaded files into a

shared folder that he knew would be made available to others, and although he knew how to turn off the sharing feature of the site, he chose not to do so. *Id.* at 524.

ANALYSIS: The court began by examining the meaning of "traffic" under § 2G2.4(c)(2), determining that a defendant traffics in child pornography if he engaged or intended to engage in an exchange or trade of such images. *Id*. at 526. The court found that no monetary gain or expectation of monetary gain is necessary. *Id.* The court then looked at the meaning of "intent". *Id.* at 528. Based on the text, legislative history, and precedent, the court found that specific intent is not needed. *Id.* at 529.

CONCLUSION: The 1st Circuit held that there was intent to traffic in child pornography where the petitioner downloaded child pornography into shared folder and allowed access to that folder by other people even though he was capable of preventing access to the pornographic images. *Id.* at 531.

***United States ex rel. Ondis v. Woonsocket*, 587 F.3d 49 (1st Cir. 2009)**

QUESTION: "Whether a response to a [Freedom Of Information Act (FOIA)] request constitutes a public disclosure within the purview of the [False Claims Act (FCA)]." *Id.* at 55.

ANALYSIS: The court reasoned that "the 'public disclosure' requirement is satisfied when there is some act of disclosure to the public outside of the government." *Id.* The court noted that "[r]esponding to a FOIA request constitutes such an act." *Id.*

CONCLUSION: The 1st Circuit held "that a response to a FOIA request is an act of public disclosure" within the purview of the FCA "because the response disseminates (and, thus, discloses) information to members of the public." *Id.* at 55.

***United States v. Santiago-Rivera*, 594 F.3d 82 (1st Cir. 2010)**

QUESTION: To what extent "a federal judge may shape a sentence for a violation of supervised release to affect an unrelated state sentence." *Id*. at 83.

ANALYSIS: The 1st Circuit addressed what types of impermissible sentencing factors have been erroneously used by district courts when sentencing a defendant upon revocation of supervised released. *Id*. at 85. The court viewed an 11th Circuit holding that vacated a sentence "on the ground that the district court was motivated to lengthen the sentence by its disapproval of the fact that an immigration judge had released [Defendant] on bond pending his appeal," as instructive on the matter. *Id.*

The 1st Circuit also noted that appellate courts have vacated sentences when "a district court stumbles over the concept of 'disparity.'" *Id*. That is, courts have found procedural error in instances of a district court's consideration of the disparity between federal sentences and local sentences for similar offenses. *Id*. at 85–86.

CONCLUSION: The 1st Circuit concluded that although a district court may consider the "disparity between federal and state sentences," it may not go so far as to explicitly fashion of a federal sentence "in order to influence the manner in which a sentence imposed by a local court was implemented." *Id*. at 86.

***Chiang v. Verizon New Eng., Inc.*, 595 F.3d 26 (1st Cir. 2010)**

QUESTION: "Whether § 1681s-2(b) of the [Fair Credit Reporting Act (FCRA)] provides for a private right of action and the standards for asserting a claim under that section." *Id*. at 29.

ANALYSIS: The 1st Circuit adopted a "plain meaning" canon of statutory interpretation and found that a private cause of action does exist for individuals seeking remedies for furnishers' violations under § 1681s-2(b). *Id.* at 36. The court also evaluated the extent of a furnisher's investigation obligation under the statute. *Id.* at 37. The court agreed with the 4th Circuit's observation that "it would make little sense to conclude that Congress used the term 'investigation' to include superficial, un reasonable [sic] inquiries by creditors." *Id*. Accordingly, the court found that the term "investigation" should be interpreted in a way that gives furnishers under § 1681s-2(b) flexibility in their investigatory obligation. *Id.*

CONCLUSION: The 1st Circuit recognized that "under § 1681s-2(b) there is a private cause of action, that the investigation must be reasonable, that [the] test is objective, and that plaintiff bears the burden of proof." *Id*. at 30. The court also held that "a § 1681s-2(b) claim requires plaintiff to show actual inaccuracies that a furnisher's objectively reasonable investigation would have been able to discover." *Id*.

***PowerShare, Inc. v. Syntel*, 597 F.3d 10 (1st Cir. 2010)**

QUESTION: Whether a district judge should apply a "clearly erroneous or contrary to law" or a "de novo" standard when "reviewing a magistrate judge's disposition of a motion to stay litigation pending the completion of a parallel arbitration proceeding." *Id.* at 12.

ANALYSIS: The court pointed out that while the Federal Magistrates Act, 28 U.S.C. § 636(b)(1), "confers authority upon district

judges to designate magistrate judges to hear pretrial motions, . . . [m]agistrate judges serve as aides to, and under the supervision of, district judges. . . ." *Id.* at 13. The court explained that as Article I judicial officers, magistrate judges "ordinarily may not decide motions that are dispositive either of a case or of a claim or defense within a case . . . because the Constitution requires that Article III judges exercise final decisionmaking authority." *Id.* (footnote omitted). The court stated that under FED. R. CIV. P. 72, "[w]hen a magistrate judge decides a non-dispositive motion, the district judge may, given a timely appeal, set aside the order if it is 'clearly erroneous or is contrary to law,'" but "when a magistrate judge passes upon a dispositive motion, he or she may only issue a recommended decision, and if there is a timely objection, the district judge must engage in de novo review." *Id.* at 14. The court noted that a motion to stay litigation is "not among the motions enumerated in [the Federal Magistrates Act]," nor "of the same character." *Id*. Nevertheless, the court stated that a "federal court's ruling on a motion to stay litigation pending arbitration is not dispositive of either the case or any claim or defense within it," and "[a]lthough granting or denying a stay may be an important step in the life of a case . . . a stay order is merely suspensory." *Id.* In addition, the court explained that "[e]ven if such a motion is granted, the court still retains authority to dissolve the stay or, after the arbitration has run its course, to make orders with respect to the arbitral award." *Id.* The court also pointed out that because the narrow scope of judicial review of arbitral awards does not extinguish the possibility of such review," there "is no final exercise of Article III power at the time the court acts on the motion to stay." *Id.*

CONCLUSION: The 1st Circuit held that "from a procedural standpoint," district judges would comport with Fed. R. Civ. P. 72 in employing a "clearly erroneous or contrary to law" standard when reviewing a magistrate judge's denial of a motion to stay litigation. *Id.*

***Sec. Exch. Comm'n v. Tambone*, 597 F.3d 436 (1st Cir. 2010)**

QUESTION: Whether a "securities professional can be said to 'make' a statement, such that liability under 17 C.F.R. § 240.106-5(b) may attach, either by (i) using statements to sell securities, regardless of whether those statements were crafted entirely by others, or (ii) directing the offering and sale of securities on behalf of an underwriter, thus making an implied statement that he has a reasonable basis to believe that the key representations in the relevant prospectus are truthful and complete." *Id.* at 442.

ANALYSIS: The court noted that the inquiry centered on "whether the defendants made untrue statements of material fact within the meaning of this rule." *Id*. The court stated that the "the pivotal word in the rule's text is 'make,' as in 'to make a statement,'" and that the "rule itself does not define that word, nor does it suggest that the word is imbued with any exotic meaning." *Id.* The court declared, "[i]n the absence of either a built-in definition or some reliable indicium that the drafters intended a special nuance, accepted canons of construction teach that the word should be given its ordinary meaning." *Id*. The court further acknowledged that "the question does not turn on dictionary meanings alone." *Id*. at 443. The court looked to the "structure of section 10(b) and Rule 10b-5, as well as other, related provisions, to interpret the term at issue," and found that "Section 10(b) grants the SEC broad authority to proscribe conduct that 'use[s] or employ[s]' any 'manipulative or deceptive device or contrivance,' in connection with the purchase or sale of any security." *Id* at 450 (alterations in original).

CONCLUSION: The 1st Circuit held that Rule 10b-5(b) does not contemplate an expansive definition of the phrase "to make a statement," noting that "the language and structure of a rule, the statutory framework that it implements, and the teachings of the Supreme Court coalesce to provide a well-lit decisional path." *Id*.

SECOND CIRCUIT

Meijer, Inc. v. Ferring B.V., 585 F.3d 677 (2d Cir. 2009)

QUESTION: Whether plaintiffs have standing as purchasers of a patent "to bring [a] *Walker Process* claim, when a court has yet to find the patent [was] fraudulently obtained." *Id*. at 690 (internal quotation marks omitted).

ANALYSIS: The court stated that *Walker Process* "reflects a willingness to let antitrust liability impact the patent system." *Id*. Additionally, the court noted that "the interest in protecting patentees from innumerable vexatious suits [cannot] be used to frustrate the assertion of rights conferred by the antitrust laws." *Id*. at 690–91 (internal quotation marks omitted). Although the court was reluctant to "expand[] the universe of potential patent challengers," it did not want to " creat[e] the potential to leave a significant antitrust violation undetected or unremedied." *Id.* at 691 (internal quotation marks omitted). The court declined "to decide whether purchaser plaintiffs *per se* have standing to raise *Walker Process* claims." *Id.* Nevertheless, the court held that the plaintiffs in the instant case should be granted "antitrust standing without altering the typical limits on who can start a challenge to a patent's

validity" because they were "challenging an already tarnished patent." *Id.*

CONCLUSION: The 2nd Circuit held "that purchaser plaintiffs have standing to raise *Walker Process* claims for patents that are already unenforceable due to inequitable conduct." *Id.* at 691–92.

***Ming Zhang v. Holder*, 585 F.3d 715 (2d Cir. 2009)**

QUESTION: Whether "an immigration judge [] or the BIA may consider the record of a credible fear interview when evaluating an alien's credibility." *Id.* at 717.

ANALYSIS: The 2nd Circuit found that petitioner's credible fear interview was "conducted in a non-coercive and careful manner" and "appropriately documented by the interviewing authorities." *Id*. at 725–26. Thus, the court determined that "petitioner's credible fear interview, like her airport interview, bears sufficient indicia of reliability." *Id*.

CONCLUSION: The 2nd Circuit held that where "the record of a credible fear interview bears sufficient indicia of reliability, it may be relied on as a source of an alien's statement." *Id*. at 726.

***Pierre v. Holder*, 588 F.3d 767 (2d Cir. 2009)**

QUESTION: "[W]hether subsection U is a necessarily included offense in a charge of removability under [§] 237(a)(2)(A)(iii) [of the Immigration and Nationality Act, 8 U.S.C.S. § 1227] as defined by subsection M." *Id.* at 772.

ANALYSIS: The court first considered precedent from the Board of Immigration Appeals and from its own circuit. *Id.* at 774. It distinguished these cases because they involved situations in which "[a]liens had been charged with removability on the basis of their convictions for an aggravated felony as defined by both subsections M and U, but because their victims did not sustain the requisite amount of actual loss under subsection M, the cases proceeded under subsection U, not M." *Id.* at 775. The court finally stated that the subsections under question could not be compared to Rule 31(c) of the Federal Rules of Criminal Procedure because a "removal proceeding is civil, not criminal," and Congress did not provide for such a statutory scheme for the statute at issue. *Id.* at 776–77.

CONCLUSION: The 2nd Circuit held that "[t]he Government's charge that an alien is removable on the basis of a conviction for an aggravated felony as defined by subsection M does not necessarily include a charge of removability for an aggravated felony as defined by subsection U." *Id.* at 772.

***Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009)**

QUESTION: Whether the Pinkerton doctrine applies to an international law conspiracy claim under the Alien Tort Statute (ATS). *Id.* at 260.

ANALYSIS: The court noted that "the only [inchoate] conspiracy crimes that have been recognized by international war crimes tribunals . . . are conspiracy to commit genocide and common plan to wage aggressive war." *Id.*

CONCLUSION: The 2nd Circuit held that "plaintiffs have not established that international law [universally] recognize[s] a doctrine of conspiratorial liability that would extend to activity encompassed by the Pinkerton doctrine." *Id.*

***Sacirbey v. Guccione*, 589 F.3d 52 (2d Cir. 2009)**

QUESTION: Whether "an arrest warrant issued by a foreign court [in Bosnia] that no longer has jurisdiction over the accused, nor the power to enforce the warrant, can provide an adequate basis for the extradition of a United States citizen." *Id.* at 54.

ANALYSIS: The court noted that the 7th, 8th and 9th Circuits have "determined that, where an extradition treaty does not condition extradition on the filing of formal charges, [they] would not read such a requirement into the treaty." *Id.* at 64. The court went on to add that whether "extradition treaties *should* contain provisions ensuring that a judicial body in the requesting country stand ready to ensure procedural regularity upon the transfer of custody" is a question "for the executive branch to decide." *Id.* at 65–66 (emphasis in original). The court thus focused on the question of "whether the offense charged is extraditable under the relevant [U.S.–Bosnia extradition] treaty.'" *Id.* at 66. The court noted that the treaty requires that an individual sought for extradition must have been charged with a crime. *Id.* at 67. The court read the treaty's provisions to mean that "the proof required . . . to establish that an individual has been 'charged' with a crime is a valid arrest warrant and the evidence submitted in order to obtain that warrant." *Id.* The court reasoned that because "[t]he arrest warrant for [the petitioner] was never re-issued – or otherwise ratified – by a Bosnian court with jurisdiction over [the] case . . . the existence of this arrest warrant . . . cannot satisfy the Treaty's requirement that Bosnia demonstrate a 'charge' by producing a valid arrest warrant." *Id.*

CONCLUSION: The 9th Circuit held that an arrest warrant issued by a Bosnian court that no longer has jurisdiction over the accused, nor the power to enforce the warrant, is not an adequate basis for the extradition of a United States citizen. *Id.* at 69.

***United States v. Byors*, 586 F.3d 222 (2d Cir. 2009)**

QUESTION: Whether a sentencing enhancement is appropriate "where a defendant has obstructed the investigation or prosecution of an *underlying offense* but has not obstructed the investigation or prosecution of a *subsequent* money laundering offense." *Id*. at 224 (emphasis in original).

ANALYSIS: The 2nd Circuit noted that the obstruction of justice guideline set forth in the U.S. Sentencing Guidelines Manual § 3C1.1 "contains two elements: (1) a temporal element, which requires the obstruction to occur during the investigation, prosecution, or sentencing of the offense of conviction and (2) a nexus element, which requires that the obstructive conduct relate to the offense of conviction." *Id*. at 227. The court held that the first element was met because "defendant's obstructive conduct occurred during the government's investigation into the money laundering offense." *Id*. Furthermore, the court determined that the second element was satisfied because defendant's witness tampering "relate[s] to fraud, which is relevant conduct or at least an offense that is closely related to the money laundering offense." *Id*. at 228.

CONCLUSION: The 2nd Circuit concluded "that Application Note 2(C) to section 2S1.1 of the Guidelines does not preclude an enhancement for obstruction of justice pursuant to section 3C1.1 of the Guidelines where a defendant's obstruction relates to an offense underlying a money laundering offense but not to the money laundering offense itself." *Id*. at 224.

***United States v. Hasan*, 586 F.3d 161 (2d Cir. 2009)**

QUESTION: "Whether the statute prohibiting making false statements on a passport application, 18 U.S.C. § 1542, contains a materiality requirement." *Id.* at 166.

ANALYSIS: The court noted that when interpreting a statute, the starting point is the "text of that statute." *Id*. The court, looking at the plain language of the statute, found "[u]nlike other statutes involving false statements, § 1542 does not contain a materiality requirement." *Id.* at 167.

CONCLUSION: The 2nd Circuit held that "the statute plainly does not require that the false statement be material." *Id.*

***United States v. Hester*, 589 F.3d 86 (2d Cir. 2009)**

QUESTION: Whether "prosecution for failure to register as a sex offender under [the Sex Offender Registration and Notification Act (SORNA),] . . . violate[s] [the] constitutional right to due process of law" where defendant has no actual knowledge of the registration requirement. *Id.* at 90.

ANALYSIS: The court first explained that "[i]t is well-established that ignorance of the law is not a valid defense to a criminal prosecution." *Id.* at 91. However, "the Supreme Court [in *Lambert v. California*] carved out a narrow exception to this rule, . . . stating: '[e]ngrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has a chance to defend charges.'" *Id.* However, the court noted that, with regard to the statute at issue in *Lambert*, the Supreme Court took special notice of the absence of "circumstances which might move one to inquire as to the necessity of registration." *Id.* at 92. In the instant case, defendant had signed the New York Sex Offender Registration form, which informed him of the need to register whenever he changed addresses. *Id.* at 93.

CONCLUSION: The 2nd Circuit held that "prosecution for failure to register as a sex offender under 18 U.S.C. § 2250(a) does not violate the right to due process of law." *Id.* at 88.

***Wilner v. NSA*, 592 F.3d 60 (2d Cir. 2009)**

QUESTION ONE: "Whether, as a general matter, [] agencies may invoke the *Glomar* doctrine . . . ." *Id.* at 64.

ANALYSIS: The court noted that the *Glomar* doctrine, which says "that an agency may, pursuant to FOIA's statutory exemptions, refuse to confirm or deny the existence of certain records in response to a FOIA request," has been upheld in the 1st, 7th, 9th, and D.C. Circuits. *Id.* at 68. The court noted that its sister circuits have held that in order to invoke the *Glomar* doctrine, "an agency must 'tether' its refusal to respond . . . to one of the nine FOIA exemptions" and that "[i]n evaluating an agency's *Glomar* response, a court must accord 'substantial weight' to the agency's affidavits, 'provided [that] the justifications for nondisclosure are not controverted by contrary evidence in the record or by evidence of . . . bad faith." *Id.* at 68.

CONCLUSION: The 2nd Circuit joined their sister circuits in holding that "an agency may refuse to confirm or deny the existence of

records where to answer the FOIA inquiry would cause harm cognizable under a FOIA exception[.]" *Id.* at 68 (internal quotation marks omitted).

QUESTION TWO: Whether, in particular, "the [National Security Agency (NSA)] may invoke the *Glomar* doctrine in response to a [Freedom Of Information Act (FOIA)] request for records obtained under the Terrorist Surveillance Program." *Id.* at 64.

ANALYSIS: The court reasoned that the NSA's response to the request for information was properly tethered to FOIA Exemption 3, which "applies to records specifically exempted from disclosure by statute," because "acknowledging the existence or nonexistence of the [requested] information . . . would reveal the NSA's organization, functions, and activities, in contravention of . . . the National Security Act of 1959." *Id.* at 71–72 (internal quotation marks omitted). The court also gave substantial weight to the NSA's affidavits, as there was no "evidence that the NSA invoked the *Glomar* doctrine in order to conceal illegal or unconstitutional activities," nor did the court "have reason to believe that the NSA was acting in bad faith in providing a *Glomar* response." *Id.* at 77.

CONCLUSION: The 2nd Circuit held that the NSA properly invoked the *Glomar* doctrine in refusing to disclose records obtained under the Terrorist Surveillance Program. *Id.* at 77.

***Zhang v. Holder*, 2009 U.S. App. LEXIS 22699 (2d Cir. Oct. 16, 2009)**

QUESTION: Whether the Board of Immigration Appeals (BIA) "erred in rejecting [plaintiff's] attempts to invoke the state-created danger doctrine as a basis for relief" after her application for asylum, request for withholding of removal, and request for relief under the Convention Against Torture (CAT) were denied. *Id*. at *1, *3 (internal quotation marks omitted).

ANALYSIS: The court noted that plaintiff's argument that the BIA should have invoked the state-created danger doctrine as a basis for relief raised an issue of first impression in the 2nd Circuit. *Id*. at *3. The court, however, saw "no reason to disagree with the BIA's conclusion, which relies on cases holding that the state-created danger doctrine does not apply in immigration proceedings." *Id*.

CONCLUSION: The 2nd Circuit held that it "will not disturb the BIA's conclusion" regarding the inapplicability of the state-created danger doctrine to immigration proceedings. *Id*.

***Ascencio-Rodriguez v. Holder*, 595 F.3d 105 (2d Cir. 2010)**

QUESTION ONE: "Whether a conviction for illegal entry is a formal, documented process pursuant to which an alien is determined to be inadmissible [under 8 U.S.C. § 1229b(b)]." *Id.* at 107 (internal quotation marks omitted).

ANALYSIS: The court acknowledged "the statute under which [appellant] was convicted, 8 U.S.C. § 1325(a)(1) . . . makes no reference to *admissibility*," but pointed out that "its language almost mirrors the definition of *inadmissibility* contained in 8 U.S.C. § 1182(a)(6)(A)(i)." *Id.* at 113 (emphasis in original). "Accordingly, his conviction following his plea of guilty constituted an admission to facts that rendered him inadmissible under § 1182(a)(6)(A)(i)."

CONCLUSION: The 2nd Circuit held that "the decisions of the Board of Immigration Appeals are reasonable interpretations of 8 U.S.C. § 1229b and entitled to *Chevron* deference[.]" *Id.* at 115.

QUESTION TWO: If such conviction does satisfy 8 U.S.C. § 1229b(b), "whether such a process interrupts an alien's continuous physical presence in the United States" for the purpose of that statute. *Id.* at 107.

ANALYSIS: The court first noted that "the [Board of Immigration Appeals' (BIA)] interpretation of the cancellation removal statute . . . is reasonable and entitled to *Chevron* deference." *Id.* at 112. Accordingly, the court adopted the BIA's holding that "it would be contrary to the overall objectives of the [Illegal Immigration Reform and Immigrant Responsibility Act of 1996] to allow an alien to continue to accrue time for purposes of obtaining relief after the alien departs under a formal order of deportation or removal, or under the threat of such an order." *Id.* at 111 (internal quotation marks omitted).

CONCLUSION: The 2nd Circuit held that "petitioner's conviction for illegal entry in violation of 8 U.S.C. § 1325(a)(1) constituted a formal, documented process which . . . terminated his continuous physical presence in the United States within the meaning of 8 U.S.C. § 1229b(b)(1)." *Id.* at 115 (internal quotation marks omitted).

***Reiseck v. Universal Communs. of Miami, Inc.*, 591 F.3d 101 (2d Cir. 2010)**

QUESTION: "Whether advertising salespersons are administrative employees for the purposes of the exemptions to the FLSA's overtime pay provisions . . . ." *Id*. at 106.

ANALYSIS: The court reasoned that where an employee earns more than $250 per week, the "short test" applies. *Id*. at 105. The court further

noted that under the "short test," an employee falls under the exemption if the employee's "primary duty consists of . . . the performance of office or nonmanual work directly related to management policies or general business operations of his employer . . . and requires the exercise of discretion and independent judgment." *Id*. Furthermore, the court noted that the "Department of Labor describes 'directly related to management policies or general business operations' in several ways . . . [f]irst, the interpretive rules state that the phrase at issue 'describes those types activities relating to the administrative operations of a business as distinguished from 'production' or, in a retail or service establishment, 'sales work' . . . [t]hey also state that 'the phrase limits the exemption to persons who perform work of substantial importance to the management or operation of the business.'" *Id*. at 106.

CONCLUSION: The 2nd Circuit held that because "[an advertising salesperson's] primary duty [is] the sale of advertising space, [he or she] is properly considered a 'salesperson' for the purposes of the FLSA and therefore does not fall under the administrative exemption to the overtime pay provisions of the FLSA." *Id*. at 107.

***Weintraub v. Bd. of Educ.*, 593 F.3d 196 (2d Cir. 2010)**

QUESTION: Whether the First Amendment protects statements made by a "public employee act[ing] as an 'employee,' and not as a 'citizen,' when he notifies his supervisors, either formally or informally, of an issue regarding the safety of his workplace that touches upon a matter of public concern, as well as on the employee's own private interests." *Id.* at 200.

ANALYSIS: The court first noted a Supreme Court decision which held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 201. The court next determined whether speech that is not specifically required by a public employee's job duties is also insulated from Constitutional attack. *Id.* at 202. In light the Supreme Court decision, the court reasoned that "speech made 'pursuant to' a public employee's job duties as 'speech that owes its existence to a public employee's professional responsibilities.'" *Id.* at 201. Further, the court noted that the phrase "pursuant to" a government employee's official duties should not be construed too narrowly. *Id.* at 202. Finally, the court noted that "other circuit courts have concluded that speech that government employers have not expressly required may

still be 'pursuant to official duties,' so long as the speech is in furtherance of such duties." *Id.*

CONCLUSION: The 2nd Circuit held that "speech can be 'pursuant to' a public employee's official job duties even though it is not required by, or included in, the employee's job description, or in response to a request by the employer" and such speech is not protected under the First Amendment. *Id.* at 203.

***United States v. Walker*, 595 F.3d 441 (2d Cir. 2010)**

QUESTION: Whether, in deciding the "proper Sentencing Guidelines treatment of prior convictions for state common law crimes, . . . the modified categorical approach applicable in [the 2nd] Circuit to prior convictions for statutory offenses also applies to prior convictions for state common law crimes." *Id.* at 442.

ANALYSIS: The court reasoned that a two-step "modified categorical approach" has been established to determine "[w]hether a prior conviction following a guilty plea to a statutory offense is a qualifying predicate for a Guidelines enhancement." *Id*. The court acknowledged that the approach, by its terms, applied to statutory offenses; however, nothing suggested that "the analysis is different with respect to common law crimes, nor is there any reason in principle that it should be." *Id.* at 444. The court also noted that "criminal statutes often incorporate elements of common law offenses, and in these circumstances, [it has] looked to the common law to determine whether the prior conviction was a qualifying predicate offense." *Id*. Finally, the court agreed with the 9th Circuit, which held that "when a 'state crime is defined by specific and identifiable common law elements, rather than by a specific statute, the common law definition of a crime serves as a functional equivalent of a statutory definition.'" *Id*.

CONCLUSION: The 2nd Circuit held that "the modified categorical approach applicable in this circuit to prior convictions for statutory offenses also applies to prior convictions for state common law crimes." *Id.* at 442.

***United States v. Culbertson*, 598 F.3d 40 (2d Cir. 2010)**

QUESTION: Whether a defendant can pursue an interlocutory appeal of the trial court's denial of motion seeking new counsel and denial of motion requesting a psychiatric examination. *Id.* at 41.

ANALYSIS: The 2nd Circuit discussed "the rule of finality embodied in 28 U.S.C. § 1291," noting that there are certain exceptions to this rule where "discretionary jurisdiction is conferred upon courts of

appeals, pursuant to 28 U.S.C. § 1292(b), to consider interlocutory orders where the district judge is 'of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.'" *Id.* at 45. The court acknowledged that "the 'collateral order doctrine' was established to permit appeals from a limited class of orders 'which finally determine claims of right separable from, and collateral to, rights asserted in the action,' and 'too important' and 'too independent' of the cause of action to require entry of final judgment as a pre-condition." *Id*. The court found that "while the order [denying the appointment of new counsel] (1) does conclusively determine a disputed question and (2) resolves an issue completely separate from the merits of the prosecution, it is not (3) effectively unreviewable on appeal from a final judgment." *Id.* at 49. The court stated, "the claimed right to counsel here does not implicate . . . a right not to be tried on account of a violation of a constitutional or statutory protection." *Id*. Additionally, the court declared that it has never "directly determined that . . . an order denying a psychiatric examination is immediately appealable, although we have alluded to that question in dictum." *Id*. The court found that a ruling that the defendant is competent and must proceed to trial "could be effectively reviewed and remedied, if erroneous, on appeal from any final judgment . . ." *Id.* at 50.

CONCLUSION: The 2nd Circuit held that "an order denying the appointment of counsel does not fit within the collateral order doctrine so as to permit an interlocutory appeal." *Id.* at 49. Further, the 2nd Circuit held that "denial of a psychiatric examination, which is in effect a holding that [the defendant] is competent to stand trial and must proceed to trial, is not immediately appealable." *Id.* at 50.

THIRD CIRCUIT

P.P. v. West Chester Area Sch. Dist., 585 F.3d 727 (3d Cir. 2009)

QUESTION: "Whether the [Individuals with Disabilities in Education Act (IDEA)] two-year statute of limitations should apply to parallel claims under § 504 of the Rehabilitation Act." *Id.* at 735.

ANALYSIS: The court stated that "the IDEA and § 504 of the Rehabilitation Act do similar statutory work." *Id*. Recognizing that similarities between two statutes is generally insufficient to borrow a statute of limitation, the court stressed "that there are few federal statutes as closely related, and under which such similar claims may be brought,

as the IDEA and § 504 of the Rehabilitation Act." *Id*. at 735–36. Due to the close relationship between the IDEA and § 504 of the Rehabilitation Act, the court reasoned that it would "not make sense that the virtually identical claims made under these two statutes would be treated differently from a statute-of-limitations perspective." *Id*. at 736.

CONCLUSION: The 3rd Circuit held "that the IDEA's two-year statute of limitations applies to claims made for education under § 504 of the Rehabilitation Act." *Id.* at 737.

***Sheriff v. Att'y Gen. of the United States*, 587 F.3d 584 (3d Cir. 2009)**

QUESTION: Whether humanitarian asylum should be granted for past persecution if one can demonstrate reasons so compelling that such a relief was warranted pursuant to 8 C.F.R. § 208.13(b)(1)(iii). *Id.* at 588.

ANALYSIS: The court began its analysis by reviewing 8 C.F.R. § 208(b)(1)(iii), which states, in relevant part, that "an applicant who has suffered past persecution and who does not face a reasonable possibility of future persecution may be granted asylum if he or she has demonstrated 'compelling reasons for being unwilling or unable to return to that country arising out of the severity of the past persecution' . . . [or] . . . has established 'that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country[.]" *Id.* at 593. The 3rd Circuit looked to the 9th Circuit's standard which holds that "[a]bsent a likelihood of future persecution, asylum is warranted [under this subsection] only if [the applicant] demonstrates that in the past he or his family has suffered under atrocious forms of persecution." *Id.* at 594. The court also noted that the 4th and the 7th Circuit had "similarly reserved humanitarian asylum based on past persecution for the most atrocious abuse." *Id.*

CONCLUSION: The 3rd Circuit held that humanitarian asylum is allowed only "where there are compelling reasons related to the severity of the past persecution," and reasonable possibility of facing serious harm upon return to the country. *Id.* at 595–96.

***United States v. Fullmer*, 584 F.3d 132 (3d Cir. 2009)**

QUESTION: Whether the Animal Enterprise Protection Act (AEPA) is unconstitutionally vague such that it has a "chilling effect" on speech and violates the Due Process Clause and the First Amendment. *Id.* at 151.

ANALYSIS: The AEPA proscribes "physical disruptions" of animal enterprises when there is intent to cause "economic damage." *Id.* at 152. "The definitions section of the AEPA states that 'physical disruption'

does not include any lawful disruption that results from lawful public, governmental, or animal enterprise employee reaction to the disclosure of information about an animal enterprise." *Id.* The court noted that "the term 'physical disruption' has a well-understood, common definition," and "the government must present the trier of fact with evidence that establishes that, beyond a reasonable doubt, the accused had the requisite intent to disrupt the functioning of an animal enterprise," both of which led the court to conclude that the statute is not fatally vague. *Id.* at 153.

CONCLUSION: The 3rd Circuit held that the AEPA is not void for vagueness and is not unconstitutional. *Id.* at 158.

***J.S. v. Blue Mt. Sch. Dist.*, 593 F.3d 286 (3d Cir. 2010)**

QUESTION: Whether the *Tinker* standard applies to student Internet speech that occurs outside of school and during non-school hours. *Id*. at 298.

ANALYSIS: The 3rd Circuit first invoked *Tinker*'s language, noting that students and teachers do not necessarily "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 295. However, the court also acknowledged that the Supreme Court has "repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Id*. at 296. In mediating between these two principles, the 3rd Circuit declined to specifically decide "whether a school official may discipline a student for her lewd, vulgar, or offensive off-campus speech that has an effect on-campus" because such a question is properly governed by *Tinker*. *Id.* at 298.

CONCLUSION: The 3rd Circuit held that "*Tinker* applies to student speech, whether on- or off-campus, that causes or threatens to cause a substantial disruption of or material interference with school or invades the rights of other members of the school community." *Id.* at 307–08.

FOURTH CIRCUIT

***In re Crescent City Estates, LLC*, 588 F.3d 822 (4th Cir. 2009)**

QUESTION: "[W]hether 28 U.S.C. § 1447(c) permits the imposition of legal fees on an attorney who erroneously removes a case from state to federal court." *Id.* at 824.

ANALYSIS: The court noted that there is a presumption that "[w]hen a fee-shifting statute does not explicitly permit a fee award against counsel, it prohibits it" and that such a presumption had not been overcome in this case. *Id.* at 825. The court then reasoned that even

though § 1447(c) amends the American rule – "parties bear their own legal costs" – to permit fee-shifting from the prevailing party to the losing party, the statute's "[t]ext nor its legislative history is sufficient to overcome the American Rule's presumption that parties rather than attorneys are liable for attorneys' fees." *Id.* at 825–26. The court further stated that "[t]he Supreme Court and other circuits have interpreted fee-shifting statutes with text materially indistinguishable from that of § 1447(c) to be inapplicable to counsel." *Id.* at 828. Finally, the court concluded that a contrary decision will "generate more collateral litigation," "pit lawyer and client against each other," "chill the right of removal," and "transform what it means to practice law." *Id.* at 829–30.

CONCLUSION: The 4th Circuit held that 28 U.S.C. § 1447(c) does not permit the imposition of legal fees upon an attorney who erroneously removes a case from state to federal court. *Id.* at 831.

***United States v. Hairston*, 2010 U.S. App. LEXIS 2386 (4th Cir. Feb. 4, 2010)**

QUESTION: Whether "a state [may] retroactively strip a felon of a previously restored right to possess firearms," and if so, whether that act "revive[s] a previously negated predicate conviction for purposes of applying a sentencing enhancement under sections 922(g)(1) and 924(e)" of North Carolina's Felony Firearms Act (NCFFA). *Id* at *7–8.

ANALYSIS: With regard to the first issue, the 4th Circuit recognized that constitutional claims under the Ex Post Facto Clause are governed by a two-part test. *Id*. at *7. First, a court must "ask whether the legislature's intent was to impose a punishment or merely enact a civil or regulatory law." *Id*. at *8. The second step requires a court to "determine whether the disability is so punitive in fact as to negate any civil or regulatory intent." *Id.* (internal quotation marks omitted). The court looked to persuasive case law in finding the North Carolina statute constitutional. *Id.*

Assuming a state's power to retroactively strip a felon of a previously restored right to possess firearms, the 4th Circuit next queried whether "stripping a restored right to possess firearms effectively revives a previously negated predicate conviction" under the NCFFA. *Id.* at *12. The court looked to an analogous Illinois felon in possession law, and adopted the 7th Circuit's logic that past "convictions were once again available" for sentencing enhancements one the restored right had been stripped. *Id*. at *13–14.

CONCLUSION: The 4th Circuit held that a state statute which retroactively strips a felon of a previously restored right to possess

firearms is constitutional. *Id.* at *8. The 4th Circuit further concluded that such an act also revives previously negated corresponding convictions for purposes of sentencing enhancement under the NCFFA. *Id.* at *14.

FIFTH CIRCUIT

In re Ford Motor Co., 591 F.3d 406 (5th Cir. 2009)

QUESTION: Whether a circuit court can grant a writ of mandamus directing a district court to reconsider a pretrial multidistrict litigation (MDL) decision. *Id.* at 410.

ANALYSIS: The court addressed this issue in two parts. *Id.* First, the court adopted the view that "transferor courts should use the law of the case doctrine to determine whether to revisit a transferee court's decision." *Id.* at 411. Therefore, "a successor judge has the same discretion to reconsider an order as would the first judge, but should not overrule the earlier judge's order or judgment merely because the later judge might have decided matters differently." *Id.* Next, in addressing whether it could properly grant mandamus given the procedural posture of the case, the court noted that "[t]he law of the case doctrine requires that courts not revisit the determinations of an earlier court unless (i) the evidence on a subsequent trial was substantially different, (ii) controlling authority has since made a contrary decision of the law applicable to such issues, or (iii) the decision was clearly erroneous and would work . . . manifest injustice." *Id.* at 412 (internal quotation marks omitted). Finding a clearly erroneous decision working manifest injustice, the court found that the "the transferor court should have reconsidered the MDL court's . . . decision." *Id.* at 414.

CONCLUSION: The 5th Circuit held that it could issue a writ of mandamus on a district court's refusal to reconsider a pretrial MDL decision. *Id.*

Schaefer v. Superior Offshore Int'l, Inc., 591 F.3d 350 (5th Cir. 2009)

QUESTION: "Whether the Bankruptcy Code requires a Chapter 11 plan to provide an explicit conversion mechanism between subordinated securities claims and equity interests." *Id.* at 354.

ANALYSIS: The court first determined that, in the present case, the "interrelation" of the subordinated securities claims and equity interests was "contingent and presently knowable." *Id.* The court then reasoned that a "court's decision to approve a plan that provides . . . for statutorily correct pro rata treatment of [subordinated securities claims] and [equity interests], adjudicated in an adversary proceeding if necessary, furnished adequate specificity and complied with [the Bankruptcy Code]." *Id.*

CONCLUSION: The 5th Circuit held that "[d]espite the uncertainty and lack of an articulated ex ante formula . . . there is no impediment to confirming a reorganization plan with unsecured claims treated in this way." *Id.* at 355.

***United States v. Young*, 585 F.3d 199 (5th Cir. 2009)**

QUESTION: Whether the Sex Offender Registration and Notification Act (SORNA) violates the constitutional right to be free from ex post facto punishment because it requires registration for crimes committed before its enactment and imposes sanctions for failing to register. *Id.* at 202–04.

ANALYSIS: Regarding sanctions, the court noted that, "[o]n its face, SORNA does not purport to punish sex offenders for their old crimes; instead, the government can only punish sex offenders for currently failing to register." *Id.* at 203 (emphasis omitted). Regarding the registration requirement, the court indicated that the Ex Post Facto Clause was violated only if the legislature's regulatory scheme was "punitive" rather than "civil." *Id.* at 204. The court found that SORNA's "express language indicates that Congress sought to create a civil remedy" and that there was no evidence that Congress intended the regulation to be punitive in design or effect. *Id.* at 205.

CONCLUSION: The 5th Circuit held that SORNA does not violate the constitutional right to be free from ex post facto punishment. *Id.* at 206.

***Trinity Universal Ins. Co. v. Employers Mut. Cas. Co.*, 592 F.3d 687 (5th Cir. 2010)**

QUESTION: Whether insurance companies that "[over]pay [in a pro rata insurance claim] defense costs may recoup a portion of those costs from a co-insurer that fails to defend a common insured." *Id.* at 689.

ANALYSIS: The court explained that the "Texas courts have repeatedly affirmed that an insurer's duty to defend is separate from and broader than its duty to indemnify." *Id*. at 694. The court found that the insurer had a duty to defend based on "uniform holdings of Texas courts that if even a single claim in a lawsuit potentially falls within an insurance policy's coverage, the insurer has a duty to provide a *complete* defense." *Id.* at 695. The court determined that the plaintiff insurance companies made compulsory payments beyond their fair share. *Id.*

CONCLUSION: The 5th Circuit affirmed the defendant insurance company's duty to defend common insured and that plaintiff-appellants

"are entitled to collect a proportionate share of defense costs" from defendant. *Id.* at 696.

***Chaney v. Dreyfus Serv. Corp.*, 595 F.3d 219 (5th Cir. 2010)**

QUESTION: Whether insurance companies are considered bank customers in the context of a negligence claim, and thus can be afforded protection under state tort law. *Id.* at 231.

ANALYSIS: The court noted that the duties on financial organizations depend on whether the claimant is a customer or a third party. *Id.* at 229. Further, the court noted that the imposition of a duty is a question of public policy. *Id.* at 231. The court recognized that "it is clearly the fear of imposing on banks endless, unpredictable liability that drives [the state's] distinction between a bank's customers and non-customers." *Id*. The court posited that there is no risk in imposing duties on the insurance companies as customers for three reasons. *Id*. First, the "funds in the accounts were registered to the insurance companies." *Id.* Second, the "addresses and taxpayer identification numbers utilized in opening the accounts made it abundantly clear that the named [insurance companies] were separate and distinct [from the holding company]." *Id.* Third, the insurance companies received "monthly statements and confirmations of account activity." *Id*. Thus, the court determined that "imposing the limited duties of care flowing to customers would hardly be crippling [to insurance companies]; nor would it 'unreasonably expand' banks' 'orbit of duty.'" *Id.*

CONCLUSION: The 5th Circuit held that insurance companies can qualify as a customers and "access the protections afforded to that status under [state] tort law, if it opens the account itself or has some equivalently direct personal relationship with the financial institution." *Id*. at 232.

***Adar v. Smith*, 597 F.3d 697 (5th Cir. 2010)**

QUESTION: Whether "Louisiana owes full faith and credit to the subject New York adoption decree." *Id.* at 703.

ANALYSIS: The court first noted that the Clause is different from *res judicata* because *res judicata* is a *voluntary* restraint by a forum state from exercising its power so as to respect the judgment of another state, whereas "the Clause is a *mandatory*, constitutional curb on every state's sovereign power" and "[w]ith respect to judgments (although not to statutes), a state as a rule *has no discretion* to disregard a decision of another state on a matter over which that other state is competent to exercise jurisdiction." *Id.* at 710 (emphasis in original). The court then

reasoned that although "[t]here are limited exceptions to the mandate of the [Clause] that look behind the judgment to original court proceedings," these exceptions are "inapplicable here and are not advanced by the Registrar." *Id*. The court noted that "Louisiana owes 'exacting' full faith and credit to the New York adoption decree." *Id.* at 711. Finally, the court reasoned that the opponent's proffered argument "that adoption decrees are fundamentally different kinds of judgments and are not owed full faith and credit" was similar to other arguments that "have either been rejected by those courts that have considered them or simply reflect a fundamental misapprehension of the law and the Constitution." *Id.*

CONCLUSION: The 5th Circuit held that "under the Full Faith and Credit Clause of the Constitution of the United States, Louisiana owes full faith and credit to the New York adoption decree. . . ." *Id.* at 719 (emphasis omitted).

SIXTH CIRCUIT

***Longaberger Co. v. Kolt*, 586 F.3d 459 (6th Cir. 2009)**

QUESTION: Whether the equitable doctrine of judicial estoppel is applicable when "a party argues an inconsistent position based on a change in controlling law." *Id.* at 470–71.

ANALYSIS: The court began by stating that judicial estoppel is "an equitable doctrine that preserves the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposite to suit an exigency of the moment." *Id.* at 470. The court reasoned that judicial estoppel "is applied with caution to avoid impinging on the truth-seeking function of the court . . . ." *Id.* The court then noted that the 2nd, 3rd, 4th, 7th and 9th Circuits have held that "judicial estoppel is inappropriate when a party is merely changing its position in response to a change in the law." *Id.* The court also noted that the 10th Circuit has held that "judicial estoppel bars changes in factual positions and does not extend to inconsistent opinions or legal positions." *Id.*

CONCLUSION: The 6th Circuit, in adopting the position of its sister circuits, held that "judicial estoppel is not applicable where a party argues an inconsistent position based on a change in controlling law." *Id.*

***Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917 (6th Cir. 2009)**

QUESTION: Whether "the act of incorporation under Section 17 [of 25 U.S.C. 477] divests entities of their tribal-sovereign immunity." *Id.* at 920.

ANALYSIS: The court recognized that "the statute [25 U.S.C. 477] is silent as to whether Section 17 incorporated tribes have sovereign immunity." *Id*. The court first noted that a tribe's immunity will remain intact "unless Congress abrogates a tribe's immunity, or the tribe waives its immunity." *Id.* at 921. Furthermore, Supreme Court precedent instructed "that abrogation of tribal-sovereign immunity must be clear and may *not* be implied." *Id.* (emphasis in original). The court further reasoned that "statutes are to be construed liberally in favor of the Indians, or [tribes] with ambiguous provisions being interpreted to their benefit." *Id.*

CONCLUSION: The 6th Circuit held that incorporated tribes "do not automatically forfeit tribal-sovereign immunity." *Id*.

***Mich. Am. Fedn. of State County v. Matrix Human Servs.*, 589 F.3d 851 (6th Cir. 2009)**

QUESTION: "[W]hether a defendant who successfully obtains dissolution of a temporary restraining order or preliminary injunction in a labor dispute case may recover its damages, fees and costs under section seven of the Norris-LaGuardia Act . . . if no bond was ordered prior to dissolution of the injunction." *Id.* at 853.

ANALYSIS: The court first asserted that "[i]t is fundamental in our civil system that each party to a lawsuit bears its own costs unless a statute or agreement provides otherwise." *Id.* at 857. Applying this policy to the Norris-LaGuardia Act, the court found this statute requires a bond for recovery. *Id*. at 858. Next, the court recognized Supreme Court precedent that "a party injured by the issuance of an injunction later determined to be erroneous has no action for damages in the absence of a bond." *Id*.

CONCLUSION: The 6th Circuit held "that section seven of the Norris-LaGuardia Act allows recovery only in relation to a bond set according to the conditions in the act." *Id.*

***United States v. Martinez*, 588 F.3d 301 (6th Cir. 2009)**

QUESTION: Whether proximate cause is the appropriate standard to apply in determining whether a health care fraud violation results in death. *Id.* at 317.

ANALYSIS: The court considered the 1st Circuit's holding that under 18 U.S.C. § 242, another health care fraud statute, the

"[r]equirement for enhanced punishment is met when the defendant's willful violation of the statute is a 'proximate cause' of the victim's death. . . ." *Id.* at 317–18. The court then noted that the 1st Circuit found that "[p]roximate cause can be demonstrated where death was the 'natural and foreseeable' result of the defendant's conduct." *Id.* at 318. The court further reasoned that "Congress was aware of principles of legal causation when it determined that a health care fraud 'violation [that] results in death' warrants an enhanced penalty." *Id.*

CONCLUSION: The 6th Circuit held that "proximate cause is the appropriate standard to apply in determining whether a health care fraud violation 'results in death.'" *Id.* at 318–19.

***United States v. Washington*, 584 F.3d 693 (6th Cir. 2009)**

QUESTION: Whether the district court has authority to reduce a sentence beyond the retroactive United States Sentencing Guidelines as amended. *Id.* at 694.

ANALYSIS: "A district court may modify a defendant's sentence only as provided by statute." *Id.* at 695. 18 U.S.C. § 3582(c)(2) limits the calculation of sentence ranges to the U.S. Sentencing Guidelines Manual § 1B1.10(b)(1). *Id.* at 696. The new policy statement accompanying § 3582(c)(2) "provides that the sentencing court may not reduce a sentence below the Guidelines range . . . ." *Id.*

CONCLUSION: The 6th Circuit held that a district court has no authority to reduce defendant's sentence below the amended Guidelines range. *Id.* at 701.

***Asher v. Unarco Material Handling, Inc.*, 596 F.3d 313 (6th Cir. 2010)**

QUESTION: "[W]hether Rule 15(c) [of the Federal Rules of Civil Procedure] permits relation back of an amendment adding otherwise untimely plaintiffs and their claims to a timely-filed complaint." *Id.* at 317.

ANALYSIS: The court first noted that circuit precedent "clearly holds that an amendment which adds a new party creates a new cause of action and there is no relation back to the original filing for purposes of limitations." *Id.* at 318. Next, the court examined the plain language of the statute. *Id*. The court then reviewed decisions that applied relation-back provisions of 15(c) in the case of misnomers or misdescriptions. *Id*. Finally, the court noted decisions by the 2nd Circuit and the District of Columbia Circuit involving attempts by plaintiffs "to invoke Rule 15(c)'s relation-back provision under these circumstances." *Id.* at 319.

CONCLUSION: The 6th Circuit held that Rule 15(c) does not permit relation back of an amendment adding otherwise untimely plaintiffs and their claims to a timely-filed complaint. *Id.* at 318.

***EEOC v. Hosanna-Tabor Evangelical Lutheran Church and School*, 597 F.3d 769 (6th Cir. 2010)**

QUESTION: "[W]hether a teacher at a sectarian school classifies as a ministerial employee . . ." under the Americans with Disabilities Act (ADA). *Id.* at 778.

ANALYSIS: The vast majority of other courts to consider the issue have held that "parochial school teachers . . . who teach primarily secular subjects, do not classify as ministerial employees for purposes of the exception." *Id*. Teachers who teach primarily religious courses or have a "central role in the spiritual or pastoral mission of the church" can be classified as ministerial employees. *Id*. at 779.

CONCLUSION: The 6th Circuit held that a teacher does not qualify as a ministerial employee unless his or her primary function is to teach religious courses or play a major part in the spiritual mission of the church. *Id.* at 782.

SEVENTH CIRCUIT

***In re Sprint Nextel Corp.*, 593 F.3d 669 (7th Cir. 2010)**

QUESTION: Whether CAFA requires the plaintiffs to document more than general state citizenship of the members of the proposed class to satisfy the home state exception requirement and avoid removal to federal court. *Id.* at 671.

ANALYSIS: The court determined that the citizenship of class members cannot merely be based on phone numbers and mailing addresses. *Id.* at 675. Rather, the court noted two ways in which citizenship can be plead such that the home state exception would be met. *Id*. First, the plaintiffs can document state citizenship of a sample of the population, evidenced by "affidavits or survey responses in which putative class members reveal whether they intend to remain in [the state] indefinitely" and the court can rely on "statistical principles to reach a conclusion as to the likelihood that two-thirds or more of the proposed class members are citizens of [the state]." *Id.* at 676. Alternatively, the plaintiffs can define the class as all [state] citizens who purchased text messaging from the defendant or an alleged coconspirator in order to remain in state court. *Id*.

CONCLUSION: The 7th Circuit held that CAFA requires more than simply documenting general state citizenship to meet the home state

exception requirement allowing the lawsuit to remain in state court. *Id.* at 674.

***Helcher v. Dearborn County*, 595 F.3d 710 (7th Cir. 2010)**

QUESTION: What constitutes an "adequate writing" under the Telecommunications Act. *Id*. at 717.

ANALYSIS: The 7th Circuit recognized three varying approaches to interpreting the writing requirement of the Telecommunications Act. First, the court found that some courts explicitly require that "local governments explicate the reasons for their decisions and link their conclusions to specific evidence in the record." *Id.* at 717–18. By contrast, the court also acknowledged the 4th Circuit's perspective that a writing need not include a statement of "findings and conclusion, and the reason or basis thereof." *Id*. at 718. Finally, the court recognized that the 1st, 6th, and 9th Circuits have struck a balance "between a dubious, literal reading of the Act and a pragmatic, policy-based approach," concluding that the purpose of the "'in writing' requirement is to allow for meaningful judicial review . . . ." *Id.*

CONCLUSION: The 7th Circuit joined the 1st, 6th, and 9th Circuits in holding that the "'in writing' requirement is met so long as the written decision contains a sufficient explanation of the reasons for the permit denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons." *Id*.

EIGHTH CIRCUIT

***Casey v. FDIC*, 583 F.3d 586 (8th Cir. 2009)**

QUESTION: Whether federal regulation 12 C.F.R. § 560.2, promulgated by the Office of Thrift Supervision (OTS), only preempts state laws that facially impose requirements upon lenders or if the statute also preempts state laws that, as applied, impose requirements on lenders. *Id.* at 593.

ANALYSIS: The court first examined the 9th Circuit's as applied analysis of two California statutes addressing unfair advertising and competition. *Id.* The 9th Circuit held that even though the statutes did not facially place requirements on lending, the statues as applied fell within the description of § 560.2(b) and were therefore preempted by the regulation. *Id.* The court then referenced OTS advisory opinions, noting that "a state law that *on its face* is not one described in § 560.2(b) may nevertheless be preempted if, *as applied*, it fits within §560.2(b)." *Id.* at 594 (emphasis in original). Finally, the court stated that the OTS's interpretation of its regulation is entitled to deference. *Id.*

CONCLUSION: The 8th Circuit held that "a state law that either on its face or as applied imposes requirements regarding the examples listed in § 560.2(b) is preempted." *Id.* at 595.

***Wheeler v. Pilgrim's Pride Corp*., 591 F.3d 355 (8th Cir. 2009)**

QUESTION: Whether "a plaintiff must prove an adverse effect on competition in order to prevail" under § 202 of the Packers and Stockyards Act (PSA), 7 U.S.C. § 192. *Id.* at 357.

ANALYSIS: The court started by citing to the Supreme Court's observation that the object of the PSA "was to secure the flow of livestock from the farms and ranges to the slaughtering center and into meat products unburdened by collusion that unduly lowered the prices to the shipper and unduly increased the price to the consumer." *Id.* at 358. The court noted that every circuit that has addressed the issue has held that proof of an anticompetitive effect is a necessary factor to prevail under the PSA. *Id.* at 362. The court reasoned that "given the clear antitrust context in which the PSA was passed, the placement of [§ 192] among other subsections that clearly require anticompetitive intent or effect, and the nearly ninety years of circuit precedent, a failure to include the likelihood of an anticompetitive effect as a factor actually goes against the meaning of the [PSA]." *Id.* at 363.

CONCLUSION: The 8th Circuit held that in order to support a claim that a practice violates § 192 of the PSA, "there must be proof of injury, or likelihood of injury, to competition." *Id.*

NINTH CIRCUIT

***Alvarado v. Cajun Operating Co*., 588 F.3d 1261 (9th Cir. 2009)**

QUESTION: Whether "compensatory and punitive damages are available for [Americans with Disabilities Act (ADA)] retaliation claims" under 42 U.S.C. § 1981a. *Id.* at 1265.

ANALYSIS: The court first observed the 7th Circuit's analysis of the issue which held that "[b]ecause the plain language of § 1981a(a)(2) limits its application to specific claims, it is inappropriate to expand the scope of the statute in reliance on legislative history to include claims for retaliation by an employer under the ADA." The court approved the 7th Circuit's analysis, itself noting that "[t]he text of section 1981a is not ambiguous [but rather] explicitly delineates the specific statutes under the ADA for which punitive and compensatory damages are available." *Id.* at 1268. The court subsequently concluded that section 1981a "limits its remedial reach to ADA discrimination claims, and does not incorporate ADA retaliation claims . . . ." *Id.*

CONCLUSION: The 9th Circuit followed the 7th Circuit and held that "the plain and unambiguous provisions of 42 U.S.C. § 1981a limit the availability of compensatory and punitive damages to those specific ADA claims listed." *Id.* at 1268–69.

***Boose v. Tri-County Metro. Transp. Dist. Of Or.*, 587 F.3d 997 (9th Cir. 2009)**

QUESTION: Whether under the American Disabilities Act and Rehabilitation Act, the local paratransit program must accommodate the plaintiff pursuant to a Department of Justice (DOJ) "regulation requiring public entities to make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability." *Id.* at 1000.

ANALYSIS: The court began by stating that the "Secretary of Transportation has the sole authority to issue final regulations to carry out [the provision]." *Id.* at 1001. The court denied plaintiff's assertion that the DOJ's rules should govern the level of services that the paratransit program is required to provide. *Id.* at 1002. The court further stated that the DOJ's "reasonable modification regulation does not, and cannot, apply by its own independent force." *Id.* The court refused to expand the DOJ's jurisdiction "beyond the limits established by its enabling statute." *Id.* at 1003. The court then noted that the Secretary of Transportation has "decided that paratransit systems should make reasonable modifications to be considered comparable, [although] he has yet to issue the final rules that would impose such a requirement." *Id.* at 1005.

CONCLUSION: The court held that it is outside the DOJ's scope of authority to determine whether the local paratransit program is adequate and instead held that it is in the Secretary of Transportation's "sole authority to determine the level of services that paratransit systems must provide to be considered comparable." *Id.* at 1005.

***Bosack v. Soward*, 586 F.3d 1096 (9th Cir. 2009)**

QUESTION: "Whether or not the *functus officio* doctrine may be applied to an interim award." *Id.* at 1003.

ANALYSIS: The 8th Circuit determined that an interim award may be final for *functus officio* if the award states that it is final, and the arbitrator intended it to be final. *Id.* The court adopted the 8th Circuit's criteria. *Id*.

CONCLUSION: The 9th Circuit held that when an award is expressly made final by the arbitrator is it deemed final for *functus officio*. *Id.*

***Burke v. County of Alameda*, 586 F.3d 725 (9th Cir. 2009)**

QUESTION: Whether an individual's right of familial association under the Fourteenth Amendment attaches when the child does not live with the parent. *Id.* at 733.

ANALYSIS: The court noted "non-custodial parents have a reduced liberty interest in the companionship, care, custody, and management of their children." *Id.* The court acknowledged "interest is unambiguously lesser in magnitude than that of a parent with full legal custody." *Id*. The court found the noncustodial parent had a reduced interest but the parent was not without any interest in the custody and management of the child. *Id*.

CONCLUSION: The 9th Circuit held that the right attaches "regardless of whether they also possess physical custody of their children." *Id*.

***Cal. Energy Comm'n v. Doe*, 585 F.3d 1143 (9th Cir. 2009)**

QUESTION: Whether the 9th Circuit, under the Energy Policy and Conservation Act (EPCA), has jurisdiction to review the U.S. Department of Energy's denial of a preemption waiver. *Id*. at 1146.

ANALYSIS: Having denied the California Energy Commission's (CEC) request for a waiver of preemption under the EPCA, the Department of Energy challenged the 9th Circuit's jurisdiction to review its decision. *Id.* The circuit court first held that the denial of the waiver of preemption left the CEC "adversely affected by a rule prescribed under [42 U.S.C. § 6295] within the meaning of § 6306(b), which confers jurisdiction on the circuit courts of appeals." *Id*. at 1148. Additionally, the court determined that "[c]onsiderations of practicality and consistency with the congressional scheme also militate in favor of review by the court of appeals." *Id*. at 1148–49. Lastly, the court held that Department of Energy's "denial of a waiver of preemption falls into the category of [r]ulemaking proceedings [which do not] necessitate additional factfinding by a district court to effectuate the review process." *Id*. at 1149.

CONCLUSION: The 9th Circuit held that it had proper "jurisdiction to entertain CEC's petition for review." *Id*. at 1150.

***Greene v. Camreta*, 588 F.3d 1011 (9th Cir. 2009)**

QUESTION: Whether a caseworker and deputy sheriff, who were "concerned for the well-being of two young girls," violated the Fourth Amendment "when they seized and interrogated a minor in a private office at her school for two hours without a warrant, probable cause, or parental consent." *Id.* at 1015.

ANALYSIS: The court acknowledged that it has "yet to address the principles governing the in-school seizure of a suspected child abuse victim." *Id.* at 1022. The court stated that it had "previously held that the warrantless, non-emergency search and seizure of an alleged victim of child sexual abuse at her home violates the Fourth Amendment." *Id.* The court declined to differentiate between whether the seizure and interrogation took place at home or at school and held that traditional "Fourth Amendment protections apply to child abuse investigations." *Id.* at 1022-23. The court noted that "although the crime of child sexual abuse 'may be heinous . . .[this] does not provide cause for the state to ignore the rights of the accused or any other parties.'" *Id.* at 1023.

CONCLUSION: The 9th Circuit applied the "traditional Fourth Amendment requirements, [and held] the decision to seize and interrogate [the minor] in the absence of a warrant, a court order, exigent circumstances, or parental consent was unconstitutional." *Id.* at 1030.

***Jeffredo v. Macarro*, 590 F.3d 751 (9th Cir. 2009)**

QUESTION: "Whether habeas relief under [§ 1303 of the Indian Civil Rights Act, (ICRA)] can be granted in a non-criminal context." *Id.* at 759.

ANALYSIS: The court took note of the Supreme Court's holding "that habeas corpus under the ICRA is the exclusive means for federal-court review of tribal criminal proceedings." *Id.* at 760 (internal quotation marks omitted). The court also noted that "[t]he [Supreme] Court has also found that Congress considered and rejected proposals for federal review of alleged violations of the [ICRA] arising in a civil context." *Id.* (internal quotation marks omitted). The court went on to explain that "[i]n interpreting § 1303, courts should hesitate to so expand the meaning of criminal and detention such that, as a practical matter, all tribal decisions affecting individual members in important areas of their lives become subject to review in federal court. Such a result would be inconsistent with the principle of broad, unreviewable tribal sovereignty in all but criminal cases involving physical detention." *Id.* (internal quotation marks omitted). Additionally, "[g]iven the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of

action that would intrude on these delicate matters." *Id.* (internal quotation marks omitted).

CONCLUSION: The 9th Circuit held that habeas relief is not available under the ICRA in non-criminal cases. *Id.*

***Parth v. Pomona Valley Hosp. Med. Ctr.*, 584 F.3d 794 (9th Cir. 2009)**

QUESTION: Whether "[w]hen an employer changes its shift schedule to accommodate its employees' scheduling desires, the mere fact that pay rates changed, between the old and new scheduling schemes in an attempt to keep overall pay revenue-neutral . . . establish[es] a violation of the Fair Labor Standards Act's ('FLSA's') overtime pay requirements." *Id.* at 796.

ANALYSIS: The court stated that because this was an issue of first impression for the court, it agreed with "the district court's approach and use[d] Supreme Court precedent on pre-FLSA pay plan alterations for guidance on how to proceed under the facts . . . ." *Id.* at 800. The court noted that the Supreme Court had previously found that "nothing in the [FLSA] bars an employer from contracting with his employees to pay them the same wages that they received previously, so long as the new rate equals or exceeds the minimum rate required by the FLSA." *Id.* Further, 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). The court found that the employees could not cite any relevant case law to support the argument that the employer "cannot respond to its employees' requests for an alternative work schedule by adopting the sought-after schedule and paying the employees the same wages they received under the less-desirable schedule." *Id.*

CONCLUSION: The 9th Circuit concluded that "the arrangement between [the employer and employees] does not violate the FLSA, because it is not prohibited under the statute, and it does not contravene the FLSA's purpose." *Id.* at 801.

***Pedroza v. Benefits Review Bd.*, 583 F.3d 1139 (9th Cir. 2009)**

QUESTION: Whether psychological injuries resulting from legitimate personnel actions are compensable under the Longshore and Harbor Worker's Compensation Act (Longshore Act). *Id.* at 1144.

ANALYSIS: "The Longshore Act provides that '[c]ompensation shall be payable under this Act in respect to disability . . . of an employee, but only if the disability . . . results from an injury.'" *Id.* at

1145. Moreover, "the injury must be work-related." *Id.* The court observed that "[t]he Act was designed to provide compensation for maritime workers who were injured while working on navigable waters in the course of their employment." *Id.* The court reasoned that extending protection to psychological injury from legitimate personnel decisions "would create a trap for the 'unwary' employer and undermine the interest of employers and employees alike." *Id.*

CONCLUSION: The 9th Circuit held that "psychological injuries arising from legitimate personnel actions are not compensable under the Longshore Act." *Id.* at 1147.

***Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2009)**

QUESTION: Whether a ballot initiative advocacy group must comply with a government request for production of documents including "internal campaign communications relating to campaign strategy and advertising," or if said group has a right of nondisclosure under the First Amendment. *Id.* at 1152.

ANALYSIS: The party asserting the right of nondisclosure must make a prima facie showing "'that enforcement of the [discovery requests] will result in (1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or 'chilling' of, the members' associational rights.'" *Id.* at 1161. The court determined that since "compelled disclosure of internal campaign communications" might "chill[] participation and . . . mut[e] the internal exchange of ideas," the First Amendment privilege applied. *Id.* at 1163. With this prima facie showing, the burden shifted to the government to "demonstrat[e] an interest in obtaining the disclosures it seeks . . . which is sufficient to justify the deterrent effect . . . on the free exercise . . . of [the] constitutionally protected right of association." *Id.* at 1162. The court conceded that although "the information [sought] is reasonably calculated to lead to the discovery of admissible evidence on the issues of voter intent and the existence of a legitimate state interest," the existence of "other sources of information," meant that the government had not "shown a sufficient need for the information." *Id.* at 1164.

CONCLUSION: The 9th Circuit concluded that the government's "intrusion on First Amendment interests" of protection from "disclosures concerning . . . political associations" are too substantial to survive exacting scrutiny. *Id.* at 1165.

***Robinson v. United States*, 586 F.3d 683 (9th Cir. 2009)**

QUESTION: Whether a claim that does not seek to challenge the Government's title to real property, but instead seeks tort relief from that real property, falls within the Quite Title Act (the "QTA). *Id*. at 686.

ANALYSIS: The court noted that the QTA is invoked when a party seeks "to adjudicate a disputed title to real property" of the United States. *Id*. The court recognized that although tort relief from real property of the United States is not facially equivalent to a declaration of title request, resolution may nonetheless force the court to consider the parties' rights to the real property, triggering the QTA. *Id*. To solve this conflict, the court inquired into the effect of the suit to determine if an "actual[] challenge[] [to] the federal government's title" existed. *Id*. at 688. The court then determined that "a suit that does not challenge title but instead concerns the use of land as to which title is not disputed can sound in tort or contract and not come within the scope of the QTA." *Id*.

CONCLUSION: The 9th Circuit held that a suit that does not "actually challenge[] the federal government's title, however denominated" is beyond the scope of the QTA. *Id.*

***United States v. Aguirre-Ganceda*, 592 F.3d 1043 (9th Cir. 2010)**

QUESTION: Whether the one-year limitation period for filing a 28 U.S.C. § 2255 motion to vacate, set aside or correct a prison sentence runs from the denial of petition for a writ of certiorari or from the denial of subsequent petition for rehearing of that denial. *Id.* at 1045.

ANALYSIS: The court first reviewed the Supreme Court's guidance in two cases to determine the appropriate definition of 'finality.' *Id.* Next, the court noted the decisions of seven other circuits that have reached this issue. *Id.* The court recognized that decisions in other circuit courts were based on Supreme Court Rule 16.3, which provides that "[w]henever the Court denies a petition for a writ of certiorari, the . . . order of denial will not be suspended pending disposition of a petition for rehearing except by order of the Court or a Justice." *Id.* The court determined that its holding is consistent with both the Supreme Court guidance and the decisions of the other circuits. *Id.*

CONCLUSION: The 9th Circuit held that "finality occurs when the Supreme Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires." *Id.*

***United States v. Burkholder*, 590 F.3d 1071 (9th Cir. 2010)**

QUESTION: "Whether the statutory right to be reasonably heard under the Crime Victims Rights Act (CVRA) requires the continuing attachment of written victim impact statements to a PSR." *Id*. at 1074.

ANALYSIS: The court noted that while the CVRA affords victims the "right to be reasonably heard at any public proceeding," the statute does not define the term "right to be reasonably heard." *Id*. The court stated that "the term 'reasonably' is meant to allow for alternative methods of communicating a victim's views to the court when the victim is unable to attend the proceeding." *Id*. at 1075. The court further noted that "[n]othing in the statute plainly requires appending written victim impact statements to a PSR." *Id.* at 1074. Furthermore, the court reasoned that the legislative history only "suggests that Congress was concerned with ensuring that crime victims be allowed to speak at proceedings." *Id.* at 1075.

CONCLUSION: The 9th Circuit held that "the CVRA provides victims the opportunity to communicate directly to the district court; it does not specifically require a district court to append a written statement to a PSR." *Id*.

***United States v. Forrester*, 592 F.3d 972 (9th Cir. 2010)**

QUESTION ONE: Whether a defendant can "make a collateral attack on a [permanent scheduling order] in a criminal case." *Id.* at 978.

ANALYSIS: The court noted that the 11th Circuit "is the only other circuit to have addressed this issue to date." *Id*. The court reasoned that not only are regulatory decisions "complex matter[s]," but also where the agency is not a party, "it has no opportunity to defend its [decision]." *Id*. The court further reasoned that allowing criminal defendants to attack such issues would "potentially place a continuing, onerous burden on district courts to constantly re-litigate the same issue." *Id*. at 979. Additionally, the court noted that the fact that "Congress has, at times, taken a more proactive stance toward controlling collateral challenges is not [persuasive]." *Id.*

CONCLUSION: The 9th Circuit held that "substantive collateral attacks on permanent scheduling orders are impermissible in criminal cases where defendants' sentences will be determined by those scheduling orders." *Id*.

QUESTION TWO: "Whether 18 U.S.C. § 2518, which mandates disclosure of the wiretap application, allows the government to redact some information in the application." *Id*. at 984.

ANALYSIS: The court noted that the 7th Circuit held in a previous case that "a defendant does not have a right to redacted portions of a wiretap application if the government is able (and willing) to defend the warrant without relying on the redacted information." *Id*. The 9th Circuit further noted that at least two district courts have found the 7th Circuit's holding to be correct. *Id*. at n.8. Additionally, the court reasoned that in some situations, such as protecting informants, "the privilege to withhold information . . . is well-established." *Id*. at 984.

CONCLUSION: The 9th Circuit held that where "the unredacted parts of the wiretap application [are] more than sufficient to establish necessity," the government may redact some information in the application. *Id*. at 985.

***United States v. Juvenile Male*, 590 F.3d 924 (9th Cir. 2010)**

QUESTION: "[W]hether the retroactive application of SORNA's [registration and reporting] provision covering individuals who were adjudicated juvenile delinquents because of the commission of certain sex offenses before SORNA's passage violates the Ex Post Facto Clause of the United States Constitution." *Id*. at 927.

ANALYSIS: The court noted that "[a] statute or regulation that imposes retroactive punishment violates the constitutional prohibition on the passage of ex post facto laws." *Id*. at 930. The court further noted that "Congressional intent . . . notwithstanding, we will find an ex post facto violation if the *effect* of SORNA's juvenile registration provision is punitive." *Id*. at (emphasis in original). The court reasoned that such a determination depends on a variety of factors, including: "the terms of the statute, the legal obligations it imposes, the practical and predictable consequences of those obligations, our societal experience in general, and the application of our own reason and logic, establish conclusively that the statute has a punitive effect." *Id.* at 931. The court further reasoned that the "juvenile registration provision imposes a disability that is neither 'minor' nor 'indirect,' but rather severely damaging to former juvenile offenders' economic, social, psychological, and physical well-being." *Id*. at 933.

CONCLUSION: The 9th Circuit held that "SORNA's juvenile registration and reporting requirement violates the Ex Post Facto Clause of the United States Constitution." *Id*. at 942.

***Cumbie v. Woody Woo, Inc.*, 596 F.3d 577 (9th Cir. 2010)**

QUESTION: Whether "a restaurant violates the Fair Labor Standards Act [(FLSA)], when . . . it requires its wait staff to participate

in a 'tip pool' that redistributes some of their tips to the kitchen staff." *Id.* at 578.

ANALYSIS: The court first observed that "an arrangement to turn over or to redistribute tips is presumptively valid." *Id.* at 579. The plaintiff argued that under 29 U.S.C. § 203(m) "an employee must be allowed to retain all of her tips – except in the case of a 'valid' tip pool involving only customarily tipped employees – regardless of whether her employer claims a tip credit." *Id.* at 580. The court analyzed 29 U.S.C. § 203(m) and concluded that "the plain text . . . imposes *conditions* on taking a tip credit and does not state freestanding *requirements* pertaining to all tipped employees." *Id.* at 581 (emphasis in original). The court also found that the FLSA "does not restrict tip pooling when no tip credit is taken" and concluded that the employee's "contributions to the pool did not, and could not, reduce her wages below the statutory minimum." *Id.* at 582.

CONCLUSION: The 9th Circuit concluded that because "nothing in the text of the FLSA purports to restrict employee tip-pooling arrangements when no tip credit is taken, [it could] perceive no statutory impediment to [the restaurant's] practice." *Id.* at 583.

***Martinez v. Wells Fargo Home Mortgage, Inc*., 598 F.3d 549 (9th Cir. 2010)**

QUESTION: "[W]hether a mortgage lender or other settlement service provider violates [the Real Estate Settlement Procedures Act (RESPA),] by charging 'excessive' fees for a settlement service it provided." *Id.* at 554.

ANALYSIS: The 9th Circuit found that of the three other circuit courts to consider the issue, all three have found that excessive fees for services actually provided are not in violation of RESPA. *Id*. Section 8(b) of RESPA authorizes charges for "services actually performed." *Id*. at 553.

CONCLUSION: The 9th Circuit joined its sister circuits, holding that "Section 8(b) is unambiguous and does not extend to overcharges" for services actually provided. *Id.* at 554.

TENTH CIRCUIT

***City of Colo. Springs v. Climax Molybdenum*, 587 F.3d 1071 (10th Cir. 2009)**

QUESTION: Whether a "proposed intervenor may establish standing, and thus federal court jurisdiction over its motion to intervene, by 'piggybacking' on the standing of an existing party to a lawsuit over

which the district court has retained jurisdiction but within which there is no current, active dispute among the parties." *Id.* at 1073.

ANALYSIS: The 10th Circuit turned to 11th and 7th Circuits for guidance in addressing this first impression issue. *Id.* at 1080–81. First, the court conveyed its agreement with the 11th Circuit's holding that a prospective intervenor "may piggyback upon the standing of a existing party to a case, provided that there is 'a justiciable case or controversy at the point at which intervention is sought.'" *Id.* at 1081. The court also agreed with 11th Circuit's limitation that "[i]ntervenors must show independent standing to continue a suit if the original parties on whose behalf intervention was sought settle or otherwise do not remain adverse parties in the litigation." *Id*. The court then stated that since a justiciable case or controversy is necessary when intervention is sought, "[n]either the mere existence of a consent decree nor the continuation of the district court's jurisdiction for enforcement purposes is enough to support piggyback standing absent an existing dispute between the original parties." *Id.* Finally, the court looked to the 7th Circuit's rationale that a "case or controversy must be present at every moment of the litigation," and held that "mere retained jurisdiction over a case does not create a perpetual case or controversy, even for the original parties to the case." *Id.* at 1081.

CONCLUSION: The 10th Circuit concluded that "within litigation over which a district court has retained jurisdiction after entering a final decree, a proposed intervenor may not establish piggyback standing where the existing parties in the suit are not seeking judicial resolution of an active dispute among themselves." *Id.* at 1081.

***Merryfield v. Jordan*, 584 F.3d 923 (10th Cir. 2009)**

QUESTION: Whether an individual committed under the Kansas Sexually Violent Predator Act (KSVPA) is required to pay the *in forma pauperis* fee of 28 U.S.C. § 1915, the Prison Litigation Reform Act (PLRA). *Id.* at 926.

ANALYSIS: The court examined the definition of "prisoner" contained in the PLRA, which specifies that a prisoner is "any person incarcerated or detained . . . who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program." *Id.* at 927 (internal quotation marks omitted). The court recognized that an individual committed under the KSVPA is detained because he or she "poses a threat of future danger due to a mental abnormality or personality disorder." *Id.* The court noted that other

circuits have "unanimously concluded that individuals who are civilly committed are not 'prisoners' within the meaning of the PLRA." *Id.* The court also referenced the Supreme Court's conclusion that a commitment under the KSVPA is a process "civil in nature," and not criminal. *Id.* (internal quotation marks omitted).

CONCLUSION: The 10th Circuit held that the "fee payment provisions of § 1915 applicable to a 'prisoner,' as defined by § 1915(h), do not apply to those civilly committed under the KSVPA." *Id.*

***Rasenack v. AIG Life Ins. Co.*, 585 F.3d 1311 (10th Cir. 2009)**

QUESTION: Whether the proper standard of review of an insurance plan administrator's decision is arbitrary and capricious rather than *de novo*. *Id.* at 1315.

ANALYSIS: The court noted that "ERISA authorizes a judicial action challenging an administrative denial of benefits but does not specify the standard of review that courts should apply." *Id*. at 1315. The court adhered to the Supreme Court's holding that "a denial of benefits challenged under § 1132(a)(1)(B) [ERISA] is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Id*. (internal quotation marks omitted). The court determined that "[u]nder trust principles, a deferential standard of review is appropriate when trustees actually exercise a discretionary power vested in them by the instrument under which they act." *Id.* (internal quotation marks omitted). However, the court found that the administrator's failure to timely issue a final decision meant "the remedies were deemed exhausted by operation of law rather than the exercise of administrative discretion." *Id*. at 1316. Accordingly, because the administrative body did not actually exercise its discretion, a deferential review of the administrative decision was inappropriate. *Id*.

CONCLUSION: The 10th Circuit held that the correct standard of review of administrative decisions is *de novo*. *Id*. at 1318.

***United States v. Caldwell*, 585 F.3d 1347 (10th Cir. 2009)**

QUESTION: "[W]hether a defendant's criminal history category can be increased for committing an offense while serving under a 'criminal justice sentence' where the probationary term he was serving at the time of the offense only later qualified as a 'criminal justice sentence' due to events that took place after the defendant committed the offense of conviction." *Id.* at 1354.

ANALYSIS: The court looked to the plain language of the sentencing statute for the meaning of "under any criminal justice sentence." *Id.* at 1355. The Court found that when a defendant is not "under" a "criminal justice sentence" at the time he committed any of the conduct leading to conviction, his criminal history category cannot be increased. *Id.*

CONCLUSION: The court held that a defendant's criminal history category cannot be increased for committing an offense while serving under a criminal justice sentence where the probationary term he was serving later qualified as a criminal justice sentence due to events subsequent to defendant's commission of the conviction offense. *Id.*

***United States v. Caldwell*, 589 F.3d 1323 (10th Cir. 2009)**

QUESTION: Whether the "mere introduction of a common supplier, made by one drug dealer to another, [is] sufficient to create a single conspiracy among all the dealers[.]" *Id.* at 1331.

ANALYSIS: The court began by looking at the type of evidence needed to uphold a conspiracy conviction. *Id.* The 10th Circuit noted that more than a casual relationship must be shown by looking at the circumstances of the case. *Id.* at 1331–32. The court found that although the petitioner had introduced the common supplier to another drug dealer, the interaction between the three people was friendly rather than aimed towards a conspiracy. *Id.* at 1332. The 10th Circuit also found it significant that the petitioner did not receive an economic benefit from the introduction, and was not involved in any drug transaction between the common supplier and the other drug dealer. *Id.*

CONCLUSION: The introduction of the common supplier, made by one drug dealer to another drug dealer, cannot alone demonstrate beyond a reasonable doubt that a conspiracy existed between the three people. *Id.*

***United States v. Cobb*, 584 F.3d 979 (10th Cir. 2009)**

QUESTION: Whether a district court has authority to decrease a defendant's sentence under the criminal sentencing statute, 18 U.S.C. § 3582(c)(2), when the sentence is based on a qualifying sentencing range as the statute requires. *Id.* at 982.

ANALYSIS: A "court can only modify a term of imprisonment upon a defendant's motion where the defendant has been sentenced to a term of imprisonment 'based on a sentencing range lowered by the Sentencing Commission.'" *Id.* (internal citation omitted). Defendant's sentencing disposition and the Fed. R. Crim. Proc. R. 11 agreement all centered on the lowered sentencing range. *Id.* at 983. The court noted that "nothing in

the language of § 3582(c)(2) or in the language of Rule 11 precludes a defendant who pleads guilty under Rule 11 from later benefitting from a favorable retroactive guideline amendment." *Id.* at 984.

CONCLUSION: The 10th Circuit held that the district court has authority to reduce sentences imposed under Rule 11 plea agreements where the sentence was based at least in part on the applicable sentencing range. *Id.* at 985.

***United States v. Pinson*, 584 F.3d 972 (10th Cir. 2009)**

QUESTION: Whether an ineffective assistance of counsel claim implicitly "waives attorney-client privilege with respect to communications with his attorney necessary to prove or disprove his claim." *Id.* at 978.

ANALYSIS: When a client puts the privileged communications between him and his counsel at issue, the claim cannot be assessed without revelation of privileged communications. *Id.* at 977. When counsel's advice is put at issue by the client, the attorney-client privilege is impliedly waived. *Id.* The court then noted that the 5th, 6th, 8th, 9th, and 11th Circuits have all recognized this principle. *Id*. at 978.

CONCLUSION: The 10th Circuit held that "when a habeas petitioner claims ineffective assistance of counsel, he impliedly waives attorney-client privilege with respect to communications with his attorney necessary to prove or disprove his claim." *Id.*

***Willis v. Bender*, 596 F.3d 1244 (10th Cir. 2010)**

QUESTION: "[W]hether Wyoming would extend its informed consent law to misrepresentations that are physician-specific in nature and made in direct response to a patient's questions." *Id.* at 1255.

ANALYSIS: The court reviewed numerous cases that concluded "physician-specific information such as experience is relevant to the informed consent issue and physicians have a duty to voluntarily disclose such information prior to obtaining a patient's consent." *Id*. The court reviewed a split of authority between state courts regarding whether a physician has "a duty to truthfully answer [patient's] physician-specific questions." *Id.* at 1256.

CONCLUSION: The 10th Circuit held that the "Wyoming Supreme Court would allow an informed consent claim where a physician lies to a patient as to physician-specific information in direct response to a patient's questions concerning the same in the course of obtaining the patient's consent and the questions seek concrete verifiable facts, not the

doctor's subjective opinion or judgment as to the quality of his performance or abilities." *Id.* at 1260.

***United States v. Wise*, 597 F.3d 1141 (10th Cir. 2010)**

QUESTION: Whether the district court commits reversible error "when a defendant's prior conviction merits criminal history points, but the defendant does not receive those points, and the district court nevertheless imposes a sentence taking into account that prior conviction to set the offense level." *Id.* at 1147.

ANALYSIS: The court noted that because the defendant's prior conviction was a third-degree felony and carried a jail sentence of 180 days, "two criminal history points should have been assigned to [defendant] for the conviction under § 4A1.1(b), [the criminal sentencing statute], as his sentence exceeded sixty days, but was less than one year and one month." *Id*. at 1149. The court determined that "the district court's error was in failing to assign criminal history points for the offense, rather than in calculating the relevant offense guidelines range." *Id*. Furthermore, the court opined that "the failure to assign [defendant] criminal history points for his prior conviction did not change his criminal history category, and thus had no effect on his overall sentence." *Id*. at 1149.

CONCLUSION: The 10th Circuit held that no reversible error occurred in "the district court's calculation of [defendant's] offense level under § 2K2.1(a)(4), [the sentencing guidelines for offenses involving public safety], notwithstanding its failure to assign him criminal history points for the [prior] offense." *Id*.

ELEVENTH CIRCUIT

***United States v. English,* 589 F.3d 1373 (11th Cir. 2009)**

QUESTION: Whether "a defendant, who was convicted under the Assimilative Crimes Act (ACA), 18 U.S.C. § 13, and who has served the state statutory maximum term of incarceration, may be sentenced to further imprisonment upon revocation of his supervised release." *Id.* at 1374.

ANALYSIS: The court first noted that it is settled law that "a term of supervised release may be imposed *in addition to* the statutory maximum term of imprisonment." *Id.* at 1376 (internal quotation marks and citations omitted) (emphasis in original). The court then noted that in non-ACA cases, it had concluded "the district court had the authority to sentence a defendant to [prison time] for violating his supervised release terms despite the fact that he had already served the maximum statutory

prison term." *Id.* at 1377. The court stated that this authority stemmed from 18 U.S.C. § 3583(e)(3), which "granted the district court discretion in certain circumstances to revoke the term of supervised release and require the defendant to serve in prison all or part of the term of supervised release." *Id.* (internal quotation marks and citations omitted). The court reasoned that the rationale underlying non-ACA cases also applied to ACA cases. *Id.* The primary function of supervised release is to provide post-imprisonment supervision and without a court's authority to further imprison, supervised release would lack the deterrent mechanism that Congress intended. *Id.*

CONCLUSION: The 11th Circuit held that a "district court possessed the authority under 18 U.S.C. § 3583(e)(3) to sentence [a defendant] to a . . . prison term for violating his supervised release terms despite his having served the maximum statutory prison term for his assimilated crime." *Id.* at 1378.

***United States v. Florez Velez*, 586 F.3d 875 (11th Cir. 2009)**

QUESTION: Whether the exemption in 18 U.S.C. § 1957(f)(1) excludes the defendants from prosecution for money laundering under § 1957(a), where the monetary transactions were "made for the purpose of securing legal representation." *Id.* at 876.

ANALYSIS: "Section 1957(a) prohibits knowingly engaging or attempting to engage in a monetary transaction in criminally derived property that is of a value greater than $10,000 and is derived from specified unlawful activity." *Id* at 877 (internal quotation marks omitted). However, the court stated that "the statute exempts any transaction necessary to preserve a person's right to representation as guaranteed by the Sixth Amendment to the Constitution." *Id.* (internal quotation marks omitted)(citation omitted). Thus, the court found that "the plain meaning of the exemption set forth in § 1957(f)(1), when considered in its context, is that transactions involving criminally derived proceeds are exempt from the prohibitions of § 1957(a) when they are for the purpose of securing legal representation to which an accused is entitled under the Sixth Amendment." *Id.* The court found that, "[a]ccordingly, the exemption is limited to attorneys' fees paid for representation guaranteed by the Sixth Amendment in a criminal proceeding and does not extend to attorneys' fees paid for other purposes." *Id.* The court determined that a prior Supreme Court decision, holding "that the Sixth Amendment right to counsel does not protect the right of a criminal defendant to use criminally derived proceeds for legal fees[,] . . . has no bearing on § 1957(f)(1) and indeed supports the conclusion that such proceeds have

been statutorily exempted from criminal penalties." *Id.* The court commented that "[t]he Government has pointed to no principle of statutory construction—nor indeed to any legal principle—that supports the conclusion that a statutory provision may be 'nullified' by a Supreme Court decision on a completely different issue, absent any indication that Congress intended such a result." *Id.* The court found that it "would . . . make little sense—and would be entirely superfluous—to read § 1957(f)(1) as an exemption from criminal penalties for non-tainted proceeds spent on legal representation, as those funds can always be used for any legal purpose." *Id.* at 879.

CONCLUSION: The 11th Circuit held that "the district court was eminently correct in holding that [d]efendants are not subject to criminal prosecution under § 1957(a), because the plain language of § 1957(f)(1) clearly exempts criminally derived proceeds used to secure legal representation to which an accused is entitled under the Sixth Amendment." *Id.*

***United States v. Jules*, 595 F.3d 1239 (11th Cir. 2010)**

QUESTION: "When a district court intends to rely on new information in deciding a motion for the modification of a sentence pursuant to 18 U.S.C. § 3582(c)(2), whether each party is entitled to notice of the information and an opportunity to respond." *Id.* at 1241.

ANALYSIS: The court reasoned that in deciding the issue, it should consider the policy statements accompanying the United States Sentencing Guidelines for applicable principles. *Id.* at 1242. The court specifically looked to a policy statement that echoes the spirit embodied in Rule 32 of the Federal Rules of Criminal Procedure. *Id.* That statement provides, "[w]hen any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor." *Id.* at 1242–43. The court also relied on 11th Circuit precedent acknowledging the "due process right not to be sentenced on the basis of invalid premises or inaccurate information." *Id.* at 1243. The court further relied on the 5th and the 8th Circuit's conclusion that a party should be afforded the opportunity to review and respond to information provided. *Id.* at 1244.

CONCLUSION: The 11th Circuit held that "each party must be given notice of and an opportunity to contest new information relied on by the district court in a § 3582(c)(2) proceeding." *Id.* at 1245.

***United States v. DuBose*, 598 F.3d 726 (11th Cir. 2010)**

QUESTION ONE: Whether a "protective order that does not contain the precise statutory language of Section 922(g)(8)(C)(ii) can subject a defendant to criminal punishment under Section 922(g)(8)." *Id.* at 730.

ANALYSIS: The court began its analysis by turning to the 4th and 1st Circuits for guidance and stated it would invoke "common sense in making [its] determination." *Id*. The court noted that the 4th Circuit had held that a protective order that did not contain "the precise statutory language, but ordered an individual to refrain from abusing his wife, unambiguously satisfies the requirements of subsection (C)(ii) that the court order prohibit the use, attempted use, or threatened use of physical force." *Id*. Next, the court noted that the 1st Circuit had also held that a protective order that "directed the defendant to refrain from abusing his wife was sufficient to satisfy the statute's provisions." *Id.* (internal quotation marks and citations omitted).

CONCLUSION: The 11th Circuit concluded that a "conviction under 18 U.S.C. § 922(g)(8) does not require that the precise language found in subsection (C)(ii) must be used in a protective order for it to qualify under the statute." *Id.*

QUESTION TWO: Whether a "defendant may challenge the validity of the underlying state court protective order in a 18 U.S.C. § 922(g)(8) prosecution[.]" *Id.* at 732.

ANALYSIS: The 11th Circuit began by noting that "[e]very other circuit to address this issue . . . has held that a defendant may not collaterally attack the underlying protective order in a Section 922(g)(8) prosecution." *Id*. The court then surveyed other circuit courts and found that the 7th, 9th, 5th, and 6th circuits all relied on a prior Supreme Court decision that held that "the federal firearms statute intended to prevent all convicted felons from possession firearms, even if the underlying felony conviction ultimately might turn out to be invalid." *Id.* at 733. Next, the court noted that the 6th Circuit had applied the Supreme Court's reasoning to "affirm the conviction of a defendant who possessed a firearm while subject to a domestic violence protection order," and that the 5th Circuit also followed and affirmed a conviction upon determining that "nothing in the language of 18 U.S.C. § 922(g)(8) indicates that it applies only to persons subject to a *valid* as opposed to an *invalid*, protective order." *Id.*

CONCLUSION: The 11th Circuit held that "protective orders satisfying the Section 922(g)(8) requirements are analogous to felony convictions for the purposes of the statute's restraint on the possession of

firearms." *Id*. Therefore, "the validity of an underlying protective order is [] irrelevant to a defendant's conviction under Section 922(g)(8)." *Id.*

***United States v. Dodge*, 597 F.3d 1347 (11th Cir. 2010)**

QUESTION: Whether a defendant's "conviction under 18 U.S.C. § 1470 for knowingly transferring obscene material to a person less than sixteen years old makes [the defendant] a 'sex offender' subject to [Sex Offender Registration and Notification Act's (SORNA)] registration requirement." *Id.* at 1351.

ANALYSIS: First, the court considered "whether a violation of 18 U.S.C § 1470 is a criminal offense as defined by SORNA." *Id*. The court noted that a conviction under 18 U.S.C. § 1470 is not expressly encompassed under SORNA's delineated list of "sex offenders." *Id*. at 5–6. However, the court recognized that SORNA "does not suggest an intent to exclude certain offenses but rather to expand the scope of offenses that meet the statutory criteria." *Id*. at 1352. Second, the court addressed "whether [a defendant's] particular conviction for knowingly attempting to transfer obscene material to a minor was a specified offense against a minor." *Id*. at 1351 (internal quotations omitted). The court determined "that SORNA permits examination of the defendant's underlying conduct – and not just the elements of the conviction statute – in determining what constitutes a 'specified offense against a minor.'" *Id*. at 1354. As a result, "Congress left courts with broad discretion" in making the ultimate ruling. *Id*. at 1355.

CONCLUSION: The 11th Circuit held that a violation of 18 U.S.C. § 1470 makes a defendant subject to the registration requirement of SORNA. *Id.* at 1351.

FEDERAL CIRCUIT

***In re United States*, 590 F.3d 1305 (Fed. Cir. Aug. 6, 2009)**

QUESTION: Whether the fiduciary exception to the attorney-client privilege applies to the United States as trustee over tribal assets and funds. *Id.* at 1313.

ANALYSIS: The court found that there were two justifications that support the fiduciary exception. *Id.* at 1312. First, the fiduciary is not the attorney's exclusive client and acts as a proxy for the beneficiary. *Id.* The court noted that there has always been a relationship of trust and asset management between Indian tribes and the government, and that relationship calls for application of the fiduciary exception. *Id.* at 1313–14. The second justification was that it is the duty of the fiduciary to

disclose to the beneficiary all information in relation to trust management. *Id.* at 1312.

CONCLUSION: The Federal Circuit held that the United States cannot deny an Indian tribe's request to obtain communications between the United States and its attorneys based on the attorney-client privilege when those communications are in regards to the management of an Indian trust and the United States has not claimed that the government or its attorneys considered a specific competing interest in those communications. *Id.* at 1314.