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Ii. Civil And Crimnal Procedure

Despite the claim that RICO has become a method for redressing virtually all means of wrongdoing, not just a weapon against the activities of the archetypal, intimidating mobster,[44] the first federal prosecutorial use of RICO against purveyors of obscene materials[45] in *Pryba* has successfully supplemented the federal prosecutorial arsenal in combatting obscenity. In 1984, Congress expanded that arsenal, previously limited to obscenity violations under 18 U.S.C. sections 1460-1469 (1988), by expanding RICO to cover obscene materials in response to a concern that organized crime was contributing to and profiting from an "explosion in the volume and availability of pornography in our society."[46] The *Pryba* court concluded that Congress' decision to allow the use of RICO against obscenity violates neither the First Amendment right of free speech nor the Eighth Amendment's prohibition of cruel and unusual punishment or excessive fines. As a result, federal prosecutors in the Fourth Circuit may now use RICO's stiffer penalties and forfeiture provisions against sellers and distributors of obscene materials.

CIVIL AND CRIMINAL PROCEDURE

For a court to exercise personal jurisdiction over a defendant in accordance with the commands of the Due Process Clause, the defendant must have sufficient minimum contacts with the forum state to ensure that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice.[47] When a court asserts personal jurisdiction over a

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if defendant agreed to participate in at least two predicate acts implicitly was not adding element to RICO conspiracy), *cert. denied*, 469 U.S. 831 (1984); United States v. Winter, 663 F.2d 1120, 1136 (1st Cir. 1981) (same), *cert. denied*, 460 U.S. 1011 (1983).

44. *See* Northeast Women's Center, Inc. V. McMonagle, 670 F. Supp. 1300, 1306-10 (E.D. Pa. 1987) (recognizing expanded use of RICO). *See generally*, Comment, *What Have They Done to Civil RICO: The Supreme Court Takes the Racketeering Requirement Out of Racketeering*, 35 AM. U.L. REV. 821, 867-68 (1986) (criticizing expansion of use of RICO).

45. *See* Fort Wayne Books, Inc. v. State, 489 U.S. 46, 60 (1989) (finding that obscenity violations could serve as predicate offenses under Indiana RICO statute); Western Business Systems, Inc. v. Slaton, 492 F. Supp. 513, 515 (N.D. Ga. 1980) (upholding use of state RICO statute and forfeiture provisions against alleged purveyors of sexually explicit material despite First Amendment challenges); 4447 Corp. v. Goldsmith, 504 N.E.2d 559, 564 (Ind. 1987) (same); State v. Feld, 155 Ariz. 88, ____, 745 P.2d 146, 152-53 (Ariz. Ct. App. 1987) (upholding use of some state RICO forfeiture provisions against purveyors of sexually explicit materials but striking down portions unconnected with racketeering activity).

46. S. 434, 98th Cong. 2d Sess., 130 CONG. REC. 5434 (Jan. 30, 1984) (remarks of Senator Helms); *See* Russello v. United States, 464 U.S. 16, 26 (1983) (stating that RICO's purpose is to provide new weapons of unprecedented scope for assault upon organized crime and its economic roots).

47. *See* International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (formulating minimum contacts test). Although the Supreme Court has variously described the appropriate inquiry for determining the constitutionality of a court's attempted exercise of personal jurisdiction over a defendant, the Court has noted that the minimum contacts standard remains the "constitutional touchstone" for personal jurisdiction. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985). Thus, due process protects individual defendants from binding *in personam* judgments of forums with which the defendants lack meaningful relations. *Id.* at 471-72.

nonresident defendant in a cause of action arising out of the defendant's contact with the forum state, the court exercises specific jurisdiction.[48] A court's exercise of specific jurisdiction is constitutionally acceptable if the defendant purposefully directs the defendant's activities at residents of the forum state, and the litigation results from injuries arising out of or relating to the defendant's activities.[49] When a court asserts personal jurisdiction over a nonresident defendant in a cause of action not arising out of the defendant's contact with the forum state, the court exercises general jurisdiction.[50] A court's exercise of general jurisdiction is constitutionally acceptable if the defendant's contacts with the forum state are continuous and systematic.[51] Once a party demonstrates that a nonresident defendant has purposefully established requisite minimum contacts with the forum state, the court must then consider the contacts in light of other factors to ascertain whether exercise of personal jurisdiction is reasonable in light of notions of fair play and substantial justice.[52] If the defendant demonstrates

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48. *See* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n.8 (1983) (defining specific jurisdiction).

49. *See Burger King*, 471 U.S. at 472 (describing constitutionally acceptable exercise of specific jurisdiction).

The purposefulness of a nonresident defendant's conduct is of critical importance in determining whether the defendant has the requisite minimum contacts to support a court's exercise of personal jurisdiction. The Supreme Court has noted that the "unilateral activity" of a party other than a defendant is insufficient to satisfy the requirement of minimum contact with the forum state. Hanson v. Denckla, 357 U.S. 235, 253 (1958). Instead, the nonresident defendant must do some act to "purposefully avai[l]" itself of the privilege of acting within the forum state and to invoke the benefits and protections of the forum state's laws. *Id.* The "purposeful availment" requirement protects a defendant from being "haled into a jurisdiction" as a result of random, fortuitous, or attenuated contacts with the jurisdiction or as a result of the "unilateral activity" of a party within the jurisdiction. *Burger King*, 471 U.S. at 475 (quoting Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984)); World Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 299 (1980); and *Helicopteros*, 466 U.S. at 417). The Court has held that a nonresident corporate defendant's delivery of products into the stream of commerce in an attempt to serve the market in the forum state and with an expectation that the products would be purchased by consumers in the forum state constitutes purposeful availment justifying the forum state's exercise of personal jurisdiction. *World Wide Volkswagen*, 444 U.S. at 297-98. The Court, however, has refused to find purposeful availment in a defendant's delivery of products into the stream of commerce without "something more" indicating an intent or purpose to serve the market in the forum state. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 112 (1987) (plurality opinion). Examples of conduct indicating an intent to serve the market in the forum state would be designing a product for the market in the forum state and advertising or marketing the product in the forum state. *Id.*

50. *See Helicopteros*, 466 U.S. at 414 n.9 (defining general jurisdiction).

51. *See id.* at 415-16 (stating that nonresident defendant's contacts with forum state must be continuous and systematic to support exercise of general jurisdiction).

52. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476-78 (1985) (describing necessary reasonableness analysis after minimum contacts inquiry). The *Burger King* Court suggested the following relevant considerations to determining the reasonableness of a court's assertion of personal jurisdiction: the burden on the defendant; the forum state's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief; the interstate judicial system's interest in obtaining the most efficient resolution of controversies. *Id.* at 477.

that the forum state's exercise of personal jurisdiction would make litigation so difficult for the defendant that the defendant would be at a "severe disadvantage" in comparison to the defendant's opponent, then due process will preclude the forum state's exercise of personal jurisdiction over the defendant.[53] Against this background, in *Federal Insurance Company v. Lake Shore, Inc.*, 886 F.2d 654 (4th Cir. 1989), the United States Court of Appeals for the Fourth Circuit considered whether the United States District Court for the District of South Carolina constitutionally could exercise personal jurisdiction over nonresident manufacturers of a ship and cargo winch that allegedly malfunctioned and caused damage while the ship was docked in Charleston, South Carolina.

In *Federal* the plaintiff, Federal Insurance Company (Federal), a New Jersey corporation, paid a $322,543.46 claim of its insured, General Electric Company, for damage to a turbine accessory base. The turbine accessory base incurred the damage when a cargo winch allegedly malfunctioned while loading the base aboard the vessel M.V. Paul Bunyon in Charleston, South Carolina. Peterson Builders, Incorporated (Peterson), a defendant, manufactured the M.V. Paul Bunyon. Peterson is a Wisconsin corporation with its principal place of business in Wisconsin. Lake Shore, Incorporated (Lake Shore), also a defendant, manufactured the cargo winch installed on the M.V. Paul Bunyon that was involved in the incident. Lake Shore is a Michigan corporation with its principal place of business in Michigan. As the subrogated insurer of General Electric, Federal sued both Lake Shore and Peterson in the United States District Court for the District of South Carolina. Federal invoked the admiralty and maritime jurisdiction of the district court and alleged causes of action for negligence, strict liability, and breach of express and implied warranties arising out of the incident. The district court granted the defendants' motion to dismiss the action for lack of personal jurisdiction, and Federal appealed.

Before considering Federal's arguments, the Fourth Circuit noted that because Congress has not authorized nationwide service of process in admiralty cases, South Carolina's long-arm statute must provide the statutory basis for an assertion of jurisdiction over Lake Shore and Peterson. Relying on *Triplett v. R.M. Wade & Co.*, 261 S.C. 419, 200 S.E.2d 375 (1973), the *Federal* court noted that the South Carolina long-arm statute extends jurisdiction "to the outer limits" of due process. Consequently, the Fourth Circuit concluded that the state law and due process analyses were identical and proceeded to address the question of the constitutionality of the exercise of personal jurisdiction over Lake Shore and Peterson by the United States District Court for the District of South Carolina.

Federal's first argument on appeal was that Lake Shore and Peterson should be subject to the jurisdiction of the district court because the defendants placed defective products that ultimately caused injury in the

53. *See Burger King*, 471 U.S. at 478 (describing due process preclusion of exercise of personal jurisdiction when unreasonably disadvantageous for nonresident defendant).

"stream of commerce" that terminated in South Carolina. Federal thus argued that the inevitability of the M.V. Paul Bunyon docking in various ports, including Charleston, justified the district court's exercise of personal jurisdiction over Lake Shore and Peterson. The Fourth Circuit, however, disagreed. Quoting *World Wide Volkswagen v. Woodson*, 444 U.S. 286, 295 (1980), the Fourth Circuit noted that the mere foreseeability of a product entering a forum has never been a "sufficient benchmark" for personal jurisdiction in accordance with due process. The *Federal* court recognized that the United States Supreme Court had stated in *World Wide Volkswagen* that a forum could assert personal jurisdiction over a nonresident corporate defendant that delivered products into the stream of commerce with the expectation that consumers within the forum state would purchase the products. The Fourth Circuit, however, relied on *Hanson v. Denckla*, 357 U.S. 235, 253 (1958), and emphasized the necessity of the defendant committing some act to purposefully avail itself of the privilege of conducting business within the forum and to invoke the benefits and protection of the forum's laws.

Applying the law to the case at hand, the Fourth Circuit concluded that Federal had failed to demonstrate that Lake Shore and Peterson "purposefully availed" themselves of the privilege of conducting business in South Carolina. The *Federal* court noted that neither Lake Shore nor Peterson maintained offices or held licenses to do business in South Carolina. Nor did either defendant have agents, employees, or subsidiaries in the state. The Fourth Circuit further noted that neither Lake Shore nor Peterson maintained a bank account or owned real or personal property in South Carolina, and neither defendant directly advertised or solicited customers in the state. The *Federal* court recognized that, after the accrual of Federal's cause of action, Lake Shore had made sales to South Carolina residents, and Peterson had sent employees to South Carolina to perform warranty work on a Navy vessel stationed in Charleston. The Fourth Circuit noted, however, that customers within South Carolina had initiated and directed these contacts, and such contacts did not result from the defendants' direct or indirect commercial activities in the South Carolina market for cargo winches or ocean going vessels. Because Lake Shore and Peterson had no control over the M.V. Paul Bunyon after the ship's owners purchased the ship, the M.V. Paul Bunyon's presence in South Carolina was merely fortuitous. The *Federal* court reasoned that a general "stream of commerce" theory of personal jurisdiction cannot replace the requirement that a defendant purposefully avail itself of forum law. Because Lake Shore and Peterson had not purposefully directed their activities at South Carolina, the Fourth Circuit held that a "stream of commerce" theory of personal jurisdiction did not apply to grant the district court personal jurisdiction over the defendants in Federal's claim. The Fourth Circuit also noted that Lake Shore's and Peterson's contacts with South Carolina could not fairly be described as "continuous and systematic" to support the district court's exercise of general jurisdiction over the defendants in accordance with the rule in *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1983).

Federal also argued on appeal that the mobility of ocean going vessels should distinguish such vessels for jurisdictional purposes. Federal argued that because ships are designed to travel between ports in different states and nations, and because shipbuilding consequently seeks to serve the market in all states containing major ports, a manufacturer of an ocean going vessel should be amenable to suit wherever the manufacturer's product docks. The Fourth Circuit, however, again disagreed with Federal. The *Federal* court noted that the United States Supreme Court rejected an argument based on the mobility of automobiles and refused to adopt a product-by-product approach to personal jurisdiction in *World Wide Volkswagen*. The Fourth Circuit reasoned that all products are mobile to some extent and that a product-by-product approach to personal jurisdiction would force courts to draw meaningless distinctions between products, thereby undermining predictability in structuring business dealings. Consequently, the Fourth Circuit concluded that the relevant inquiry for jurisdictional purposes is the nature of the defendant's contacts with the forum state and not the characteristics of the defendant's products.

Finally, the Fourth Circuit concluded that the lack of overall reasonableness in the district court's assertion of personal jurisdiction over Lake Shore and Peterson constituted an independent ground for dismissing Federal's claim. The *Federal* court noted that the overall reasonableness of a court's exercise of jurisdiction depends on the burden on the defendant, the interests of the forum state, the plaintiff's interest in obtaining relief in the chosen forum, and the interstate judicial system's interest in the efficient resolution of controversies and furtherance of fundamental substantive social policies. The Fourth Circuit reasoned that Lake Shore and Peterson would bear a substantial burden defending in South Carolina. Because Federal and its insured are not residents of South Carolina, the *Federal* court reasoned that both Federal's interest in the forum and the forum's interest in the dispute were minimal. Concluding that the district court's exercise of personal jurisdiction over the defendants would be both unreasonable and unfair and would violate due process, the Fourth Circuit affirmed the district court's decision dismissing Federal's claim for want of personal jurisdiction.

The Fourth Circuit's decision in *Federal*, refusing to find personal jurisdiction when a defendant delivers products into the "stream of commerce" without additional activities, follows established personal jurisdiction doctrine.[54] The court's refusal to base personal jurisdiction on the charac-

54. *See* World Wide Volkswagen Corp. v. Woodson, 444 U.S. 297, 295 (1980) (stating that mere foreseeability that product will enter forum is not "sufficient benchmark" for personal jurisdiction under Due Process Clause); Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 112 (1987) (plurality opinion) (stating that defendant's delivery of product into stream of commerce without "something more" indicating intent or purpose to serve market for product in forum state is insufficient basis for exercise of personal jurisdiction); DeJames v. Magnificence Carriers, Inc., 654 F.2d 280, 286 (3d Cir. 1981) (stating that foreseeability that product will enter forum is insufficient basis for assertion of personal jurisdiction).

teristics of the defendant's product instead of the nature of the defendant's contacts with the forum also is consistent with prior cases.[55] Consequently, the *Federal* decision represents a consistent exposition of existing law rather than a significant change in the law of personal jurisdiction.

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In *Louisiana Public Services Comm'n v. FCC*, 476 U.S. 355 (1986), the United States Supreme Court concluded that a federal statute will preempt state law when Congress expresses a clear intent to preempt state law, when an actual conflict between state and federal law is present, or where compliance with both federal and state law is effectively impossible.[56] The Court further noted that a federal statute will preempt state law where there is implicit in the federal statute an intention to bar state regulation, where comprehensive federal regulation has occupied an entire field of law, or where a state law interferes with the accomplishment and execution of the full objectives of Congress in enacting the statute.[57] The Supremacy Clause of Article VI of the United States Constitution provides the authority for federal preemption of state law.[58]

In 1947, Congress enacted the Federal Arbitration Act (FAA),[59] which provided for the enforceability of arbitration agreements within contracts affecting interstate commerce. Courts, however, could set aside an arbitration agreement within a contract when contract principles disallowed enforcement of the provision.[60] In 1988, Virginia enacted a statute requiring contracts between automobile manufacturers and dealers to contain a clause to declare invalid any contractual provisions that denied access to the procedures and forums of Virginia.[61] While the FAA contains no specific preemption provision, the Fourth Circuit held, in *Supak & Sons Manufacturing Company v. Pervel Industries Inc.*, 593 F.2d 135 (4th Cir. 1979), that the FAA preempted conflicting state laws which restrict the validity or enforceability of arbitration agreements. The *Supak* court addressed the question of whether general contract principles could render an arbitration clause invalid. Holding that the FAA only governed contractually agreed upon arbitration provisions, the *Supak* court asserted that the FAA did not

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55. *See Burger King*, 471 U.S. at 475 (focusing on nature of defendant's contacts with forum in personal jurisdiction inquiry); World Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 296-97 n.11 (1980) (refusing to adopt product-by-product approach to personal jurisdiction); DeJames v. Magnificence Carriers, Inc., 654 F.2d 280, 286 (3d Cir. 1981) (stating that court must focus on defendant's conduct in personal jurisdiction inquiry).

56. *Louisiana Public Service Comm'n*, 476 U.S. at 368-69 (1986).

57. *Id.*

58. *Id. See* U.S. CONST. art. VI.

59. 9 U.S.C. §§ 1-208 (1990).

60. *See* 9 U.S.C. § 2 (providing for validity, irrevocability, and enforcement of agreements to arbitrate except when grounds exist for revocation of any contract).

61. *See* Va. Code Ann. § 46.1-550.527(10) (1988) (repealed 1989), *reenacted* Va. Code Ann. § 46.2-1569(9) (1990).

displace state law governing general principles of contract formation.[62] The United States Supreme Court, however, in *Southland Corporation v. Keating*, 465 U.S. 1 (1984), held that the FAA preempts a state statute if the statute, on its face or as applied, imposes burdens on arbitration agreements that do not apply to contracts generally.[63] The *Southland* Court emphasized the Congressional purpose to support arbitration and prohibit state attempts to undercut the enforceability of arbitration agreements.[64]

The United States Court of Appeals for the Fourth Circuit addressed Virginia's attempt to undercut the enforceability of arbitration in *Saturn Distribution Corporation v. Williams*, 905 F.2d 719 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 516 (1991). The Fourth Circuit considered whether the FAA preempted Virginia Code section 46.1-550.5:27, which prohibits automobile manufacturers and dealers from entering into agreements containing mandatory alternative dispute resolution provisions. The plaintiff, Saturn Distribution Corporation (Saturn), was created in 1985 to design, market, and manufacture a new line of automobiles. As part of Saturn's manufacturing and marketing policy, Saturn required all contracts with dealers to contain mandatory binding arbitration provisions. Saturn's "Dealer Agreement" contained these provisions. When Saturn submitted the Dealer Agreement to the Commissioner of the Virginia Department of Motor Vehicles (Commissioner), the Commissioner refused to approve the Dealer Agreement. Applying Virginia Code sections 46.1-550.5:24, 27, the Commissioner would not approve the Dealer Agreement unless the Dealer Agreement contained a provision to opt out of the binding arbitration provisions. Saturn sued the Commissioner, seeking declaratory and injunctive relief and claiming that the FAA preempted the Virginia statute that prohibited mandatory arbitration clauses.

In the lower court proceedings, the United States District Court for the Eastern District of Virginia, in *Saturn Distribution Corp. v. Williams*, 717 F.Supp. 1147 (E.D. Va. 1989), held that the FAA did not preempt the Virginia statute. The district court reasoned that because the Virginia statute affected the formation of arbitration agreements rather than the enforcement of existing arbitration agreements, the statute did not conflict with the purposes and objectives of Congress as enacted in the FAA. The district court further reasoned that the Virginia statute did not single out arbitration agreements, but rather affected a much broader general area of contract law. The district court concluded that the Virginia statute, by ensuring consensual rather than forced arbitration, was entirely in harmony with the FAA.

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62. *Id.*; *see, e.g.*, Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967); Duplan Corp. (Duplan Yarn Division) v. W.B. Davis Hosiery Mills, Inc., 442 F.Supp. 86 (S.D.N.Y. 1977).

63. Southland Corp. v. Keating, 465 U.S. 1, 16-17 n. 11 (1984). *See* H.R. REP. No. 96, 68th Cong., 1st Sess., 1 (1924) (indicating congressional intent to require enforcement of arbitration agreements equally with enforcement of other contracts).

64. *Southland*, 465 U.S. at 16.

Saturn appealed the decision of the district court, arguing that the district court erred in holding the Virginia statute valid. To resolve the issue, the Fourth Circuit first stated that the Supremacy Clause of Article VI of the United States Constitution provides Congress with the power to preempt state law. The Fourth Circuit then cited *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), for the proposition that federal law preempts state law when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Looking to the legislative history of the FAA, the Fourth Circuit concluded that Congress enacted the FAA to promote the enforceability of arbitration agreements and to make arbitration a more viable option to parties wishing to avoid the costs of litigation. The Fourth Circuit, citing *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983), also stated that Congress intended the FAA to promote arbitration, notwithstanding any state substantive or procedural policies to the contrary. In view of the FAA's requirement that states place no greater restriction on arbitration provisions than states place on other contractual terms, the Fourth Circuit concluded that when a state law singles out arbitration agreements and limits the enforceability of those agreements, the FAA preempts the state law.

The Commissioner argued that the Virginia statute did not limit the enforceability of arbitration agreements, but rather only limited the formation of arbitration agreements. Attempting to limit the preemptive effect of the FAA, the Commissioner contended that the FAA only applied to existing arbitration agreements and, therefore, the FAA's preemption could not reach legislation affecting the formation of arbitration agreements. The Fourth Circuit disagreed with the reasoning of the Commissioner, stating that the FAA had a broader preemptive effect. The Fourth Circuit asserted that Congress intended to foreclose all state attempts to undercut the enforceability of arbitration agreements. The Fourth Circuit concluded that courts should not allow states to avoid the enforceability requirements of the FAA by banning arbitration agreements altogether.

Concluding that the FAA preempted a ban on the formation of arbitration agreements, the Fourth Circuit determined that the FAA preempted the Virginia statute. Acknowledging that the FAA would not preempt the Virginia statute if the Virginia statute applied equally to arbitration agreements and other contracts, the Fourth Circuit asserted that the Virginia statute applied unequally. Because Virginia law allowed certain contract terms to be nonnegotiable but disallowed nonnegotiable arbitration agreements, the statute imposed burdens on arbitration agreements that Virginia law did not impose on contracts generally. The Fourth Circuit determined that the FAA preempted a law which unfairly burdened arbitration agreements while not placing similar burdens on other contract provisions. The Fourth Circuit, therefore, reversed the decision of the district court and granted summary judgment to Saturn. The Fourth Circuit prohibited the Commissioner from taking any action to restrict or discourage the use and enforcement of the mandatory arbitration provision in the Saturn contracts.

Judge Widener dissented on the grounds that the Virginia legislature has the power to protect its own citizens. Asserting that federal legislation

is least preemptive when a court bases preemption on the fact that state legislation frustrates federal policy, Judge Widener reasoned that the FAA should only preempt statutes that affect existing arbitration agreements. Judge Widener concluded that Congress designed the FAA to regulate the enforceability of otherwise valid arbitration agreements and not the formation of such agreements.

Given the Supreme Court's denial of certiorari,[65] the Fourth Circuit's decision in *Saturn* follows the rule that the FAA preempts all state statutes banning the formation of contracts with nonnegotiable arbitration agreements. As to FAA preemption of statutes banning nonnegotiable arbitration provisions in other circuits, the case law on the issue is scarce. The First Circuit, in *Securities Indus. Ass'n v. Connolly*, 883 F.2d 1114 (1st Cir. 1989), found Massachusetts regulations similar to those in *Saturn* preempted by the FAA. The First Circuit held, as did the *Saturn* court, that Massachusetts regulations making mandatory arbitration clauses in contracts between securities brokers unethical violated the congressional policy in the FAA of encouraging arbitration.[66] Holding that a federal statute could preempt state law where the state law interfered with congressional policy, the First Circuit held the Massachusetts regulations invalid.[67] Two district court cases also support the proposition that the FAA's preemption is broad based. In *Barbier v. Shearson Lehman Hutton Inc.*, 752 F. Supp. 151 (S.D.N.Y. 1990) the United States District Court for the Southern District of New York acknowledged that Congress did not intend for the FAA to preempt all state law in the field of arbitration.[68] The *Barbier* court, however, then stated that the FAA could preempt state law even where the state law and the FAA conflicted indirectly.[69] The question, the *Barbier* court concluded, was whether the state law would undermine the goals and policies of the FAA.[70] Thus, the *Barbier* court, in line with the *Saturn* court, implied broad preemptive scope in the FAA. Further, the United States District Court for the Southern District of Florida, in *Securities Industry Ass'n v. Lewis*, 751 F. Supp. 205 (S.D. Fla. 1990), also held, on the same reasoning as the Barbier court, that the FAA preempts any statute designed to interfere with the ability of contracting parties to freely enter into arbitration agreements.[71] The case law, therefore, seems to indicate that the FAA not only preempts statutes limiting the enforceability of arbitration agreements, but

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65. 111 S. Ct. 516 (1991).

66. Securities Industry Ass'n v. Connolly, 883 F.2d 1114, 1119 (1st Cir. 1989).

67. *Id.* at 1124.

68. Barbier v. Shearson Lehman Hutton, Inc., 752 F. Supp. 151, 160-61 n.15 (S.D.N.Y. 1990). *See* New England Energy, Inc. v. Keystone Shipping Co., 855 F.2d 1, 4 (1st Cir. 1988) (asserting that FAA does not preempt all state law).

69. *Barbier*, 752 F. Supp. at 160-61 n.15.

70. *Id. See* Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University, 489 U.S. 468, 477-78 (1989) (asserting preemption where state rule would undermine goals and policies of FAA).

71. Securities Industry Ass'n v. Lewis, 751 F. Supp. 205, 207 (S.D.Fla. 1990).

also limits the power of states to regulate the formation of arbitration agreements.

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South Carolina Rules of Civil Procedure Rule 4(d) states that a "voluntary appearance by defendant is equivalent to personal service. . . ." Before the South Carolina legislature adopted the current rules, South Carolina Code Section 15-9-70 (1976) contained a statement identical to the portion of Rule 4(d) quoted above. Case law construing that code section interpreted a voluntary appearance as equivalent to a general appearance, which occurred whenever a defendant manifested an intent to be in court.[72] A special appearance under prior law was an appearance for the sole purpose of contesting the court's jurisdiction.[73] The present South Carolina Rules of Civil Procedure retain only the voluntary, or general appearance provision.[74] South Carolina Rule of Civil Procedure Rule 12(b)(2) states that a defendant may assert the defense of lack of personal jurisdiction by motion or by responsive pleading. This creates what the Fourth Circuit, in *Maybin v. Northside Correctional Center*, 891 F.2d 72 (4th Cir. 1989), called a "paradox" in the South Carolina rules: If a defendant only can make a general appearance, how can the defendant assert an objection to personal jurisdiction under Rule 12(b) without simultaneously waiving objection to personal service under Rule 4(d)?

In *Maybin* the United States Court of Appeals for the Fourth Circuit considered whether the defendant, Northside Correctional Center (the Center), waived its objection to personal jurisdiction by making a "voluntary appearance" before the district court, as that term is used in Rule 4(d) of the South Carolina Rules of Civil Procedure. The plaintiff in *Maybin* instituted a civil action against the Center in South Carolina state court, alleging racial discrimination. The Center thereafter removed the action to the United States District Court for the District of South Carolina, and moved to dismiss the action on the ground that the district court lacked personal jurisdiction over defendant. The defendant's motion cited the plaintiff's failure to properly serve the defendant with the summons and complaint as one ground for dismissal, and included arguments regarding the Eleventh Amendment and sovereign immunity.

The Magistrate recommended dismissing the complaint under the Eleventh Amendment and because of the plaintiff's failure to properly serve the Center. The plaintiff filed exceptions to the Magistrate's Report and attempted to cure the defect in service by serving the Administrator for the Department of Corrections. The Center responded to the plaintiff's exceptions, asserting that service still was improper because the plaintiff did not serve the defendant within the 120-day time limit imposed in Federal Rules

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72. Stephens v. Ringling, 102 S.C. 333, 86 S.E. 683 (1915).

73. Security Management, Inc. v. Schoolfield Furniture Indus., Inc., 275 S.C. 466, 272 S.E.2d 638, 639 (1980).

74. *See* Dunbar v. Vandermore, 295 S.C. 493, 369 S.E.2d 150, 151 (S.C. Ct. App. 1988) (stating that general appearance is only appearance party can make under existing law).

of Civil Procedure Rule 4(j). Plaintiff then filed a Motion to Extend Time to Serve Defendants, giving no reasons, however, for failure to serve defendant within the time limit. The Magistrate then issued a second report recommending dismissal of the complaint for failure to properly serve defendant within the 120-day time period. The Magistrate also denied the plaintiff's motion to extend time, ruling that the plaintiff had failed to demonstrate sufficient cause for failing to timely serve the Center. Accepting the Magistrate's recommendation, the district court dismissed the case based solely upon the jurisdictional defect of insufficiency of service.

The plaintiff appealed to the Fourth Circuit, arguing that any defects in the service of process became irrelevant when the Center made a "voluntary appearance" in the district court. The plaintiff asserted that because the Center included arguments regarding the timeliness of plaintiff's action, the Eleventh Amendment, and sovereign immunity with its objection to personal jurisdiction, the Center waived any objection to personal jurisdiction. In resolving the issue, the Fourth Circuit first examined the plaintiff's initial service of process under South Carolina Rules of Civil Procedure Rule 4(d)(5). Rule 4(d)(5) governs service when the defendant is a state agency or officer, and requires a plaintiff to deliver a copy of the summons or complaint to the agency or officer and to send a copy of both documents to the Attorney General. The court stated that to legally serve an agency, a plaintiff must serve the required documents upon a person of suitable position and discretion within the agency and, therefore, the plaintiff's service upon an employee of the Center was ineffective. Accordingly, the Fourth Circuit affirmed the district court's finding that plaintiff's initial service of process was inadequate.

The Fourth Circuit next considered the paradox presented by South Carolina Rules of Civil Procedure Rules 4(d) and 12(b) in determining whether the Center had waived any objection to personal service when the Center made a general appearance to object to personal jurisdiction. The Fourth Circuit reasoned that courts must consider rules of civil procedure in relation to one another and must construe the rules together. The court stated that under Rule 12(b), a party should be able to raise an objection to personal jurisdiction without simultaneously waiving that party's objection under 4(d).

The Fourth Circuit then examined how the South Carolina Court of Appeals had dealt with the problem of elimination of a special appearance to object to personal jurisdiction from the South Carolina Rules of Civil Procedure. In *Smalls v. Weed*, 291 S.C. 258, 353 S.E.2d 154 (S.C. Ct. App. 1987), the South Carolina Court of Appeals held that when a defendant appeared and asserted two claims going to the merits of the action, in addition to a jurisdictional objection, the defendant had waived personal jurisdiction. In *Dunbar v. Vandermore*, 295 S.C. 493, 369 S.E.2d 150 (S.C. Ct. App. 1988), the South Carolina Court of Appeals considered whether the defendant in that case had waived the defendant's right to assert jurisdictional defenses by requesting an extension of time prior to moving to dismiss for lack of personal jurisdiction. The court of appeals held that

the defendant had not waived the right to object to personal jurisdiction under Rule 12(h)(1), which provides only two circumstances under which a party waives that right: if the defendant omits the objection from the motion, or the defendant fails to make the defense by motion, responsive pleading or an amendment to the pleading. The Fourth Circuit observed that, in light of *Smalls*, although the legislature had eliminated the term "special appearance" from the South Carolina Rules, the legislature had not entirely discarded the procedure described by the term. The Fourth Circuit concluded that under *Smalls* and *Dunbar*, if a defendant appears before the court to contest personal jurisdiction, and does not simultaneously address the merits, the defendant has not waived any jurisdictional objection under Rule 4(d).

Applying *Smalls* and *Dunbar* to the case at bar, the Fourth Circuit found that none of the Center's arguments, including the objection to personal jurisdiction, went to the merits of the action, implicitly acknowledging jurisdiction of the court. The court observed that the timeliness, Eleventh Amendment, and sovereign immunity arguments were jurisdictional issues. The Fourth Circuit determined that the Center did not waive personal jurisdiction merely because the Center alerted the court to other types of jurisdictional defects. Accordingly, the Fourth Circuit affirmed the decision of the district court.

Maybin reconciles the inconsistency between South Carolina Rules of Civil Procedure Rules 4(d) and 12(b). The Fourth Circuit decision resolves the confusion generated by the elimination of the special appearance from South Carolina law by focusing on the procedural aspects of the special appearance rather than the appearance in the law of the term itself.

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Rule 68 of the Federal Rules of Civil Procedure (Rule 68) establishes the guidelines by which parties contemplating litigation may agree to a judgment.[75] The defending party may extend an offer of judgment to the opposing party. The complaining party then has ten days to accept the offer by written notice to the defending party. Rule 68 does not address squarely the possibility of a party revoking its offer of judgment during the ten day acceptance period. Several authorities have concluded that offers made pursuant to Rule 68 are irrevocable for ten days after the offer.[76] In

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75. Fed. R. Civ. P. 68. Rule 68 states, in pertinent part:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. . . .

Id.

76. *See* Radecki v. Amoco Oil Co., 858 F.2d 397, 402 (8th Cir. 1988) (assuming for

Colonial Penn Insurance Company v. Coil, 887 F.2d 1236 (4th Cir. 1989), the Fourth Circuit considered whether a party could revoke its offer during the ten day acceptance period under Rule 68 if the party based its offer on the offeree's fraudulent behavior.

A second, unrelated issue before the Fourth Circuit was whether the court should take judicial notice of the outcome of a state court case involving the same issue as that on appeal. Rule 201(b)(2) of the Federal Rules of Evidence allows for judicial notice of a fact that is capable of accurate and ready determination by resort to reasonably accurate sources.[77] Normally, an appellate court will not consider facts that were not part of the record before the district court.[78] While hesitant to employ Rule 201 on a regular basis, appellate courts recognize that, in appropriate circumstances, courts should take notice of facts beyond the appellate record in the interest of justice.[79] In *Colonial Penn* the Fourth Circuit considered whether it should take notice of an insured party's guilty plea to arson in state court when that same party sought, before the Fourth Circuit, to enforce the insurance company's offer of judgment to pay for the fire damage.

In *Colonial Penn* the Colonial Penn Insurance Company (Colonial Penn) insured the defendants', Mr. and Mrs. Coils' (the Coils), home against fire. In 1987 the Coils' home suffered severe fire damage. The Coils demanded payment from Colonial Penn under their insurance policy, but Colonial Penn refused to settle the claim. Colonial Penn filed for declaratory judg-

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argument that offers under Rule 68 are irrevocable); Fisher v. Stolaruk Corp., 110 F.R.C. 74, 75 (E.D. Mich. 1986) (stating that offers under Rule 68 are irrevocable).

77. Fed. R. Evid. 201(b)(2).

78. *See* Storm Plastics, Inc. v. United States, 770 F.2d 148, 155 (10th Cir. 1985) (finding error in district court judge's personal appraisal of specific fishing lures without hearing evidence); Wilson v. Volkswagen of America, 561 F.2d 494, 510 n.38 (4th Cir. 1977) (stating that courts normally do not travel outside the record of the case).

79. *See* Shuttlesworth v. Birmingham, 394 U.S. 147, 157 (1968) (taking notice of prior Supreme Court opinions for description of event common to both cases); Dowalski v. Gagne, 914 F.2d 299, 305-06 (1st Cir. 1990) (approving district court's notice of defendant's prior conviction though no certified copy of conviction was introduced into evidence); In re Calder, 907 F.2d 953, 955 n.2 (10th Cir. 1990) (approving bankruptcy court's notice of Calder's financial statements in refusing to discharge Calder's debts); United States v. Hope, 906 F.2d 254, 260 (7th Cir. 1990) (considering record of state court, not on appellate record, to determine whether defendant actually was convicted of previous criminal conduct); Sinalao Lake Owners Ass'n v. City of Simi Valley, 864 F.2d 1475, 1479 & n.2 (9th Cir. 1989) (taking notice of public data compilations to refute party's claim that they would suffer unreasonable delay by going to trial in state court); Marshall v. Bramer, 828 F.2d 355, 358 (6th Cir. 1987) (approving trial court's notice of criminal record of Klu Klux Klan to draw inference, for discovery purposes, of Klan's propensity for racial violence); United States v. Author Services, 804 F.2d 1520, 1523 (9th Cir. 1986) (approving district court's notice of district court's own records from prior case); E.I. du Pont De Nemours & Co. v. Cullen, 791 F.2d 5, 7 (1st Cir. 1986) (examining du Pont's complaint in state court, not on appellate record, to determine what type of action du Pont originally filed); Coney v. Smith, 738 F.2d 1199, 1200 (11th Cir. 1984) (taking notice of state court proceedings, not on appellate record, to determine whether state court heard particular issue); Green v. Warden, U.S. Penitentiary, 699 F.2d 364, 369 (7th Cir. 1983) (considering Green's extensive litigation record, not on appellate record, to determine whether to enjoin Green from filing civil actions or appeals before obtaining leave of appropriate court).

ment in federal district court, claiming that the Coils had committed arson. Colonial Penn was unable to discover conclusive evidence of arson, however, and offered the Coils judgment for $50,000, pursuant to Rule 68 of the Federal Rules of Civil Procedure. The Coils verbally accepted the offer and endorsed the check, but the defendants never served Colonial Penn with written notice, in accord with Rule 68, until after Colonial Penn had rescinded its offer.

Seven days after Colonial Penn extended its offer of judgment, the claims examiner for Colonial Penn received a telephone call from the aunt of the Coils' daughter's boyfriend, who lived in the Coils' home at the time of the fire. The boyfriend had informed his aunt that he had helped the Coils intentionally set fire to the house. Upon learning this information, Colonial Penn immediately revoked its offer of judgment.

On the same day, the boyfriend's aunt also informed the local sheriff's office of the Coils' actions. The Coils were arrested and charged with arson. After the federal district court had ruled that Colonial Penn could not rescind its offer of judgment, the Coils pleaded guilty to the criminal charge. The guilty pleas, therefore, were not a part of the district court's record before the Fourth Circuit.

In *Colonial Penn* the district court held that offers pursuant to Rule 68 are irrevocable for ten days subsequent to the offer. The district court found that the defendants properly had accepted Colonial Penn's offer of judgment when the defendants signed the check. The district court distinguished Rule 68 judgments from judgments actually procured by trial. According to the district court, when parties submit their fate to a court, that court has the power to correct itself after it has rendered a judgement. Although Rule 60 of the Federal Rules of Civil Procedure specifically allows federal courts to review judgments of cases that go to trial if the cases were possibly affected by a party's fraud, the district court refused to consider the new information in *Colonial Penn*. The court reasoned that, because the parties agreed to a judgment among themselves rather than resorting to the court, the court subsequently could not reopen the case.

Colonial Penn appealed the district court's holding enforcing Colonial Penn's offer of judgment. On appeal, Colonial Penn also moved to include in the appellate record the Coils' guilty pleas to the criminal charge of arson. The Fourth Circuit first addressed whether it should take notice of the Coils' guilty pleas in state court. The Coils argued that the guilty pleas were irrelevant and should not be included in the record because Colonial Penn had withdrawn its offer before the Coils pleaded guilty.

The Fourth Circuit, however, found that the Coils' admission of guilt was directly relevant because the criminal proceedings in state court involved the same property and issues as those on appeal. The Fourth Circuit found that the contents of the state court's records, though not contained in the appellate record, were sufficiently reliable for judicial notice purposes pursuant to Rule 201(b)(2) of the Federal Rules of Evidence. In the interest of justice, the Fourth Circuit took notice of the guilty pleas.

The Fourth Circuit then addressed whether a party may withdraw an offer of judgment within ten days of the offer in accord with Rule 68.

While noting that several courts, without discussion, have found that Rule 68 offers cannot be withdrawn for ten days the Fourth Circuit observed that exceptional factual situations may merit recision of such offers. The *Colonial Penn* court readily determined that a fair result in the case mandated that Colonial Penn, on proper grounds, could revoke its offer.

The Fourth Circuit compared the case at bar to a situation where the fraudulent parties had procured a judgment. In such a situation, the Fourth Circuit noted that under Rule 60(b) of the Federal Rules of Civil Procedure, the insurance carrier could move successfully to vacate the judgment. The Fourth Circuit concluded that the compelling factual circumstances in *Colonial Penn* gave the court implicit authority to revoke the Rule 68 offer to carry out justice. The Fourth Circuit, therefore, held that courts have supervisory authority under Rule 68 to vacate a settlement. Accordingly the Fourth Circuit remanded the case to the district court with the instruction to vacate the settlement if the district court found that the Coils procured the settlement through fraud.

The Fourth Circuit is the only United States Circuit Court of Appeals that has addressed squarely whether Rule 68 offers may be revoked in appropriate circumstances. In *Radecki v. Amoco Oil Co.*, 858 F.2d 397 (8th Cir. 1988), the Eighth Circuit assumed, for the sake of argument, that Rule 68 prohibits revocation of an offer of judgement. In *Radecki*, however, the Eighth Circuit never directly addressed the issue, because the court characterized the offering party's subsequent offer as a clarification of the original offer rather than a revocation. The *Radecki* court concluded that courts should characterize, if possible, settlement communications subsequent to a party's offer as clarifications rather than revocations.

The *Colonial Penn* decision is consistent with the purpose of Rule 68 to encourage settlements.[80] The Fourth Circuit's decision places Rule 68 settlements on equal footing with final court judgments in cases of fraud, because the court will open up both kinds of judgments when one party has perpetuated a fraud. Consequently, parties should be more amenable to settlement under Rule 68 with the knowledge that the opposing party's fraudulent behavior may be grounds for rescinding the agreement.

The Fourth Circuit's judicial notice of the defendants' guilty pleas in state court also is in accord with the decision of other federal appellate courts considering the issue. Although the Fourth Circuit stated that federal appellate courts rarely take notice of facts outside the record, federal courts frequently invoke Rule 201(b) of the Federal Rules of Evidence to take notice of a reliably accurate fact.

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The Ethics in Government Act (the Act), 28 U.S.C. sections 591-598 (1989), provides a mechanism for investigating and prosecuting certain executive branch officers. The Act seeks to avoid the bias that could result from the Justice Department's prosecution of high-ranking executive branch

80. *See* Marek v. Chesny, 473 U.S. 1, 5 (1985) (stating that purpose of Rule 68 is to encourage settlements); Delta Air Lines v. August, 450 U.S. 346, 352 (1981) (same).

officers by requiring that the Attorney General appoint an independent counsel to prosecute any case involving certain executive branch officers. Under Section 594(a) of the Act, the independent counsel may "exercise all investigative and prosecutorial functions and powers" which the Attorney General and Department of Justice normally exercise. In recent years, courts have explored the extent of the independent counsel's powers under the Act.[81] In *Appeal of U.S. by Atty. Gen.*, 887 F.2d 465 (4th Cir. 1990), the United States Court of Appeals for the Fourth Circuit further defined the limits of the independent counsel's powers and determined, specifically, how the independent counsel's functions should coexist with the Attorney General's functions.

In *Appeal of U.S. by Atty. Gen.* the Fourth Circuit considered whether the Act grants independent counsel the sole authority to appeal a judicial decision under section 7 of the Classified Information Procedures Act (CIPA), 18 U.S.C. App. sections 1-16 (1982). Under the CIPA, the Attorney General may bring an interlocutory appeal from a district court's refusal to allow the government to substitute unclassified summaries in place of classified evidence at trial. Because the independent counsel can exercise all prosecutorial powers of the Attorney General in cases involving high-ranking executive branch officers, this case forced the Fourth Circuit to determine how the Attorney General's mission to protect national security under the CIPA affected the independence of the independent counsel under the Act.

The events leading to the appeal began when a former CIA officer, Joseph F. Fernandez, allegedly made false statements to officials investigating the "Iran-Contra" affair. A federal grand jury indicted Fernandez on two counts of giving false official statements and two counts of obstructing proceedings. Because Fernandez was a high-ranking executive branch officer, the Attorney General appointed independent counsel to prosecute Fernandez. Pursuant to section 5(a) of the CIPA, Fernandez gave the independent counsel notice that he planned to use classified information during his trial defense. At a pretrial hearing, the district court for the Eastern District of Virginia found that some of the classified items were relevant to Fernandez's defense and, therefore, admitted the items for use in trial. Subsequently, the independent counsel, pursuant to section 6(c)(1) of the CIPA, moved to substitute unclassified summaries for the classified items. The district court rejected the independent counsel's motion for the use of summaries.

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81. Morrison v. Olson, 487 U.S. 654 (1988) (holding that appointment of independent counsel pursuant to Ethics in Government Act is constitutional and stating that "[t]he functions of the independent counsel include conducting grand jury proceedings and other investigations, participating in civil and criminal court proceedings and litigation, and appealing any decision in any case in which the counsel participates in an official capacity"); U.S. v. Poindexter, 725 F. Supp. 13 (D.D.C. 1989) (stating that independent counsel is by nature independent of Attorney General and may not always be able to follow Department of Justice policies).

The independent counsel then requested that the Attorney General file an affidavit under section 6(e) of the CIPA to block Fernandez' use of the classified items. A section 6(e) affidavit absolutely prohibits the use of classified documents at trial. Once the Attorney General files a section 6(e) affidavit, the district court must decide whether to allow the trial to proceed without the forbidden evidence or whether to dismiss the case altogether. The Attorney General refused to file the affidavit. Instead, the Attorney General filed an interlocutory appeal under CIPA section 7(a), alleging that the district court's ruling against using unclassified summaries instead of classified information was improper.

The independent counsel challenged the Attorney General's right to appeal, arguing that the Act grants the independent counsel the sole authority to appeal under section 7 of the CIPA. The Attorney General alleged, however, that the Attorney General possessed the exclusive right to file an appeal, even when independent counsel was prosecuting a case. The Attorney General contended that a single decision maker should decide whether to disclose classified information, whether to move that unclassified summaries be substituted for classified information, whether to appeal adverse decisions on substitution, and whether to jeopardize the prosecution by filing a 6(e) affidavit. The Attorney General argued that if the independent counsel is given the sole authority to file appeals, the Attorney General must either do nothing or put the entire prosection at risk by filing a section 6(e) affidavit.

To resolve the issue, the Fourth Circuit looked to the statutory language of section 7(a) of the CIPA and section 594(a) of the Act. Section 7(a) of the CIPA gives the United States the authority to appeal from adverse CIPA orders. Section 594(a) of the Act gives the independent counsel, notwithstanding any other provision of law, the power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice and the Attorney General. The Fourth Circuit reasoned that because section 594(a) granted the independent counsel power to exercise all the prosecutorial functions of the Attorney General, the independent counsel could exercise the Attorney General's function of appealing adverse decisions under the section 7(a) of the CIPA. The Fourth Circuit further reasoned that the independent counsel's power, notwithstanding any other provision of the law, meant that the independent counsel's prosecution powers should not be limited by other statutes, including the CIPA. The Fourth Circuit stated that the only exception to section 594(a)'s broad grant of prosecutorial power to the independent counsel is contained within section 594 itself. Section 594 provides that only the Attorney General may authorize wiretaps. Therefore, the Fourth Circuit concluded that when the Act requires the appointment of an independent counsel, the independent counsel can exercise all other investigative and prosecutorial functions of the Attorney General.

The Fourth Circuit next analyzed whether appealing an adverse ruling under the CIPA is a prosecutorial function and therefore within the jurisdiction of the independent counsel. After determining that the Act classifies