2016 Federal Decisions
Presented to the Tuscaloosa County Bar Association CLE
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Commonwealth of Puerto Rico v. California Tax-Free Trust, No. 15-233 (U.S. June 13, 2016): Puerto Rico passed legislation, known as the Recovery Act, which mirrored Chapters 9 and 11 of the Federal Bankruptcy Code and would have enabled Puerto Rico's public utility corporations to restructure their climbing debt. The Supreme Court held that the Bankruptcy Code, particularly section 903(1), preempts the Recovery Act.

RICO; INTERNATIONAL LAW

RJR Nabisco, Inc. v. European Community, No. 15-138 (U.S. June 20, 2016): RICO evinces an intent by Congress to reach extraterritorial acts with respect to those predicate acts falling within the purview of RICO. Thus, foreign enterprises can be enterprises under RICO, but foreign enterprises will qualify only if they engage in, or significantly affect, commerce directly involving the United States. Additionally, RICO civil liability can extend only to damages which are incurred domestically.

ADMINISTRATIVE LAW

Encino Motor Cars, Inc. v. Navarro, No. 15-415 (U.S. June 20, 2016): Courts do not apply *Chevron* deference where a regulation is "procedurally defective"- where the agency errs by failing to follow the correct procedures in issuing the regulation.

AFFIRMATIVE ACTION

Fisher v. University of Texas at Austin, No. 14-981 (U.S. June 23, 2016): The Court upheld, under strict-scrutiny review, UT's use of race as a criteria in admissions decisions. As to the “compelling governmental interest” component of the test, "the decision to pursue the educational benefits that flow from student body diversity is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper." Additionally, when determining whether the use of race is narrowly tailored to achieve the university's permissible goals, the school satisfied its burden of demonstrating that "available" and "workable" "race-neutral alternatives" do not suffice.

IMMIGRATION

United States v. Texas, No. 15-674 (U.S. June 23, 2016): The Fifth Circuit had affirmed an injunction stopping implementation of the President's immigration policy concerning deportation rankings. The Supreme Court affirmed by an equally-divided Court, so this holding is non-precedential.

INDIAN LAW

Dollar General Stores, Inc. v. Mississippi Band of Choctaw Indians, No. 13-1496 (U.S. June 23, 2016): An equally-divided Court affirmed the Fifth Circuit’s holding that Indian tribal courts have

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Whole Woman's Health v. Hellerstedt, No. 15-274 (U.S. June 27, 2016): The Court (5-3) invalidated two Texas statutes which (1) required physicians performing abortions to have hospital-admitting privileges at a nearby hospital, and (2) required establishments performing abortions to have facilities akin to surgical centers. The Court (per Justice Breyer) reasoned that these laws place substantial obstacles in the path of a woman's right to abortion and thus imposed an undue burden on the exercise of that right. The Court's majority embraced the undue burden test from the plurality opinion from *Planned Parenthood v. Casey*.

B. FROM THE ELEVENTH CIRCUIT COURT OF APPEALS

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National Mining Assn. v. DOL, No. 14-11942 (11th Cir. Jan. 25, 2016): The Court upheld (in a complex 83-page decision) a proposed regulation by the Mine Safety and Health Administration ("MSHA") relating to mine dust monitors.

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STATUTORY DAMAGES ABSENT ACTUAL DAMAGES
Vista Marketing, LLC v. Burkett, No. No. 14-14068 (11th Cir. Feb. 4, 2016): Under the Stored Communications Act, 18 U.S.C. §§ 2701-2712 (the "SCA"), (1) there is no authority to award statutory damages absent a finding of actual damages; and (2) attorneys fees are recoverable only in a "successful action to enforce liability."

LABOR RELATIONS; EMPLOYEE VS. INDEPENDENT CONTRACTOR
Crew One Productions, Inc. v. NLRB, No. 15-10429 (11th Cir. Feb. 3, 2016): Local hired freelance stagehands which obtained employment through a referral service, Crew One Productions are independent contractors and not employees; thus, the Board erred by directing Crew One to hold an election and certifying a stagehand union.

AFFORDABLE CARE ACT; CONTRACEPTION MANDATE

Eternal Word Television Network, Inc. v. State of Alabama, No. 14-12696 (11th Cir. Feb. 18, 2016): The Court upheld against First Amendment and RFRA attack the "contraceptive mandate" of the Affordable Care Act ("ACA").

FAIR HOUSING ACT

Hunt v. AIMCO Properties, LP, No. 14-14085 (11th Cir. Feb. 18, 2016): Landlord's threatening to evict tenant with Down's Syndrome son adequately pleaded failure to provide reasonable accommodation to a person with a disability. A FHA plaintiff must plead and prove circumstances sufficient to cause reasonable housing provider to make appropriate inquiries about possible need for accommodation.

FIREARM MANUFACTURER LIABILITY; DAUBERT

Seamon v. Remington Arms Co., No. 14-15662 (11th Cir. Feb. 17, 2016): District court improperly disallowed expert for lack of *Daubert* reliability; district court mischaracterized the expert's opinion and evidence supporting it.

JUDICIAL ESTOPPEL

Slater v. U.S. Steel Corp., No. 12-15548 (11th Cir. Feb. 24, 2016): The panel affirmed the District Court's reversal of the Bankruptcy Court's refusal to apply judicial estoppel to bar a Title VII claim which the plaintiff/debtor failed to disclose in her Chapter 7 bankruptcy schedules (the bankruptcy was filed 21 months after the Title VII case). Under existing Eleventh Circuit law, whether the plaintiff succeeded in maintaining the inconsistent positions was not dispositive. Judge Tjoflat specially concurred, calling for *en banc* review.

TITLE VII MIXED MOTIVE

Quigg v. Thomas County School Dist., No. 14-14530 (11th Cir. Feb. 22, 2016): Mixed-motive claims based on circumstantial evidence are evaluated under the test from *White v. Baxter Healthcare Corp.*, 533 F.3d 381 (6th Cir. 2008) - not the *McDonnell Douglas* framework; thus, plaintiff must offer substantial evidence that (1) defendant took an adverse employment action against the plaintiff; and (2) the protected characteristic was a motivating factor for the defendant's adverse employment action.

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Evanto v. FNMA, No. 15-11450 (11th Cir. March 1, 2016): Assignee is not liable under the Truth in Lending Act for a servicer's failure to provide the borrower with a payoff balance; assignee liability under TILA is limited to violations "apparent on the face" of the documents.

SECURITIES

Fried v. Stiefel Laboratories, Inc., No. No. 14-14790 (11th Cir. March 1, 2016): Rule 10b-5(b) plaintiff must prove that defendant omitted material fact necessary to keep other statements from being materially misleading; district court properly rejected plaintiff's proposed instruction focusing solely on defendants' failure to disclose material information.

DEFAMATION

Michel v. NYP Holdings, Inc., No. 15-11453 (11th Cir. March 7, 2016): District Court properly dismissed defamation complaint; although reasonable reader could conclude that subject article presented statements of fact (not just non-actionable opinion), plaintiff failed to plead facts giving

rise to reasonable inference of actual malice. Dismissal should have been without prejudice so as to allow re-pleading.

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Romano-Murphy v. CIR, No. 13-13186 (11th Cir. March 7, 2016):Taxpayer is entitled to a pre-assessment administrative determination by the IRS of her proposed liability for trust fund taxes if she files a timely protest.

ELEVENTH AMENDMENT

Nichols v. Alabama State Bar, No. 15-13248 (11th Cir. Mar. 10, 2016): The Alabama State Bar is an arm of the state entitled to Eleventh Amendment immunity.

CONSTITUTIONAL LAW

Blue Martini Kendall LLC v. Miami Dade County, FL, No. 14-13722 (11th Cir. March 17, 2016): County and off-duty deputies moonlighting as private guards at nightclub were entitled to indemnity in suit by patrons; *Fla. Stat.* § 30.2905 makes a private employer "responsible for the acts or omissions of the deputy sheriff while performing services for that employer while off duty."

CLASS ACTIONS; PREDOMINANCE

Brown v. Electrolux Home Products, Inc., No. 15-11455 (11th Cir. March 21, 2016): In a "smelly washer" consumer class action, California class was unsuitable because there was no evidence any class member actually viewed the allegedly misleading marketing materials (the named plaintiff for the California class admitted he saw no such materials). The same was true for the Texas class, especially since the Texas DTPA requires proof of reliance.

FDCPA

Bishop v. Ross Earle & Bonan, P.A., No. 15-15285 (11th Cir. March 25, 2016): (1) Debt-collection letter sent to the consumer's attorney - rather than directly to the consumer - qualifies as a "communication with a consumer;" (2) Omitting the "in writing" requirement set forth in § 1692g amounts to waiver of that requirement by the debt collector; (3) omission of the "in writing" requirement states a claim for "false, deceptive, or misleading" behavior in violation of § 1692e. On this last issue, the Court rejected the "competent lawyer" standard for FDCPA communications directed to lawyers, holding that the "least sophisticated consumer" standard controls.

ALL WRITS/ANTI-INJUNCTION

Original Brooklyn Water Bagel Co., Inc. v. Bersin Bagel Group, LLC, No. 15-11748 (11th Cir. March 25, 2016): Anti-Injunction Act deprived the district court of the power to enjoin Bersin from prosecuting state court suit, based on *res judicata* effect of prior action.

SERVICE OF PROCESS

DeGazelle Group, Inc. v. Tamaz Trading Establishment, No. 15-13543 (11th Cir. March 30, 2016): FedEx is not a Rule-authorized method of service.

ADA

Frazier-White v. Gee, No. 15-12119 (11th Cir. April 7, 2016): Neither Plaintiff's request for an indefinite extension of "light duty" status or her request for reassignment to an unspecified position was an identified reasonable accommodation, causing ADA claim to fail.

TITLE VII
Trask v. Secretary of Veterans Affairs, No. 15-11709 (11th Cir. April 5, 2016): Plaintiffs failed to demonstrate that, though they were long-serving and highly qualified clinical pharmacists, they were in fact qualified for the PACT positions for which promotions were sought, given their requirements (which Plaintiffs lacked) of having "advanced scope" and providing independent mid-level care and holding independent prescription-writing authority.

BANKRUPTCY; PROCEDURE
Rosenberg v. DVI Receivables XIV, LLC, No. 14-14620 (11th Cir. April 8, 2016): When trying a case arising under title 11, a district court (just like a bankruptcy court) must apply the filing deadline found in the FRBP when addressing a Rule 50(b) motion (which requires filing within 14 days, unlike 28 days under FRCP).

ARBITRATION; WAIVER
Collado v. J&G Transport, Inc., No. 15-14635 (11th Cir. April 21, 2016): Waiver of the right to arbitrate a federal claim does not extend to later asserted state claims added by amendment.

QUALIFIED IMMUNITY
Carter v. Butts County, No. 15-12529 (11th Cir. May 3, 2016): Deputy lacked even arguable probable cause to effect arrests of lender's representatives because he knew that the agents were lawfully on deputy's property preparing for resale after foreclosure.

RESPA
Renfroe v. NationStar Mortgage, Inc., No. 15-10582 (11th Cir. May 12, 2016): (1) RESPA plaintiff alleging that servicer failed to comply with Qualified Written Request procedures, in violation of 12 U.S.C. § 2605, adequately pleaded (in light of CFPB regulations interpreting requirements for servicers in responding to disputes) that servicer failed to supply a statement of reasons it had concluded there was no error in the increase in payments; (2) that plaintiff adequately pleaded "actual damages" under RESPA for servicer's failure to refund allegedly wrongful increase; and (3) plaintiff adequately pleaded "pattern and practice" to trigger possible entitlement to statutory and punitive damages under RESPA.

LABOR; INJUNCTIONS
Secretary, USDOL v. Lear Corp., No. 15-12060 (11th Cir. May 13, 2016): District court erred by enjoining Lear from pursuing litigation against former employee without finding that such litigation was either baseless or preempted.

CLASS ACTIONS; PREDOMINANCE
Carriuolo v. General Motors Co., No. 15-14442 (11th Cir. May 19, 2016): District court properly grant of class certification to Florida purchasers of certain Cadillac CTS cars, based on GM's falsely stating on the window stickers that the car received all 5-star ratings for certain crash tests (with some of the cars, no tests had then been performed; once the car was tested, it received all 5-stars except for a 4-star as to passenger frontal collision). FDUTPA (Florida's deceptive trade practices act) does not require proof of reliance, and thus common issues predominated.

STATUTES OF LIMITATION
Foudy v. Miami-Dade County, FL, No. 15-12233 (11th Cir. May 19, 2016): Four-year catch-all

statute of limitations under 28 U.S.C. § 1658(a) applies to claims under the Drivers Privacy Protection Act.

FDCPA; BANKRUPTCY

Johnson v. Midland Funding LLC, No. 15-11240 (11th Cir. May 24, 2016): *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254, 1261 (11th Cir. 2014), under which a debt collector violates the FDCPA when it files a proof of claim in a bankruptcy case on a debt that it knows to be time-barred, does not create irreconcilable conflict between the Code and the FDCPA.

LABOR

NLRB v. Gaylord Chemical Co., No. 15-10006 (11th Cir. June 3, 2016): Employer had bargaining relationship with union that pre-dated Employer's change of location, Employer's operation in new location was continuation of prior operation, and thus Employer had continuing obligation to bargain after the move.

TAX

Scott v. US, No. 14-14649 (11th Cir. June 14, 2016): Under 26 U.S.C. § 6672, one becomes a "a responsible person" who is required to pay over to the Internal Revenue Service trust fund taxes - i.e., taxes withheld by a business from employees' wages, if that person was "required to collect, truthfully account for, and pay over any tax;" and a responsible person becomes personally liable of the person acted willfully in failing to do collect and pay over the withholdings. Held: evidence was conflicting as to the scope of Scott's check-writing authority and other job duties, which created fact question on "responsible person" issue.

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Home Design Services, Inc. v. Turner Heritage Homes, Inc., No. 15-11912 (11th Cir. June 17, 2016): Judges are necessarily better able than juries to resolve whether the "average lay observer" would find "substantial similarity" between two architectural works.

SECURITIES; ADMINISTRATIVE LAW

Hill v. SEC, No. 15-12831 (11th Cir. June 17, 2016): This is an important decision on a hot issue - the constitutionality of the SEC Administrative tribunals. The Eleventh Circuit vacated a district court order enjoining an administrative proceeding, holding that the district court lacked jurisdiction over lawsuits collaterally attacking an administrative action. The Court concluded it "fairly discernible" from the review scheme provided in 15 U.S.C. § 78y that Congress intended the respondents' claims to be resolved first in the administrative forum, not the district court, and then, if necessary, on appeal to the appropriate federal court of appeals.

ARBITRATION; CONTRACT FORMATION

Bazemore v. Jefferson Capital Systems, Inc., No. 15-12607 (11th Cir. July 5, 2016): Order denying arbitration was affirmed; under Georgia law (the state law applicable to contract formation) there was no evidence that an agreement to arbitrate was ever entered into in connection with a "clickwrap" agreement (agreeing to terms by clicking on acceptance).

FCRA

Hinkle v. Midland Credit Mgmt., Inc., No. 15-10398 (11th Cir. July 11, 2016): Downstream debt buyer could not satisfy its investigatory duty under 15 U.S.C. § 1681s-2(b), so as to support summary judgment in its favor on a reinvestigation claim, by simply relying on internal data to

verify a consumer's identity and liability, when the buyer had no underlying documents relating to the debt. Given the evidence of Midland's system for handling these type disputes, the evidence was sufficient to support a finding that its violation was willful under section 1681n.

RULE 60; SETTLEMENT
Hartford Cas. Ins. Co. v. Crum & Forster Spec. Ins. Co., No. 15-12781 (11th Cir. July 12, 2016): Courts are to apply an equitable approach that generally counsels against granting requests for vacatur made after the parties settle, but creates a carve-out for "exceptional circumstances;" such circumstances were present in this case.

ADMIRALTY
Tundidor v. Miami-Dade County, No. 15-12597 (11th Cir. Aug. 3, 2016): Canal is not navigable in admiralty if an artificial obstruction prevents vessels from using the canal to conduct interstate commerce.

FIRST AMENDMENT
Flanigan's Enterprises, Inc. v. City of Sandy Springs, No. 14-15499 (11th Cir. Aug. 3, 2016)
Under *Williams v. Attorney General*, 378 F.3d 1232 (11th Cir. 2004), the Due Process Clause does not contain a right to buy, sell, and use sexual devices.

SECURITIES; AMERICAN PIPE TOLLING; RICO
Dusek v. J.P.Morgan Chase & Co., No. 15-14463 (11th Cir. Aug. 10, 2016): Because the *American Pipe* rule for class-action tolling of the statute of limitations is a principle of equitable and not legal tolling, it does not apply to save an otherwise untimely claim brought in violation of a statute of repose (in this case, a claim under Section 20(a) of the Securities Act). Section 1964(c) of RICO prohibits the bringing of a RICO claims based on predicate acts of mail and/or wire fraud which would be actionable securities fraud claims.

BANKRUPTCY; DOMESTIC SUPPORT OBLIGATIONS
In re Gonzalez, No. 15-14804 (11th Cir. Aug. 11, 2016): Exception to the automatic stay for domestic support obligations does not apply after the confirmation of a debtor's Chapter 13 plan.

ENVIRONMENTAL LAW
Black Warrior Riverkeeper v. U.S. Army Corps of Engineers, No. 15-14745 (11th Cir. Aug. 12, 2016): Corps' 2012 decision to reissue Nationwide Permit 21 ("NWP 21"), a general permit regulating discharge of dredged or fill materials into navigable waters by surface coal mining operations, was neither arbitrary nor capricious.

FIRST AMENDMENT
Wright v. City of St. Petersburg, No. 15-10315 (11th Cir. Aug. 15, 2016): City's exclusion of Wright from a park for one year for misconduct was lawful even though it had an incidental effect on his First Amendment rights during that year.

ERISA; BENEFITS CLAIMS
Alexandra v. Oxford Health Insurance, Inc. Freedom Access Plan, No. 15-11513 (11th Cir. Aug. 16, 2016) Held: (1) district court correctly decided that the record of the external review was properly before the district court, but erred in holding that the adverse external review decision barred Alexandra from presenting her challenge to the adverse medical necessity determination; and (2)

because the external review process does not conflict with ERISA, it is not preempted.

FIRST AMENDMENT; EMPLOYMENT
Carollo v. Boria, No. 15-11512 (11th Cir. Aug. 17, 2016)
Qualified immunity did not bar First Amendment termination claim at motion to dismiss stage; reasonable public officials would have known at the time of termination that it violated the First Amendment to terminate a colleague for speaking about matters of public concern outside the scope of his ordinary job responsibilities.

SECTION 1981
Moore v. Grady Mem. Hosp., No. 14-14719 (11th Cir. August 22, 2016): Section 1981 complaint sufficiently alleged specific instances of actions motivated by race, which included summarily suspending African American doctor's privileges, diverting cases to white physicians outside of hospital, and failing to provide operating rooms for surgery to the African-American doctors of Morehouse College.

TITLE VII; JOINT EMPLOYER
Peppers v. Cobb County, No. 15-10866 (11th Cir. August 25, 2016): Retired investigator with Cobb County DA's office sued County under Title VII and Equal Pay Act. The district court granted summary judgment to County, rejecting Plaintiff's theory that County and DA were joint employers because County was responsible for approving the District Attorney's budget and paying Peppers's salary and benefits. The Eleventh Circuit affirmed, reasoning that the County is a legally separate and distinct entity that did not control the fundamental aspects of the employment relationship.

BANKRUPTCY; CONTEMPT
In re: Ocean Warrior, Inc., No. 15-11891 (11th CIr. August 26, 2016): Civil contempt proceeding conducted through pursuant to a show-cause order complied with due process. President of entity was not entitled to appointed counsel because incarceration was not involved in civil contempt. Bankruptcy court had jurisdiction to conduct a contempt proceeding ancillary to a core matter.

RICO
Ray v. Spirit Airlines, Inc., No. 15-13792 (11th Cir. Sept. 2, 2016): RICO claim was properly dismissed: plaintiffs failed to adequately allege proximate cause and failed to properly plead existence of RICO enterprise.

CONSTITUTIONAL TORTS
Jacoby v. Baldwin County, No. 14-12932 (11th Cir. Aug. 29, 2016): Pretrial detainee's conditions of confinement alleged were not so unsanitary or outrageous to trigger substantive due process violation, and (2) under the test for procedural due process applicable to an already-confined inmate, his procedural due process rights were not violated.

ARBITRATION; UNAVAILABLE ARBITRATOR AND SEVERABILITY
Parm v. National Bank of California, NA, No. 15-12509 (11th Cir. Aug. 29, 2016): Arbitration agreement providing for arbitration before Cheyenne River Soiux Tribe was unenforceable because the arbitral forum was unavailable. The arbitrator selection was so integral to the clause, moreover, that it could not be severed from the remainder of the agreement, and thus arbitration

was properly denied.

ARBITRATION; POST-ARBITRAL REVIEW
Wiregrass Metal Trades Council AFL-CIO v. Shaw Environmental & Infrastructure, Inc., No. 15-11662 (11th Cir. Sept. 8, 2016): Arbitrator acts within her authority when she even arguably interprets a contract, but she exceeds her authority when she modifies the contract's clear and unambiguous terms.

EMPLOYMENT
EEOC v. Catastrophe Management Solutions, Inc., No. 14-13482 (11th Cir. Sept. 15, 2016): Held: (1) EEOC improperly conflated the distinct Title VII theories of disparate treatment and disparate impact; (2) Title VII prohibits discrimination based on immutable traits, and the proposed amended complaint does not assert that dreadlocks - though culturally associated with race - are an immutable characteristic of black persons; and (3) the EEOC's Compliance Manual was not entitled to deference or persuasiveness because it conflicted with the position taken by the EEOC in an earlier administrative appeal, the EEOC has not offered any explanation for its change in course.

FIRST AMENDMENT; POLITICAL DONATIONS
Alabama Democratic Conference v. Attorney General, No. 15-13920 (11th Cir. Sept. 26, 2016): The Court upheld Alabama's PAC-to-PAC transfer ban (*Ala. Code* § 17-5-15(b)) against a First Amendment challenge brought by the ADC.

FLSA
Calderone v. Scott, No. 15-14187 (11th Cir. Sept. 28, 2016): Joining the D.C., Second, Third, Seventh, and Ninth Circuits, an FLSA collective action and a Rule 23(b)(3) state-law class action may be maintained in the same proceeding.

FDCPA
Ray v. McCullough Payne and Haan LLC, No. 16-11518 (11th Cir. Sept. 29, 2016): A post-judgment garnishment action under Georgia law is not against the consumer, but rather against the garnishee, and thus is not subject to the exclusive venue provisions of the FDCPA, 15 U.S.C. § 1692i(a)(2). The First and Eighth Circuits have held likewise; the Ninth Circuit disagrees.

RESPA (REG. X)
Lage v. Ocwen Loan Servicing, Inc., No. 15-15558 (11th Cir. Oct. 7, 2016): Under Regulation X, a loan servicer's duty to evaluate a borrower's loss mitigation application is triggered only when the borrower submits the application more than 37 days before the foreclosure sale. The Court held that the timeliness of the Borrowers' application is measured using the date the foreclosure sale was scheduled to occur when Borrowers submitted their complete application.

EQUITABLE TOLLING; FORUM SELECTION
Chang v. Carnival Corp., No. 14-13228 (11th Cir. Oct. 6, 2016): State court action improperly filed in violation of forum selection clause did not equitably toll statute of limitations in otherwise untimely filed second action filed in the contractually chosen forum.

STANDING
Nicklaw v. CitiMortgage, Inc., No. 15-14216 (11th Cir. Oct. 6, 2016): Putative class action seeking

statutory damages under New York law for mortgagee's failure to file timely discharge of mortgage failed to allege sufficient injury-in-fact under *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016), thus depriving plaintiff of standing.

AGE DISCRIMINATION (EN BANC)
Villareal v. R.J. Reynolds Tobacco Co., No. 15-10602 (11th Cir. Oct. 5, 2016): Applicant for employment cannot sue an employer for age discrimination based on disparate impact because the applicant has no status as an employee. Plaintiff was not entitled to equitable tolling of disparate treatment claim because he admitted facts that establish that he did not diligently pursue his rights.

BANKRUPTCY; FORECLOSURE
In re Failla, No. 15-15626 (11th Cir. Oct. 4, 2016): Because the word "surrender" in the bankruptcy code, 11 U.S.C. § 521(a)(2), requires that debtors relinquish their right to possess the property, a person who agrees to "surrender" his house in bankruptcy may oppose a foreclosure action in state court.

LABOR
Mercedes-Benz U.S. International, Inc. v. NLRB, No. 15-10291 (11th Cir. Oct. 3, 2016): NLRB had found that MBUSI violated the NLRA in three ways: (1) maintaining an overly broad solicitation and distribution rule that employees would reasonably understand to prohibit solicitation in work areas by employees not on working time of other employees not on working time; (2) prohibiting an employee not on working time from distributing union literature in one of MBUSI's team centers, which are mixed-use areas; and (3) prohibiting employees not on working time from distributing union literature in the MBUSI atrium, which is a mixed-use area. The Court enforced the Board's order in part, affirming the atrium violation and the solicitation and distribution policy ruling. However, Board's remedial order involving the team centers was overly broad, and remand was necessary for further findings as to whether MBUSI's team centers are converted mixed-use areas during the pre-shift period. And on a 2-1 conclusion, the Court held that "the ALJ failed to recognize the distinction between converted and permanent mixed-use areas and failed to analyze the relative volume and nature of work and non-work activity in the team centers."

QUALIFIED IMMUNITY
Fish v. Brown, No. 15-12348 (11th Cir. Oct. 3, 2016): Deputies which accompanied plaintiff's sometime lover into home, where lover entered residence with consent of plaintiff, were entitled to qualified immunity on Fourth Amendment claims; officers' entry was arguably lawful under either the "consent once removed" doctrine or the "impliedly open to public use" doctrine. The case contains a robust synopsis of qualified immunity law.

QUALIFIED IMMUNITY
Wate v. Kubler, No. 15-15611 (11th Cir. Oct. 12, 2016): Officers who tased and struggled with decedent (arrestee died after the struggle) were not entitled to qualified immunity; substantial evidence demonstrated that decedent was not a flight risk or a threat to the safety of the officers or the public prior to the conclusion of the tasings.

TRIBAL IMMUNITY
Williams v. Poarch Band of Creek Indians, No. 15-13552 (11th Cir. Oct. 18, 2016): Tribal immunity barred Plaintiff's ADEA claims against the tribe for alleged age discrimination in a firing decision.

PRELIMINARY INJUNCTIONS
Wreal, LLC v. Amazon.com, Inc., No. 15-14390 (11th Cir. Oct. 28, 2016): Delay in seeking a preliminary injunction of even only a few months, though not necessarily fatal, militates against a finding of irreparable harm.

ADMIRALTY
Girard v. M/V "Blacksheep," No. 15-15803 (11th Cir. Nov. 3, 2016): Marine salvor brought in rem action against vessel which his actions purportedly helped save at sea, seeking recovery of a "salvage award" for role in saving ship from impending sea peril. In reversing judgment for the defendant, the panel abrogated *Klein v. Unidentified Wrecked & Abandoned Sailing Vessel*, 758 F.2d 1511 (11th Cir. 1985), holding that "but for" causation was not properly an element of the claim based on prior panel precedent.

FALSE CLAIMS ACT
USA ex rel. Saldivar v. Fresenius Medical Care Holdings, Inc., No. 15-15497 (11th Cir. Nov. 8, 2016): District court lacked subject matter jurisdiction over qui tam claim because relator's knowledge of the actual overbilling in issue was secondhand, and thus he was not an original source, nor did he have "direct and independent knowledge of the information on which the allegations are based." 31 U.S.C. § 3730(e)(4)(B). Moreover, the information in issue was publicly disclosed.

FUTILITY DOCTRINE
Chang v. J.P. Morgan Chase Bank, N.A., No. 15-13636 (11th Cir. Nov. 8, 2016): District court abused its discretion in denying amendment to pleading, based on futility doctrine, where plaintiff had developed facts in discovery which, if found by a trier of fact, would have proven the essential elements of a cognizable claim.

QUALIFIED IMMUNITY
May v. City of Nahunta, No. 15-11749 (11th Cir. Nov. 15, 2016): Officer was entitled to qualified immunity for decision to seize plaintiff for purpose of detaining her for mental health evaluation at hospital, given EMT's reports of her self-injury and behavior. But officer was not entitled to qualified immunity for manner of seizure, where plaintiff offered substantial evidence that officer detained her in a closet for 20 minutes and forced her to disrobe in front of him.

QUALIFIED IMMUNITY
Melton v. Abston, No. 15-11412 (11th Cir. Nov. 18, 2016): In deliberate indifference section 1983 case, nurse, physician who left broken arm untreated and unexamined, and Sheriffs were not entitled to summary judgment on qualified immunity, despite the lack of on-point case law, because medical need was "so obvious that even a lay person would easily recognize the necessity for a doctor's attention."

CAFA
Wright Transportation, Inc. v. Pilot Corp., No. 15-15184 (11th Cir. Nov. 23, 2016): Federal courts that are given original subject-matter jurisdiction over state-law claims by the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d), retain that jurisdiction even when the class claims are dismissed before the class is certified.

QUALIFIED IMMUNITY

Bailey v. Wheeler, No. 15-11627 (11th Cir. Nov. 28, 2016): The Court affirmed the district court's denial of sheriff's motion to dismiss based on qualified immunity, in action by deputy arising from sheriff's dissemination of a BOLO warning to all officers due to deputy's being a "loose cannon," where deputy had filed written report to his chief regarding racial profiling by deputies in the department. The BOLO could have adversely affects protected speech if his alleged retaliatory conduct "would likely deter a person of ordinary firmness from the exercise of First Amendment rights." The Court also reasoned that the First Amendment violation was so apparent that on-point case law was not needed to notify the defendant that his conduct would infringe on plaintiff's free speech rights.

II. CRIMINAL DECISIONS FROM THE UNITED STATES SUPREME COURT

CRIMINAL LAW

Musacchio v. US, No. 14-1095 (U.S. Jan. 25, 2016): Sufficiency of evidence challenge should be assessed against the elements of the charged crime, not against the elements set forth in a jury instruction which erroneously heightened the burden on the prosecution by injecting an additional essential element not present in the charging statute.

JUVENILE CONVICTIONS; LIFE WITHOUT PAROLE

Montgomery v. Louisiana, No. 14-280 (U.S. Jan. 25, 2016): The Court gave retroactive application (for cases on state collateral review) to *Miller v. Alabama*, which held that mandatory life-without-parole sentences for juveniles violates the Eighth Amendment.

STATUTORY CONSTRUCTION

Lockhardt v. US, No. 14-8358 (U.S. Feb. 29, 2016): Statutory construction principle "rule of last antecedent" requires that a limiting phrase be deemed to modify only the immediately preceding phrase. The dissent argued that competing principle of statutory construction (the "series qualifier principle"), together with the natural reading of the phrase and the statute's application to child pornography offenses, created at least an ambiguity which under the rule of lenity would require a construction favoring the defendant.

FEDERAL SENTENCING GUIDELINES

Molina-Martinez v. U.S., No. No. 14-8913 (U.S. April 20, 2016): Miscalculation of a guidelines range, even where eventual sentencing falls within the correct range, requires resentencing without presentation by defendant of “additional evidence” demonstrating the illegality of the sentence.

HOBBS ACT

Ocasio v. U.S., No. 14-361 (U.S. May 2, 2016): Defendant may be convicted of conspiring to violate the Hobbs Act based on proof he reached agreement with owner of property to obtain that property under color of official right.

SENTENCING

Betterman v. Montana, No. 14-1457 (U.S. May 19, 2016): Sixth Amendment right to speedy trial does not apply at sentencing phase.

BATSON

Foster v. Chatman, No. 14-8349 (U.S. May 23, 2016): State court's finding of no purposeful discrimination in prosecution's exercising strikes was clearly erroneous; prosecution's file obtained in post-conviction proceedings belied the prosecution's proffered nondiscriminatory reasons for several strikes and substantiated racial animus.

CRIMINAL PROCEDURE

Utah v. Streiff, No. 14-1373 (U.S. June 20, 2016): Evidence obtained in a search incident to arrest, where the arrest was legal but the initial stop was not, was nevertheless admissible because there was no flagrant police misconduct; discovery of a valid, pre-existing, and untainted arrest warrant attenuated the connection between the unconstitutional stop and the evidence.

CRIMINAL PROCEDURE

Birchfield v. North Dakota, No. 14-1468 (U.S. June 23, 2016): The Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving, but not warrantless blood tests.