

## First Impressions

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### FIRST CIRCUIT

***Bonneau v. Plumbers & Pipefitters Local Union 51 Pension Trust Fund*, 736 F.3d 33 (1st Cir. 2013)**

**QUESTION**; “Whether a retroactively conferred benefit during the course of employment constitutes a ‘benefit attributable to service’ and so an ‘accrued benefit’ for purposes of the [Employment Retirement Income Security Act’s (ERISA)] anti-cutback rule.” *Id.* at 34.

**ANALYSIS**; The court looked to the plain language of ERISA’s anti-cutback rule, which “prohibits the decrease by amendment of any accrued benefit of a participant in an ERISA plan.” *Id.* at 35. The court noted that prior to amendment, the anti-cutback rule applied only to “benefits attributable to service,” and therefore “accrued benefits” must be attributable to services already performed. *Id.* at 37. The court noted that § 1002(23) the provision uses the term “employee” and tethered “accrued benefits” to the “employee’s accumulated contribution.” *Id.* at 38. The court read § 1002(23) and § 1054(g)(1) together and found that

a “benefit may be accrued only by an ‘employee,’ but once accrued, the benefit is protected from diminution as long as the individual who accrued the benefit is a ‘participant’ in the plan, whether as an employee or as a retiree.” *Id.* at 39. The benefit “accrues” when it “provide[s] incentives for future employment[.]” *Id.* The court concluded that “[o]nce an individual continues employment in exchange for a promised benefit, that is enough . . . to generate the sort of ‘justified expectation’ the anti-cutback rule is designed to protect.” *Id.*

**CONCLUSION;** The 1st Circuit held that a retroactively conferred benefit can be an accrued benefit for the purpose of the anti-cutback rule. *Id.*

***Mazariegos-Paiz v. Holder*, 734 F.3d 57 (1st Cir. 2013)**

**QUESTION;** Whether administrative exhaustion is satisfied when an agency, “either on its own initiative or at the behest of some other party to the proceedings, has addressed those claims on the merits, regardless of whether the petitioner himself raised them.” *Id.* at 60.

**ANALYSIS;** The court stated that Congress granted the court jurisdiction to review any non-constitutional claims dealing with removal “only if the alien has exhausted all administrative remedies” that are available to him as a matter of right. *Id.* at 62. The court noted that there are two ways in which an alien exhausts their administrative remedies. *Id.* First, an alien presents his or her issue to the Board of Immigration Appeals or alternatively, the agency may elects to “address in sufficient detail the merits” of the particular issue. *Id.* at 62–63. The court reasoned that allowing these two avenues for exhaustion “creates a fully calibrated balance of responsibilities” by allowing aliens to seek the benefit of the “agency’s expertise” and also by allowing the agency to correct its own mistakes by addressing the issue itself. *Id.*

**CONCLUSION;** The 1st Circuit held, consistent with the 2nd, 3rd, 5th, 9th, and 11th Circuits that an issue is “exhausted when it has been squarely presented” to and, subsequently, “squarely addressed by the agency,” regardless of which party initially raised the issue in question. *Id.* at 63.

***United States v. Melvin*, 730 F.3d 29 (1st Cir. 2013)**

**QUESTION;** Whether law enforcement’s use of voice identification testimony from a police officer who heard a defendant’s voice at a proffer session violates law enforcement’s promise “that it would not use against [the defendant] . . . any statements made or other information

disclosed at the proffer session.” *Id.* at 32 (internal quotation marks omitted).

**ANALYSIS;** The court asserted that [i]nformal immunity agreements, such as proffer agreements, are shaped by the language of the contract conferring the immunity.” *Id.* at 37 (internal quotation marks omitted). The court noted that “whenever possible, contracts should be construed to give effect to every word, clause, and phrase.” *Id.* (internal quotation marks omitted). The court asserted that if a proffer agreement includes the phrase “statements made or other information” the phrase “other information provided by the defendant . . . encompasses *any* knowledge the government gained at the proffer session because of the defendant’s presence there.” *Id.* (emphasis added) (internal quotation marks omitted).

**CONCLUSION;** The 1st Circuit held that “knowledge of [a] defendant’s voice tone, inflections, and speaking characteristics gleaned from [a] defendant’s speech at [a] proffer session is ‘other information’ that cannot be used against [a] defendant in the government’s case in chief.” *Id.*

***Yamon v. Yamon*, 730 F.3d 1 (1st Cir. 2013)**

**QUESTION;** “Whether, as a matter of law, the conclusion that a child is ‘now settled’ under Article 12 [of the Hague Convention] precludes a court from ordering return.” *Id.* at 4.

**ANALYSIS;** The court noted that while “[u]nder Article 12, a judicial or administrative authority ‘shall . . . order the return of a child, unless it is demonstrated that the child is not settled in its new environment,” the Hague Convention does not indicate “that an authority is prohibited from ordering the child returned if settledness is found.” *Id.* at 16. The court asserted that the “[i]t is consistent with the Conventions overall structure that Article 12 leaves it within the court’s discretion whether to order the return of a ‘now settled’ child.” *Id.* The court posited that “[t]he Executive Branch has consistently interpreted Article 12 as conferring upon an authority the discretion to order the return of a child found ‘now settled.’” *Id.* at 19. The court noted that “[c]ourts of other signatory nations have held that the Convention confers upon a court the authority to weigh considerations such as concealment when determining whether to order the return of a child ‘now settled.’” *Id.* at 20. Likewise, the court noted that “[w]hile no other circuit has addressed the ‘now settled’ defense in particular, . . . [the 3rd, 4th, 6th, and 9th] [C]ircuits accept the general proposition that ‘courts retain the discretion to order return even if one of the Convention’s exceptions is proven.’” *Id.*

**CONCLUSION;** The 1st Circuit held that “[c]oupled . . . with the rest of the text of the Convention, the Convention’s purposes, the inherent equitable powers of federal courts, and the insights of the Executive Branch, . . . the Convention confers upon a federal district court, authority to order, at its discretion, the return of a child found to be ‘now settled.’” *Id.* at 21.

#### SECOND CIRCUIT

***Kreisberg v. Healthbridge Management, L.L.C.*, 732 F.3d 131 (2d Cir. 2013)**

**QUESTION;** Whether the National Labor Relations Board (NLRB) “may delegate its power to authorize § 10(j) actions to the General Counsel” under the National Labor Relations Act (NLRA). *Id.* at 134, 139.

**ANALYSIS;** The court noted that the statutory language of 29 U.S.C. § 153(d) provides that the General Counsel “shall have such other duties as the [NLRB] may prescribe or as may be provided by law.” *Id.* at 139. The court reasoned that the plain language of the statute “permits a property constituted [NLRB] to delegate its § 10(j) power and enable the General Counsel to prosecute NLRA violations before a federal district court.” *Id.* at 140.

**CONCLUSION;** The 2nd Circuit held that the NLRB may delegate its power to authorize § 10(j) actions. *Id.* at 142.

#### THIRD CIRCUIT

***Friedman’s Liquidating Trust v. Roth Staffing Cos.*, 738 F.3d 547 (3d Cir. 2013)**

**QUESTION;** Whether “a post-petition payment to a creditor pursuant to a Wage Order entered at a debtor’s request reduce the creditor’s the creditor’s new value defense – and thereby increase preference liability – the same as it would if the payment had been made pre-petition.” *Id.* at 549.

**ANALYSIS;** The 3rd Circuit observed that the Bankruptcy Code provisions should be viewed as a whole and that “[c]ontext is therefore key in determining the meaning of a particular provision.” *Id.* at 549. First, the court noted that the provision at issue here dealt with the “preferences” section of the Code. *Id.* at 553. The court found that this

clearly suggested that this section “concerns transactions occurring during the preference period” and not post-petition. *Id.* at 550–51. Next, the court noted that the “hypothetical liquidation test must be performed as of the petition date points to that date as the cutoff for determining new value.” *Id.* at 554. The court found that “extending preference analysis past the petition date would be inconsistent with [the statute].” *Id.* at 555. Additionally, the court found that the statute of limitations began to run as of the petition date and “[i]f Congress had intended to allow post-petition transactions to affect the impact on the estate, it is likely it would have crafted a different statute of limitations.” *Id.* at 555–56. The court also observed, “[b]ecause Congress specifically articulated an intention – in an analogous defense to preference liability – to confine the analysis to pre-petition activity, we should assume it had the same intention with respect to new value defenses. *Id.* at 557. Finally, the court found that other courts that reviewed this issue “concluded that the new value advanced after the petition date should not be considered in a creditor’s new value defense.” *Id.* at 558.

**CONCLUSION;** The 3rd Circuit held that a transfer “made after the filing of a bankruptcy petition . . . does not affect the new value defense.” *Id.* at 550.

***Papotto v. Hartford Life & Accident Insurance Co.*, 731 F.3d 265 (3d Cir. 2013)**

**QUESTION;** “Whether a remand to an ERISA plan administrator is a final decision and qualifies for review pursuant to § 1291.” *Id.* at 270.

**ANALYSIS;** The court engaged in a three-step analysis developed in *Kreider Dairy Farms, Inc. v. Glickman*, 190 F.3d 113 (3d Cir. 1999), to determine when a “remand to an administrative agency may be deemed final” for purposes of § 1291. *Id.* at 270. First, the court considered “whether the remand order of the District Court ‘finally resolves’ the underlying issue of the case.” *Id.* at 273. Second, the court determined if the legal issue is important. *Id.* at 273. Finally, the court considered “whether the denial of immediate review [would] foreclose appellate review as a practical matter.” *Id.* at 274 (internal quotation marks omitted). The court determined from this analysis that the “District Court only administratively closed, and thus . . . retained jurisdiction over, the proceeding below,” and that “either party may, at any time, move to re-open proceedings and seek . . . review.” *Id.* at 275.

**CONCLUSION;** The 3rd Circuit held that an administrative agency will not necessarily always qualify for review pursuant to § 1291 and that

“the District Court’s remand order directing the Plan Administrator to read causation into . . . [a provision] is not final.” *Id.* at 276.

***S.H. v. Lower Merion School District*, 729 F.3d 248 (3d Cir. 2013)**

**QUESTION;** Whether “the jurisdictional umbrella” of the Individuals with Disabilities Education Act (IDEA) “encompasses not merely children with disabilities, but also children who have been misidentified as disabled.” *Id.* at 257.

**ANALYSIS;** Under §1415(a) “[t]he IDEA guarantees procedural safeguards with respect to the provision of a free appropriate public education to *children with disabilities* and their parents.” *Id.* The court further reasoned, “there is no indication that the term ‘child with a disability’ includes children who are mistakenly identified as disabled, but who are, in fact, not disabled.” *Id.* at 257–58.

**CONCLUSION;** The 3rd Circuit held, “under the Act’s plain language, it is clear that the IDEA creates a cause of action *only* for individuals with disabilities.” *Id.* at 258.

***United States v. Fish*, 731 F.3d 277 (3rd Cir. 2013)**

**QUESTION;** Whether a District Court’s application of U.S.S.G. § 2S1.1(b)(3) should be reviewed under a plenary standard or under a clear error standard. *Id.* at 279.

**ANALYSIS;** The 3rd Circuit first reviewed challenges to a district court’s application of the Guidelines in other contexts. *Id.* The court reasoned that in cases where “there is no dispute over the factual determinations but the issue is whether the agreed-upon set of facts fit within the enhancement requirements, [it has] . . . reviewed for clear error the district court’s applications of those facts to the Guidelines.” *Id.*

**CONCLUSION;** The 3rd Circuit held that the clear error standard, not the plenary standard, applied in reviewing “the application of the undisputed facts to the requirements for the [sentencing] enhancement for sophisticated money laundering.” *Id.*

***United States v. Gause*, 536 Fed. Appx. 234 (3d Cir. 2013).**

**QUESTION;** Whether an 18 U.S.C § 3147 sentencing enhancement applies to violations of 18 U.S.C. § 3146 failure to appear. *Id.* at 236.

**ANALYSIS;** The court noted that seven circuits, including the 1st, 4th, 5th, 6th, 9th, and 11th Circuits, have held that § 3147 encompasses violations of § 3146. *Id.* These circuits have “reasoned that the terms of the statute are unambiguous” in holding that “by its plain terms, § 3147

encompasses violations of § 3146.” *Id.* The court reasoned that because the language of § 3147 is clear and unambiguous, the judicial inquiry was complete. *Id.* at 237.

**CONCLUSION;** The 3rd Circuit joined its sister circuits in holding that the § 3147 sentencing enhancement applied to § 3146 failure to appear. *Id.*

***United States v. Jones, 740 F.3d 127 (3d Cir. 2014)***

**QUESTION;** Whether “‘assault’ under [U.S.S.G.] § 3A1.2(c)(1) requires assaultive conduct whereby [an individual] caused an official victim to actually experience apprehension of immediate bodily injury.” *Id.* at 138.

**ANALYSIS;** The court noted that the 1st, 3rd, 4th, 7th, and 8th Circuits have held “that assault under § 3A1.2(c)(1) should generally be read as a reference to common law criminal assault.” *Id.* (internal quotation marks omitted). The court stated that it was aware of no court of appeals that has held to the contrary.” *Id.* The court agreed with the assault definition articulated by the 1st Circuit that “[c]ommon law assault embraces two different crimes; one is attempted battery, . . . an intended effort to cause bodily harm to another which falls short of success regardless of whether the intended victim knows of the attempt, [and] [t]he other . . . is an act which is intended to, and reasonably does, cause the victim to fear immediate bodily harm; such menacing constitutes assault even if no physical harm is attempted, achieved or required.” *Id.* at 139 (internal quotation marks omitted).

**CONCLUSION;** The 3rd Circuit, “in interpreting § 3A1.2(c)(1), . . . [held] in accord with [its] sister circuits that assault is defined according to its common-law definition.” *Id.* at 138.

***United States v. Ward, 732 F.3d 175 (3d Cir. 2013)***

**QUESTION;** Whether FED. R. CRIM. P. 32 “affords all criminal defendants the right to deliver an unsworn allocution.” *Id.* at 180.

**ANALYSIS;** The court noted that a criminal defendant has the “right to make a statement to the sentencing court” whether such allocution is sworn or unsworn. *Id.* at 182. This allows a defendant to “raise mitigating circumstances and to present his individualized situation to the sentencing court.” *Id.* The court observed that defendant assumes a risk because an allocution “whether sworn or unsworn . . . can be used in subsequent criminal prosecutions.” *Id.* at 183. Therefore, “if defendant is concerned about the future use of his statement against him, it makes no difference whether the statement was sworn or not.” *Id.* Finally, the

court noted that “the sentencing judge has always retained the discretion to place certain restrictions on what may be presented during an allocation.” *Id.* at 182.

**CONCLUSION;** The 3rd Circuit held that FED. R. CRIM. P. 32 does not guarantee a criminal defendant can make an unsworn allocution. *Id.* at 184.

#### FOURTH CIRCUIT

***Cosey v. Prudential Insurance Co. of America*, 735 F.3d 161 (4th Cir. 2013)**

**QUESTION;** “[W]hether the phrase ‘proof satisfactory to the plan administrator’ unambiguously confers discretionary decision-making authority on a plan administrator” in a plan subject to the Employee Retirement Income Security Act of 1974 (ERISA). *Id.* at 166.

**ANALYSIS;** The court noted that the 1st, 2nd, 3rd, 7th, and 9th Circuits “have held that [the] language [‘proof satisfactory to the plan administrator’] does not unambiguously confer . . . discretionary authority.” *Id.* The court “agree[d]” with the conclusions reached by [the] five sister circuits. *Id.* The court posited “that the phrase ‘proof satisfactory to us’ is inherently ambiguous,” and that the 4th Circuit “require[s] . . . clear plain language that expressly creates discretionary authority.” *Id.* at 166–67. The court noted that the language at issue does not give insured employees “sufficient notice whether their plan administrator has broad, unchanneled discretion to deny claims.” *Id.* at 167 (internal quotation marks omitted). Finally, the court stated that it “is [a] well settled principle that ambiguities in an ERISA plan must be construed against the administrator responsible for drafting the plan.” *Id.* at 168.

**CONCLUSION;** The 4th Circuit joined the 1st, 2nd, 3rd, 7th, and 9th Circuits in “declin[ing] to impose an abuse-of-discretion standard review based solely on a plan’s requirement that claimants submit ‘proof satisfactory to the plan administrator.’” *Id.*

***Gaines Motor Lines, Inc. v. Klaussner Furniture Industries Inc.*, 734 F.3d 296 (4th Cir. 2013)**

**QUESTION;** Whether federal courts, absent a federal tariff, “have subject matter jurisdiction over a motor carrier’s breach of contract claim against a shipper for unpaid freight charges” under the Interstate Commerce Commission Termination Act (ICCTA). *Id.* at 299, 302.



**ANALYSIS;** The court noted that 49 U.S.C. § 14101(b)(2) provides that the exclusive remedy for breach of contract authorized by § 14101(b)(1) “shall be an action in an appropriate State court or United States district court.” *Id.* at 304. The court reasoned that Congress, by authorizing “motor carriers to privately negotiate rates . . . does not imply that Congress intended . . . to federalize every resulting breach of contract claim.” *Id.* Rather, the court noted, that “motor carriers can only sue in an ‘appropriate’ court.” *Id.*

**CONCLUSION;** The 4th Circuit held that when operating under a private contract, instead of a federal tariff, a party must first establish an alternative basis for federal jurisdiction before a federal court can adjudicate the dispute. *Id.* at 305.

***Othi v. Holder*, 734 F.3d 259 (4th Cir. 2013)**

**QUESTION;** Whether 8 U.S.C. “[§] 1101, as amended by IIRIRA [Illegal Immigration Reform and Immigrant Responsibility Act], still allows for the case-by-case analysis of an alien’s intent under *Rosenberg v. Fleuti*, 374 U.S. 449 (1963), when determining whether the alien is ‘seeking an admission’ for purposes of removal proceedings.” *Id.* at 265.

**ANALYSIS;** The court then noted that the 1st, 2nd, 3rd, 5th, 7th, 9th, 10th and 11th Circuits has found that the *Fleuti* doctrine did not survive IIRIRA amendments, albeit in different ways. *Id.* 266. The court reasoned that Congress’ enactment of § 1101(a)(13)(C) provided exemptions that barred a “legally permanent resident” (LPR) from automatic admission back into the country. *Id.* at 267. The court found that part (v) of section 1101(a)(13)(C) applied to a LPR who previously “committed an offense identified in § 1182(a)(2) of this title.” *Id.* Thus, LPRs who fall in this category are “back into the general class of ‘aliens’ and are treated as all other aliens for ‘admission’ purposes.” *Id.*

**CONCLUSION;** The 4th Circuit held, in accordance with 1st, 2nd, 3rd, 5th, 7th, 9th, 10th, and 11th Circuits, that the IIRIRA’s plain language ended the *Fleuti* doctrine, and thus placed an LPR who previously committed an offense into the general class of “aliens.” *Id.*

***United States v. McManus*, 734 F.3d 315 (4th Cir. 2013)**

**QUESTION;** What is “[t]he proper manner of applying the five-level [U.S.S.G.] § 2G2.2(b)(3)(B) enhancement to a defendant’s use of a file-sharing program to distribute child pornography?” *Id.* at 318.

**ANALYSIS;** The court noted that the phrase “distribution for the . . . expectation of receipt of a thing in value” of § 2G2.2(b)(3)(B) was unambiguous. *Id.* at 318–19. The court reasoned, based on the plain

reading of the text that once the Government has proven distribution, it must then show that the defendant distributed pornography with the “belief that he would get something of value in return.” *Id.* Thus, the court found that “to trigger the § 2G2.2(b)(3)(B) five-level enhancement, the Government must show that the defendant: (1) knowingly made child pornography in his possession available to others by some means, and (2) made his pornographic materials available for the specific purpose of obtaining something of valuable consideration, such as more pornography, whether or not he actually succeeded in obtaining the desired thing of value.” *Id.* at 319. The court found that “it [was] clearly possible based on the features of the system that a user [of the file-sharing program] could distribute his files without any reasonable expectation of receiving anything of value in exchange.” *Id.* at 322.

**CONCLUSION;** The 4th Circuit held the five-level enhancement under the U.S.S.G. does not apply unless the Government “submit[s] sufficient individualized evidence of [a defendant’s] intent to distribute his [or her] pornographic materials in expectation of receipt of a thing of value.” *Id.*

#### FIFTH CIRCUIT

***D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013)**

**QUESTION;** Whether “the rights of collective action embodied in [the National Labor Relations Act (NLRA)] make the NLRA distinguishable from cases which hold that arbitration must be individual arbitration[.]” *Id.* at 362.

**ANALYSIS;** The court explained that “no court decision prior to the Board’s ruling under review . . . had held that the [NLRA] Section 7 right to engage in ‘concerted activities for the purpose of . . . other mutual aid or protection’ prohibited class action waivers in arbitration agreements.” *Id.* at 356. The court noted that both precedent by the NLRB and other circuits have held that Section 7 of the NLRA protects collective-suit filings, “whether in lawsuits or in arbitration.” *Id.* at 356–57. In addition, the court found no inherent conflict between the NLRA and the Federal Arbitration Act that would make such protection invalid. *Id.* at 361. The court further reasoned that it was “loath to create a circuit split” because the 2nd, 8th, and 9th Circuits, which previously addressed the question, have held arbitration agreements containing class waivers to be enforceable. *Id.* at 362.

**CONCLUSION;** The 5th Circuit held that the rights of collective action in the NLRA do not make those cases distinguishable from cases that hold that arbitration must be individual. *Id.*

***EEOC v. Boh Brothers Construction Co.*, 731 F.3d 444 (5th Cir. 2013)**

**QUESTION;** Whether the three evidentiary paths for plaintiffs put forth by the Supreme Court in *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998), “are the *exclusive* paths to success on a Title VII same-sex harassment claim” or are merely illustrative.” *Id.* at 455.

**ANALYSIS;** The court reasoned that because in *Oncale* the Court employed phrasing such as “for example” and “[w]hatever evidentiary route the plaintiff chooses to follow” in its discussion of the evidentiary paths, an exclusive interpretation would be impractical. *Id.* The court noted that the 3rd, 7th, 8th, and 10th Circuits have “held that the *Oncale* categories are illustrative, not exhaustive, in nature.” *Id.*

**CONCLUSION;** The 5th Circuit held that the evidentiary paths in *Oncale* “are illustrative, not exhaustive, in nature.” *Id.*

***Moore v. CITGO Refining & Chemicals Co.*, 735 F.3d 309 (5th Cir. 2013)**

**QUESTION;** Whether, pursuant to FED. R. CIV. P. 54(d), the combination of plaintiffs’ good faith, a defendant’s “enormous wealth,” and plaintiffs’ “limited resources” serves a sufficient basis for a district court to reduce or to deny costs to a prevailing defendant. *Id.* at 319–20.

**ANALYSIS;** The court noted that “at least four circuits . . . have rejected a ‘relative wealth’ rationale,” and stated that “[t]he fact that the prevailing party is substantially more wealthy than the losing party is not a sufficient ground for denying or limiting costs to the prevailing party.” *Id.* at 320. The court looked to the plain language of the Rule and opined that Congress did not intend FED. R. CIV. P. 54(d) to be swallowed by an “enormous” or “relative” wealth exception. *Id.* The court reasoned that barring even a wealthy defendant from recovering costs, the court reasoned, would be “impermissibly punitive.” as it would “undermine the foundation . . . that justice is administered to all equally, regardless of wealth or status.” *Id.*

**CONCLUSION;** The 5th Circuit held that, “[c]onsistent with the great weight of authority from the federal circuits, reducing or eliminating a prevailing party’s cost award based on its wealth—either relative or absolute—is impermissible as a matter of law.” *Id.*

***Nguyen v. Holder*, 542 Fed. Appx. 384 (5th Cir. 2013)**

**QUESTION;** Whether a refugee who previously adjusted her status to that of a lawful permanent resident (LPR) is eligible to readjust to LPR status using the § 209(c) waiver of inadmissibility under the Immigration and Nationality Act (INA). *Id.* at 388.

**ANALYSIS;** The court first looked to § 209 of the INA, which the Board of Immigration Appeals (BIA) has interpreted as only allowing those aliens who have not previously acquired LPR status to seek adjustment. *Id.* at 390. The court reasoned that since § 209 was sufficiently ambiguous, the BIA's interpretation was reasonable and entitled to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) deference. *Id.* at 391. The court also noted that "several of [its] sister circuits have also agreed that an alien who has already adjusted from refugee to LPR status is ineligible for a § 209(c) waiver." *Id.*

**CONCLUSION;** The 5th Circuit, relying on the BIA's interpretation of § 209, held that a refugee who has already adjusted to LPR status may not readjust under § 209, and thus is not eligible for a § 209(c) waiver. *Id.* at 391, 393.

***Simmons v. Sabine River Authority State of Louisiana*, 732 F.3d 469 (5th Cir. 2013)**

**QUESTION;** Whether "the Federal Power Act [(FPA)] preempts property damage claims under state law where the claim alleges negligence for failing to act in a manner FERC [Federal Energy Regulatory Commission] expressly declined to mandate while operating a FERC-licensed project." *Id.* at 471.

**ANALYSIS;** The court noted that the FPA contains a savings clause, 16 U.S.C. § 821, which expressly preserves certain state causes of action for property damages against licensees. *Id.* at 474. The court determined that the savings clause is limited in that it only exempts "requirements that reflect [or] establish proprietary rights or rights of the same nature as those relating to the use of water in irrigation or for municipal purposes." *Id.* at 476 (internal quotation marks omitted). The court noted that the Supreme Court has held that the FPA occupies the field of public water use and power generation, with the exception of water use rights. *Id.* at 476.

**CONCLUSION;** The 5th Circuit held that, because the state laws at issue infringe on the operational control of a power generation plant by a FPA licensee, the FPA preempts conflicting state law property damage claims. *Id.* at 477.

***United States v. Moore*, 733 F.3d 161 (5th Cir. 2013)**

**QUESTION;** Whether the Sentencing Guidelines under the Application Note 4(C)(ii)(I) of 18 U.S.C. app. § 2B1.1 (“sub-sub-paragraph I”) permit the district court to presume that there were at least fifty victims when calculating an offense level in a case that involves theft of United States Postal Service (“Postal Service”) mail from more than one of the Postal Service’s own collection boxes. *Id.* at 162.

**ANALYSIS;** The court looked to the plain language of the special rule and noted that “if the case involved a collection box, it is the case itself, not the collection box or boxes, that is presumed to have involved at least 50 victims; the *collection box* itself does not have victims.” *Id.* at 164. The court found no basis in the plain language of sub-sub-paragraph I for a presumption of fifty additional victims for each additional Postal Service receptacle. *Id.* The court reasoned that “this plain reading of sub-sub-paragraph I is confirmed by comparing it to the companion provision in sub-sub-paragraph II, which governs ‘housing unit cluster’ boxes.” *Id.* at 164–65.

**CONCLUSION;** The 5th Circuit held that the sub-sub-paragraph I of the Sentencing Guidelines allows the district court to presume that there were at least 50 victims when calculating an offense level in a case that involved one or more Postal Service’s collection boxes, but, outside of sentencing purposes, the rule does not permit the presumption of more than 50 victims. *Id.* at 167.

***Valdiviez-Hernandez v. Holder*, 739 F.3d 184 (5th Cir. 2013)**

**QUESTION;** Whether “expedited removal proceedings apply only to lawfully admitted non-permanent resident aliens who committed aggravated felonies.” *Id.* at 188.

**ANALYSIS;** The court noted that the 3rd, 4th, 7th, and 9th Circuits have uniformly rejected the proposition that the expedited removal proceedings enumerated under 8 U.S.C. § 1228(b) are inapplicable to aliens who are not admitted to the United States. *Id.* The court reasoned that while an analysis under § 1227 would yield such a result, applying its limits would result in a “complete variance from the thrust of § 1228(b).” *Id.* at 190. The court further explained that the regulations adopted by the Department of Homeland Security provide that “the expedited procedures apply even if the alien has never been admitted.” *Id.* at 191.

**CONCLUSION;** The 5th Circuit held that “§ 1228(b)’s expedited removal process applies to all aliens convicted of an aggravated felony who are not admitted for permanent residence.” *Id.*

## SIXTH CIRCUIT

***Grant, Konvalinka & Harrison, P.C. v. Still*, 737 F.3d 1034 (6th Cir. 2013)**

**QUESTION ONE;** Whether the creditor in a bankruptcy case “bears the burden of establishing the validity of a creditor’s security interest in debtor’s property.” *Id.* at 1036.

**ANALYSIS;** The court began by noting that “numerous bankruptcy courts in other jurisdictions have imposed . . . [the burden of establishing the validity of a creditor’s security interest] on creditors seeking relief under 11 U.S.C. § 362(d)(2).” *Id.* at 1038–39. The court reasoned that requiring creditors to carry the burden of proof is sound judicial policy because “the creditor will likely be in the best position to show that its interest is valid.” *Id.* at 1040.

**CONCLUSION;** The 6th Circuit held that the burden of establishing the validity of a security interest falls on the creditor seeking relief. *Id.*

**QUESTION TWO;** Whether a bankruptcy “trustee may use his hypothetical lien-creditor status and avoidance powers to oppose a motion for relief from the automatic stay after the expiration of the two-year statutory limitation on avoidance actions under 11 U.S.C. § 546(a)(1)(A).” *Id.* at 1036.

**ANALYSIS;** The court began by noting that the most common approach in bankruptcy courts, which has also been adopted by the 9th Circuit, is that “a trustee may use his avoidance powers defensively following the expiration of the statutory limitation on filing avoidance actions.” *Id.* at 1041. The court noted that the 1st, 7th, and 9th Circuits “permitted trustees to object to claims after the limitations period had run” when “construing the predecessor to § 502(d).” *Id.* at 1042. Finally, the court observed that “the majority view . . . furthers one of the central purposes of the Bankruptcy Code—to ensure the equality of the distribution among creditors of the debtor.” *Id.* (internal quotation marks omitted).

**CONCLUSION;** The 6th Circuit held that “the bankruptcy court properly adopted the majority view in holding that [a] [t]rustee was entitled to use his avoidance powers defensively without regard to the two-year statute of limitations under 11 U.S.C. § 546(a)(1)(A).” *Id.*

***United States v. Church*, 731 F.3d 530 (6th Cir. 2013)**

**QUESTION;** Whether under 18 U.S.C. § 3663A a defendant is obligated to pay restitution to third-party medical providers who have provided medical treatment to victim(s) of the defendant's wrongdoing. *Id.* at 536.

**ANALYSIS;** The 6th Circuit noted that the 4th and 9th Circuits have held that "third-party medical providers are entitled to restitution when they pay some or all of the cost of the victim's medical treatment themselves," because of the statute's language providing "that a defendant must . . . pay what it costs to care for the victim, whether or not the victim paid for the care or was obligated to do so." *Id.* The court contrasted the expansive language in § 3663A from language in other restitution statutes, which define a victim's losses as "costs incurred by the victim." *Id.* The court reasoned that the statute's stated purpose "to ensure that the offender realizes the damage caused by the offense and pays the debt owed to the victim as well as to society" also supports the 4th and 9th Circuits' holdings. *Id.*

**CONCLUSION;** The 6th Circuit agreed with the 4th and 9th Circuits and held that a defendant is obligated under 18 U.S.C. § 3663A to pay restitution to third-party medical providers who have provided medical treatment to the defendant's victim(s). *Id.* at 636–37.

***United States v. Miller*, 734 F.3d 530 (6th Cir. 2013)**

**QUESTION;** Whether a criminal defendant "uses" a person's name under 18 U.S.C. § 1028A to fraudulently obtain a loan by lying and misrepresenting his authority to act on behalf of an individual. *Id.* at 539–40.

**ANALYSIS;** The court noted that "uses" is not defined in the statute. *Id.* at 540–41. The court found that the two reasonable interpretations advanced by the parties based on the words ordinary meaning and statutory interpretation created ambiguity in the statute. *Id.* The court reasoned that when faced with multiple reasonable interpretations of "uses" and "no conclusive guidance from the legislative history or case law," it must apply the rule of lenity, which requires that vague criminal statutes be interpreted as most favorable for the defendant. *Id.* at 542.

**CONCLUSION;** The 6th Circuit held that a defendant does "not 'use' a means of identification within the meaning of §1028A by" misrepresenting his authority to act on behalf of an individual in order to obtain a loan. *Id.*

## EIGHTH CIRCUIT

***United States v. Ashcraft*, 732 F.3d 860 (8th Cir. 2013)**

**QUESTION;** Whether disability payments are “earnings” within the meaning of the Consumer Credit Protection Act, 15 U.S.C. § 167(a), and subject to garnishment despite the fact that an employee rendered his or her services before receiving disability payments. *Id.* at 861.

**ANALYSIS;** The court found that payments are considered “earnings” if they amount to “compensation paid or payable for personal services” regardless of how an employee’s payments are labeled. *Id.* at 864. The court reasoned that disability payments fit within the definition of earnings because they serve as replacement income for personal services performed by employees in the past, although an employee receiving disability payments may no longer be rendering services to the employer. *Id.*

**CONCLUSION;** The 8th Circuit held that disability payments are subject to garnishment under the Consumer Credit Protection Act because they fall within the definition of “earnings” even if an employer receives personal services before an employee receives payments. *Id.* at 865.

## NINTH CIRCUIT

***Herb Reed Enterprises LLC v. Florida Entertainment Management*, 736 F.3d 1239 (9th Cir. 2013)**

**QUESTION;** Whether “the likelihood of irreparable harm must be established—rather than presumed, as under prior [9th] Circuit precedent—by a plaintiff seeking injunctive relief in the trademark context.” *Id.* at 1242.

**ANALYSIS;** The court noted that it had previously held “that the likelihood of irreparable injury may be presumed from a showing of likelihood of success on the merits of a trademark infringement claim,” however the Supreme Court has recently held that a “plaintiff must establish irreparable injury when seeking a permanent injunction, applies in the patent context.” *Id.* 1248–49 (internal quotation marks omitted). The court noted that the Supreme Court has also recently held that “the requirement that a plaintiff seeking a preliminary injunction demonstrate that irreparable injury is *likely* in the absence of an injunction.” *Id.* at 1249 (internal quotation marks omitted). The court noted that it previously “held that likely irreparable harm must be demonstrated to



obtain a permanent injunction in a trademark infringement action.” *Id.* The court noted that the 6th and 11th Circuits have held “that a plaintiff must establish irreparable harm—applies to a preliminary injunction in the trademark infringement case.” *Id.*

**CONCLUSION;** The 9th Circuit joined the 6th and 11th Circuits in holding “that a plaintiff must establish irreparable harm . . . [to obtain] a preliminary injunction in a trademark infringement case.” *Id.*

***In re Wal-Mart*, 737 F.3d 1262 (9th Cir. 2013)**

**QUESTION;** The 9th Circuit addressed whether “a non-appealability clause in an arbitration agreement that eliminates all federal court review of arbitration awards, including review under § 10 of the Federal Arbitration Act (FAA)” is enforceable. *Id.* at 1264.

**ANALYSIS;** The court reasoned that “[p]ermitting parties to contractually eliminate all judicial review of arbitration awards would not only run counter to the text of the FAA, but would also frustrate Congress’s attempt to ensure a minimum level of due process for parties to an arbitration.” *Id.* at 1268. The court opined that “[i]f parties could contract around this section of the FAA, the balance Congress intended would be disrupted, and parties would be left without any safeguards against arbitral abuse.” *Id.*

**CONCLUSION;** The 9th Circuit held that 9 U.S.C. § 10(a) could not be waived or eliminated by contract. *Id.*

***Obsidian Financial Group, LLC v. Cox*, 740 F.3d 1284 (9th Cir. 2014)**

**QUESTION;** “[W]hether First Amendment defamation rules apply equally to both the institutional press and individual speakers.” *Id.* at 1291.

**ANALYSIS;** The 9th Circuit observed that the 2nd, 4th, 8th, 10th, and D.C. Circuits have all “held that the First Amendment defamation rules in *Sullivan* and its progeny apply equally to the institutional press and individual speakers.” *Id.* The court posited that “the protections of the First Amendment do not turn on whether the defendant was a trained journalist, formally affiliated with traditional news entities, engaged in conflict-of-interest disclosure, went beyond just assembling others’ writings or tried to get both sides of a story.” *Id.* The court agreed with the Supreme Court’s prior reasoning that “a First Amendment distinction between the decline of print and broadcast media the line between the media and others who wish to comment on political and social issues becomes far more blurred.” *Id.* (internal quotation marks omitted). The court noted further that “[i]n defamation cases, the public-figure status

of a plaintiff and the public important of the statement at issue – not the identify of the speaker –provide the First Amendment touchstones.” *Id.*

**CONCLUSION;** The 9th Circuit agreed with its sister circuits and held that the “negligence requirement for private defamation actions is not limited to cases with institutional media defendants.” *Id.*

***Piñon v. Bank of America, NA, 741 F.3d 1022 (9th Cir. 2014).***

**QUESTION;** Whether the “principles of substantive due process developed by the Supreme Court in the tort context [apply] to liquidated damages clauses in private contracts,” such as credit card fees. *Id.* at 1026.

**ANALYSIS;** The court distinguished liquidated damages provisions in a contract, which are enforceable “if the damages flowing from the breach are likely to be difficult to ascertain or prove at the time of agreement and the liquidated sum represents a good faith effort by the parties to appraise the benefit of the bargain,” from unenforceable penalty clauses which are designed to punish the breaching party or coerce his performance. *Id.* The court reasoned that punitive damages are most common in tort, and are generally not recoverable for breach of contract unless the conduct is also a tort. *Id.* The court noted that punitive damages were not developed for compensation purposes, but rather are aimed at retribution and deterring future harmful conduct. *Id.* at 1027. The court reasoned that since the penalty clauses leading to credit card fees originated from private contracts, “they are distinct from jury-determined punitive damages awards . . .” *Id.*

**CONCLUSION;** The 9th Circuit held that “the due process analysis developed in the context of jury-awarded punitive damages is not applicable to contractual penalty clauses.” *Id.*

***Rodriguez-Castellon v. Holder, 733 F.3d 847 (9th Cir. 2013)***

**QUESTION;** Whether an alien’s state crime conviction of lewd and lascivious acts upon a 14- or 15-year-old child qualifies as a “crime of violence” under 18 U.S.C. § 16(b), and is thus an “aggravated felony” under 8 U.S.C. § 1227(a)(2)(A)(iii) rendering him or her deportable. *Id.* at 850.

**ANALYSIS;** The court noted that the Immigration and Nationality Act defines “aggravated felony” to mean, among other things, a “crime of violence” under § 16(b). *Id.* at 852. The court reasoned that under § 16(b), a state crime is a “crime of violence” if it is (1) a felony and (2) “involves a substantial risk that physical force against the person . . . of another may be used in the course of committing the offense.” *Id.* at

854. The court noted that the 2nd, 5th, 8th, 10th, and 11th Circuits have found that state statutes criminalizing sexual conduct by an older adult with children 14-15 years old constitutes a crime of violence as defined by § 16(b). *Id.* at 856–57. The court reasoned that a felony conviction under California Penal Code § 288(c)(1) was a “crime of violence” because it raised a substantial risk that physical force would be employed to ensure the child’s compliance. *Id.* at 860.

**CONCLUSION;** The 9th Circuit held that a state conviction for sexual conduct upon a 14 or 15-year-old child qualifies as a “crime of violence” under § 16(b) because it presents a substantial risk of the use of force in the ordinary case. *Id.*

***Seven Arts Filmed Entertainment, Ltd. v. Content Media Corp.*, 733 F.3d 1251 (9th Cir. 2013)**

**QUESTION;** Whether “a claim for copyright infringement in which ownership is the disputed issue is time-barred if a freestanding ownership claim would be barred.” *Id.* at 1255.

**ANALYSIS;** The court noted that the 2nd and 6th Circuits “have held that where the gravamen of a copyright infringement suit is ownership, and a freestanding ownership claim would be time-barred, any infringement claims are also barred.” *Id.* The 9th Circuit agreed with this reasoning, stating that “[o]ur sister circuits’ approach makes good sense—allowing infringement claims to establish ownership where a freestanding ownership claim would be time-barred would permit plaintiffs to skirt the statute of limitations for ownership claims and lead to results that are potentially bizarre[.]” *Id.* (internal quotation marks omitted). The court further reasoned that “[a]n alternative approach would allow plaintiffs who claim to be owners, but who are time-barred from pursuing their ownership claims forthrightly, simply to restyle their claims as ‘infringement’ and proceed without restriction.” *Id.*

**CONCLUSION;** The 9th Circuit joined the 2nd and 6th Circuits and held “that an untimely ownership claim will bar a claim for copyright infringement where the gravamen of the dispute is ownership, at least where, as here, the parties are in a close relationship.” *Id.* at 1258.

***Shapiro v. Henson*, 739 F.3d 1198 (9th Cir. 2014)**

**QUESTION;** “[W]hether a trustee’s turnover power is solely restricted to recovering bankruptcy estate property, or its value, from entities having ‘possession, custody, or control’ (collectively ‘possession’) of such property at the time the motion for turnover is filed.” *Id.* at 1200.

**ANALYSIS;** The court reasoned that “[t]he plain language of [Bankruptcy Code] § 542(a), pre-Code practice, and the context of other Code provisions indicate that the trustee’s turnover power is not restricted to property of the estate at the time the motion is filed.” *Id.* at 1200. The court found that the phrases “during the case” and “or the value of such property” in § 542(a) demonstrate “the trustee’s power to move for turnover against an entity that does not have possession, custody, or control of property of the estate at the time the motion is filed.” *Id.* at 1202. The court stated that “[i]f the trustee can only move for turnover against an entity currently in possession of the property, that entity could avoid liability under §542(a) simply by transferring the property,” therefore § 542(a) fills a gap in the trustee’s avoiding powers by allowing them to proceed against someone who had possession of the property of the estate when the bankruptcy proceeding began, but then transfers it. *Id.* at 1203.

**CONCLUSION;** The 9th Circuit held that “a trustee may seek turnover from an entity that had possession, custody, or control of the subject property during the bankruptcy case whether or not the entity had possession, custody or control at the time the turnover motion is filed.” *Id.* at 1204 (internal quotation marks omitted).

***Tobar v. United States*, 731 F.3d 938 (9th Cir. 2013)**

**QUESTION;** Whether the discretionary function exception to sovereign immunity applies to claims under the Public Vessels Act (PVA). *Id.* at 945.

**ANALYSIS;** The court first noted that the 4th, 5th, and 11th Circuits “have held that the discretionary function exception applies to claims under the PVA.” *Id.* The court noted “Congress’s intent to exempt discretionary functions from independent judicial review” and reasoned that in light of such intent, the discretionary function exception must be applied to the PVA as it is to the Suits in Admiralty Act. *Id.*

**CONCLUSION;** The 9th Circuit joined the 4th, 5th, and 11th Circuits in holding that the discretionary function exception applies to claims under the PVA. *Id.* The 9th Circuit also joined the 4th, 5th, and 11th Circuits “in holding that the discretionary function exception applies” specifically to the PVA’s waiver of sovereign immunity. *Id.*

***United States v. King*, 735 F.3d 1098 (9th Cir. 2013)**

**QUESTION;** Whether a defendant charged with unlawful dealing in firearms in violation of 18 U.S.C. § 922(a)(1)(A) is entitled to receive a jury instruction requiring the government to prove that the defendant

“was not acting as an authorized agent of a federal firearms licensee.” *Id.* at 1101.

**ANALYSIS;** The court noted that an authorized agent is included in § 922(a)(1)(A)’s terms “any person . . . except a . . . licensed dealer.” *Id.* at 1104. The court reasoned that while the Gun Control Act affords corporate entities with the status of legal parenthood, “any corporate applicant must provide a wealth of information about each ‘responsible person,’ owner, and partner of the company.” *Id.* at 1105. The court posted that the proposed agency instructions were “at odds with the Gun Control Act’s purpose and comprehensive nature.” *Id.* The court refused to endorse a rule that would allow an agent to escape criminal liability simply because he had been authorized by his principal to so act. *Id.*

**CONCLUSION;** The 9th Circuit concluded that a defendant charged with unlawful dealing in firearms in violation of § 922(a)(1)(A) is not entitled to receive a jury instruction requiring the government to prove that the defendant “was not acting as an authorized agent of a federal firearms licensee.” *Id.* at 1101, 1106.

***USW Local 12-639 v. USW International*, 728 F.3d 1107 (9th Cir. 2013)**

**QUESTION;** Whether claims under the Labor-Management Reporting and Disclosure Act (LMRDA) § 609 protect elected and not appointed union officers from discipline suffered in their official capacities. *Id.* at 1115.

**ANALYSIS:** The court noted that the Conference Report accompanying the LMDRA explained that “prohibition on suspension without observing certain safeguards applies only to suspension of membership in the union; *it does not refer to suspension of a member’s status as an officer of the union.*” *Id.* at 1117. The court further reasoned that Congress did not intend for § 609 and other sections of the LMRDA “to protect against disciplinary actions that impinge on the incidents of union employment, regardless of appointed versus elected status.” *Id.* The court posited that because § 609 does not apply to actions directed against *appointed* union officers in their official capacities, it should not apply to actions directed against *elected* union officers. *Id.*

**CONCLUSION;** The 9th Circuit held that “LMDRA § 609 does not protect union officers from discipline suffered in their official capacities.” *Id.* at 1109.

## TENTH CIRCUIT

***United States v. Crowe*, 735 F.3d 1229 (10th Cir. 2013)**

**QUESTION;** Whether under U.S.S.G. § 2B1.1(b) the concept of reasonable foreseeability applies to a district court’s calculation of “actual loss” rather than its calculation of “credits against loss.” *Id.* at 1235–36.

**ANALYSIS;** The court noted that the 2nd Circuit interpreted the language of U.S.S.G. § 2B1.1 and its accompanying commentary as applying “reasonable foreseeability” to “actual loss” only. *Id.* at 1236–37. The court reasoned that because the language in Note 3 of U.S.S.G. § 2B1.1 treats amounts recovered by fraud victims as “credits against loss,” it is irrelevant whether a defendant “reasonably anticipated a precipitous decline in the real estate market that might result in the original lender or successor lenders being unable to recoup their losses from the sale of pledged collateral should she default.” *Id.* at 1237. The court posited that the only foreseeability issue to be determined was the “reasonable foreseeability of the ‘actual loss’” and not during the calculation of “credits against loss.” *Id.*

**CONCLUSION;** The 10th Circuit held that when calculating loss for the “purposes of U.S.S.G. § 2B1.1(b) applies only to a district court’s calculation of ‘actual loss,’ and not to its calculation of the ‘credits against loss.’” *Id.* at 1241.

***Wadsworth v. World of Life Christian Center*, 737 F.3d 1268 (10th Cir. 2013)**

**QUESTION;** “Whether, in the event that a restricted debtor transfers more than 15% of his gross annual income (GAI) to a qualified religious or charitable organization, a trustee may avoid the entire annual transfer or only the portion exceeding 15%.” *Id.* at 1271.

**ANALYSIS;** The court stated that “the plain language [of 11 U.S.C. § 548(a)(2)] subjected the entire transfer to avoidance if the transfer exceeded 15% of the debtor’s GAI.” *Id.* The court further noted that nothing in the plain language of the statute indicates that, if the transfer exceeds 15% of the debtor’s GAI, only the portion exceeding 15% is avoidable. *Id.*

**CONCLUSION;** The 1st Circuit held that in the event that a restricted debtor transfers more than 15% of his GAI to a qualified religious or charitable organization, a trustee may avoid the entire annual transfer. *Id.*

## ELEVENTH CIRCUIT

***Black Warrior Riverkeeper, Inc. v. Black Warrior Minerals*, 734 F.3d 1297 (11th Cir. 2013)**

**QUESTION;** “Whether a citizen [filing suit under the Clean Water Act] may evade the 60-day waiting period and sue a permit holder for violations of the new source performance standards when those standards are incorporated in the permit.” *Id.* at 1300.

**ANALYSIS;** The court reasoned that “[a]lthough the Act provides for citizen suits, it erects two hurdles for citizens to overcome before they commence a civil action against a discharger.” *Id.* at 1301. First, the citizen must provide notice to federal and state authorities before waiting 60 days prior to filing suit. *Id.* at 1302. Second, where the federal or state authorities commence suit first against the discharger, the citizen is barred from bringing a separate lawsuit (although the citizen may join the government suit). *Id.* The court noted, “Congress provided no exception to the 60-day waiting period for citizen suits about violations of permit conditions.” *Id.* The court interpreted the Act within the entirety of its context, not “interpreting a provision in a way that would render other provisions of the statute superfluous.” *Id.* at 1303. The court stated that the provision in question “does not exempt suits based on violations of permit conditions.” *Id.*

**CONCLUSION;** The 11th Circuit held that to allow this type of suit against a permit holder “would disrupt the statutory scheme for the enforcement of permits . . . [by] both undermin[ing] the overarching shame and nullify[ing] the statutory preference for government enforcement.” *Id.* at 1304.

***Durango-Georgia Paper Co. v. H.G. Estate, LLC*, 739 F.3d 1263 (11th Cir. 2014)**

**QUESTION;** Whether under 29 U.S.C. § 1369 of the Employee Retirement Income Security Act of 1974 (ERISA) “the trustee of a corporation that is a contributing sponsor and is in bankruptcy can maintain an action for the benefit of the bankruptcy estate and the estate’s unsecured creditors against the corporation’s former owner . . . for liabilities arising from the termination of a pension plan.” *Id.* at 1266.

**ANALYSIS;** The 11th Circuit noted that nothing in ERISA’s provisions or its legislative history suggests that “the duty of a current or

former controlled group to pay unfunded benefit liabilities is a duty owed to the employer as contributing sponsor, rather than to the plan's beneficiaries." *Id.* at 1272. The court found that the House Report relevant to ERISA states that the purpose of § 1369 was "to protect the [Pension Benefit Guaranty Corporation's] insurance program from companies that transfer large amounts of unfunded benefits to a weaker company or that otherwise attempt to evade liability for their pension promises." *Id.* The court also found that the report makes it plain that § 1369 "applies to any situations in which a principal purpose of a transaction is to evade *liability to participants and beneficiaries for benefit entitlements.*" *Id.* (internal quotation marks omitted). Therefore, the court found that ERISA clearly put funding requirements in place "for the benefit of plan beneficiaries, not for the protection of a bankrupt plan sponsor's unsecured creditors." *Id.* at 1273.

**CONCLUSION;** The 11th Circuit held that under ERISA, the trustee of a corporation that was a contributing sponsor and was in bankruptcy could not maintain an action for the benefit of the bankruptcy estate and the estate's unsecured creditors against the corporation's former owner for liabilities arising from the termination of a pension plan. *Id.* at 1266.

***Lesinski v. South Florida Water Management District*, 739 F.3d 598 (11th Cir. 2014)**

**QUESTION;** Whether the arm of the state analysis under the Eleventh Amendment should be used to determine whether a state entity is a "person" for liability purposes under the False Claims Act (FCA). *Id.* at 601.

**ANALYSIS;** The court noted that the "Eleventh Amendment largely shields states from suit in federal courts without their consent, leaving parties with claims against a State to present them, if the State permits, in the State's own tribunals." *Id.* The court also noted that the "Eleventh Amendment's protection extends not only to the state itself, but also to state officers and entities when they act as an arm of the state." *Id.* (internal quotation marks omitted). The court stated in contrast, that the FCA imposes liability on "any person" who "knowingly presents, or causes to be presented, a false claim or fraudulent claim for payment." *Id.* The court noted that the Supreme Court has held that the term "person" under the FCA "cannot include states or state agencies, at least for *qui tam* purposes." *Id.* The court also noted that the Supreme Court has also held that there is a "virtual coincidence of scope between the statutory inquiry into whether States can be sued under the FCA and the



Eleventh Amendment inquiry into whether unconsenting States can be sued under the FCA.” *Id.*

**CONCLUSION;** The 11th Circuit joined the 4th, 5th, 9th and 10th Circuits in holding that “courts should employ the Eleventh Amendment arm of the state analysis to determine whether a state entity is a ‘person’ subject to FCA liability.” *Id.* at 602.

***United States v. Mathauda*, 740 F.3d 565 (11th Cir. 2014)**

**QUESTION;** “Whether willful blindness satisfies the knowing requirement of [U.S.S.G.] § 2B1.1(b)(8)(C).” *Id.* at 568.

**ANALYSIS;** The court noted that the D.C. Circuit has “held that a district court did not err when it applied a sentencing enhancement based on the defendant’s violation of a prior court order, despite the defendant’s alleged lack of knowledge of the order, because he was willfully blind to the order he violated.” *Id.* The court reasoned that “there are two predominant formulations of ‘willful blindness’: when a defendant purposely contrived to avoid learning all the facts, or the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming the fact.” *Id.* 568–69 (internal quotation marks omitted).

**CONCLUSION;** The 11th Circuit agreed with the D.C. Circuit and held that willful blindness satisfies the knowing requirement of § 2B1.1(b)(8)(C). *Id.*

D.C. CIRCUIT

***United States v. Martinez-Cruz*, 736 F.3d 999 (D.C. Cir. 2013)**

**QUESTION;** Whether “due process requirements are satisfied if the defendant meets a burden of production but must then face a burden of persuading the court that the prior conviction was secured in violation of his right to counsel.” *Id.* at 1002.

**ANALYSIS;** The court explained that the question creates tension between “the presumption of regularity to final judgments” and the “unique constitutional defect” in the failure to provide counsel. *Id.* at 1002–03. The court reasoned that “[w]ithout defense counsel, the original proceedings are far less likely to yield a record that can clearly resolve the validity of the prior proceeding.” *Id.* at 1003. The court also recognized the government’s superior access to the evidence when such an appeal occurs. *Id.* at 1004.

**CONCLUSION;** The D.C. Circuit held that “the government [has] the ultimate burden of persuasion, but only once the defendant produces objective evidence sufficient to support a reasonable inference that his right to counsel was not validly waived.” *Id.*

FEDERAL CIRCUIT

***In re City of Houston*, 731 F.3d 1326 (Fed. Cir. 2013)**

**QUESTION;** “[W]hether § 2(b) of the Lanham Act bars a local government entity, such as Houston and the District [of Columbia], from registering [a trademark for] its own insignia.” *Id.* at 1330.

**ANALYSIS;** The court looked to the plain language of the statute and determined that § 2(b) of the Lanham Act “prohibits registration of an insignia of the United States, or of any State or municipality.” *Id.* at 1331 (internal quotation marks omitted). The court reasoned further that “nothing in this plain language that suggests a government entity such as Houston should be exempted from the reach of the prohibition.” *Id.*

**CONCLUSION;** The Federal Circuit concluded that “the context of § 2(b) supports the plain language of the prohibition and Houston’s identity as a governmental entity does not free it from the reach of § 2(b).” *Id.* The Federal Circuit similarly held that § 2(b) of the Lanham Act prohibited the District of Columbia from registering its trademark. *Id.* at 1335.

***LifeScan Scotland, Ltd. v. Shasta Technologies, LLC*, 734 F.3d 1361 (Fed. Cir. 2013).**

**QUESTION;** “[W]hether patent exhaustion applies to a product distributed for free.” *Id.* at 1374.

**ANALYSIS;** The court posited that “the [Supreme] Court has never confined the application of patent exhaustion to [the] context [of sale] . . .” *Id.* The court noted that “the [Supreme] Court has more fundamentally described exhaustion as occurring when the patented product passes to the hands of a transferee and when he legally acquires title to it.” *Id.* (internal quotation marks omitted). The court reasoned that the Supreme Court’s language “is broad enough to include a transfer of title that does not amount to a sale.” *Id.*

**CONCLUSION;** The Federal Circuit held “that, in the case of an authorized and unconditional transfer of title, the absence of consideration is no barrier to the application of patent exhaustion principles. *Id.*

***Pacific Coast Marine Windshields Ltd. v. Malibu Boats, LLC*, 739 F.3d 694 (Fed. Cir. 2014)**

**QUESTION;** Whether “the concept of prosecution history estoppel applies to design patents as well as utility patents.” *Id.* at 700.

**ANALYSIS;** The court noted that “treatises and district court opinions going back to 1889 have recognized that the concept of prosecution history estoppel applies to design patents as well as utility patents . . . .” *Id.* The court reasoned that “[t]he same principles of public notice that underlie prosecution history estoppel apply to design patents as well as utility patents.” *Id.* at 702. The court posited that “[p]rosecution history estoppel in design patents promotes the clarity that is essential to promote progress,” [and] [r]efusing to apply the principles of prosecution history estoppel to design patents would undermine the definitional and public notice requirements of the statutory claiming requirement.” *Id.* (internal quotation marks and citation omitted).

**CONCLUSION;** The Federal Circuit held “that the principles of prosecution history estoppel apply to design patents as well as utility patents.” *Id.*

***Tembenis v. Secretary of HHS*, 733 F.3d 1190 (Fed. Cir. 2013)**

**QUESTION;** Whether the estate of a petitioner who dies prior to judgment is entitled to compensation for lost future earnings under 42 U.S.C. § 300aa-15(a)(3)(B) of the National Childhood Vaccine Injury Act (Vaccine Act). *Id.* at 1191.

**ANALYSIS;** The court considered the different forms of compensation allowed under § 300aa-15(a) of the Vaccine Act, noting that subsection (a)(3) treats those over the age of 18 differently from those under the age of 18. *Id.* at 1193–94. The court further noted that the statute refers to “the impairment of future earnings capacity,” and not the “termination of such capacity.” *Id.* at 1195. The court found that subsection (a)(3)(B) presumes “a person who is alive at the time an award for future lost earnings is made would have had an earning capacity as of age 18 but for the vaccine-related injury.” *Id.* Accordingly, the court reasoned that if the claimant dies before the compensation is awarded, “there is no reasonable expectation” that the claimant would reach the age of 18. *Id.*

**CONCLUSION;** The Federal Circuit held that eligibility for future lost earnings under § 300aa-15(a)(3)(B) requires the person suffering from a vaccine-related injury to survive the compensation judgment. *Id.* at 1191.