

2011'S TOP ELEVEN

Second Circuit Decisions
from

CONNECTICUT

By James I. Glasser and Jenny R. Chou

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**This article marks our third annual round-up
of Second Circuit decisions emanating from the District of Connecticut.
As in previous years, beyond geography, the process for case selection was purely
subjective and reflects our view of cases we thought would be of interest to
Connecticut's civil and criminal federal practitioners. Before turning to the
decisions, congratulations are in order to Judges Susan L. Carney and Christopher
F. Droney, Connecticut's newest additions to the Second Circuit Court of Appeals.
Now, to the cases.**

Criminal Cases

First up is *United States v. Brown*, an appeal from a determination by Judge Janet Hall that the defendant qualified for the imposition of an enhanced sentence under the Armed Career Criminal Act (the Act).¹ The Act requires that a defendant who is convicted as a felon in possession of a firearm or ammunition and who has “three prior convictions...for a violent felony or a serious drug offense, or both, committed on occasions different from one another” be sentenced to at least fifteen years imprisonment.²

On appeal, Mozzelle Brown argued that his two prior felony drug convictions, for which he was sentenced on the same day, did not qualify as offenses “committed on occasions different from one another.” The Second Circuit dispatched that argument quickly but spent more time considering Brown’s second argument that his third “qualifying” conviction for assaulting a corrections officer did not constitute a “violent felony” under the Act. The Circuit concluded that assaulting a corrections officer, in violation of Conn. Gen. Stat. § 53a-167c(a), indeed satisfied the “catch-

all” definition of “violent felony” under the “categorical approach” because it is both similar “in kind” and “degree of risk posed” to the listed offenses found in the Act. The Circuit further found that violation of the statute, which requires “the act of injuring an employee for the purpose of preventing her from performing her official duties[,] tends to entail especially violent consequences.”³ Finally, the Circuit noted that the Connecticut statute only applies where the officer has, in fact, suffered physical injury. The “certainty” of “injury to another,” the Circuit held, satisfies the statutory definition of “violent felony” under the Act.⁴

Our next decision, *United States v. Bell*, springs from an attempt to serve a search and seizure warrant at a gas station in Bridgeport that resulted in a harrowing shoot-out between John W. Bell, Jr. and police.⁵ Bell was charged with attempted murder of a federal officer; assaulting, resisting, impeding a federal officer; and using a firearm in connection with a crime of violence. After a five-day jury trial, Bell was convicted of attempting to murder a federal officer and using a firearm in connection with a crime of violence. Judge

Alfred V. Covello denied Bell’s post-trial motion for acquittal but granted a motion for a new trial. The U.S. Attorney’s Office appealed, and, on October 20, 2009, the Second Circuit reversed and remanded for reinstatement of the verdict and sentencing. Bell was thereafter sentenced to 156 months’ imprisonment.⁶

On his appeal, Bell claimed prejudice from alleged improper comments made by the prosecutor in rebuttal summation. Bell claimed that the prosecutor sought to inflame the passions of the jury by comparing him to Lee Harvey Oswald and by mischaracterizing the evidence when it argued that Bell was “a gun fanatic” who “carried a different weapon every single day” and “accessorizes with [guns] kind of changes it like a woman changes her purse.”⁷

The Second Circuit found the prosecutor’s reference to “Lee Harvey Oswald” and a “magic bullet” an accurate, “if colorful,” comment on evidence and a fair response to arguments advanced by the defendant. The Circuit was more concerned about the second claim of error; it found certain other comments by the prosecutor more “trou-

bling,” because they “overstated the trial evidence in a number of respects,” and still other comments “misleading” because they were “unsupported by the evidence.” The Circuit nevertheless affirmed the conviction, noting that Bell failed to object to the allegedly improper comments at trial and, under plain error review, the unobjected-to comments did not constitute “flagrant abuse,” and were an “aberration in an otherwise fair proceeding.”⁸

Next up is a blast from the past. In the 1990s, the U.S. Attorney’s Office mounted a concerted effort to address violent crime in Connecticut’s urban centers. That initiative resulted in numerous multi-defendant cases brought against criminal drug organizations, including the Latin Kings. *Morales v. United States*, resulted from one such prosecution.⁹ Richard Morales was prosecuted, along with 32 others, and convicted after a three-month trial of engaging in violent crimes in aid of racketeering and conspiracy to possess with intent to distribute. Judge Alan H. Nevas sentenced Morales to six life sentences, one of which was on the drug conspiracy count.

The drug conspiracy count alleged a multi-object conspiracy involving marijuana, heroin, cocaine, and cocaine base. The jury found Morales guilty on the drug conspiracy count but did not return a special verdict specifying which drug(s) were the object of the conspiracy. The life sentence imposed by Judge Nevas on that count was premised on the assumption that the jury found that Morales conspired to possess a drug other than marijuana, because that drug carries “only” a maximum ten year sentence. The Court of Appeals affirmed Morales’ conviction and sentence on direct appeal.¹⁰

Thereafter, Morales filed a *pro se* writ of *habeas corpus* arguing, among other things, that his trial and appellate counsel were ineffective for not challenging the life sentence imposed on the drug conspiracy count since Second Circuit precedent, namely *United States v. Orozco-Prada*, 752 F.2d 1076 (2d Cir. 1984), required that the sentence for the drug conspiracy count be based on the drug carrying the lowest statutory penalty, i.e., marijuana in this case.

The District Court denied the habeas petition and the Second Circuit affirmed despite finding that the imposition of a life sentence on the drug conspiracy count

based on the general verdict was error. The Circuit affirmed on the ground that Morales—who had been sentenced to five other life sentences that were not impacted by the error—could not establish prejudice.

Though affirming, the Circuit took the opportunity to address the District Court’s error. The Circuit found that Judge Nevas was cognizant of *Orozco-Prada*, but erred in his reliance on *United States v. Peters*, 617 F.2d 503 (7th Cir. 1980). In *Peters*, the trial court used the verdict on a substantive drug count involving cocaine base to assume that the jury also convicted the defendant of conspiring to traffic in cocaine base. Judge Nevas referred to this factual scenario, which was also present in this case, as an “exception” to *Orozco-Prada*. The Second Circuit declined to adopt *Peters* and emphasized that “it remains an open question in this Circuit whether convictions for substantive drug offenses may be used to clarify an ambiguous jury verdict convicting a defendant of conspiracy to distribute multiple types of drugs.”¹¹

In our fourth criminal case of 2011, *United States v. Page*, the Second Circuit affirmed Judge Robert N. Chatigny’s decision to deny the defendant’s motion to sever a count charging him as a felon in possession of a firearm, from five counts charging him with various narcotics offenses.¹² On appeal, Anthony Page argued that the denial of his motion to sever prejudiced the jury against him when it heard that he had a prior felony conviction, and therefore denied him of his right to a fair trial.

The evidence at trial established that Page sold crack and heroin. In July 2008, federal agents executed a search and seizure warrant and recovered a loaded revolver, along with 77 bags of heroin. Page was arrested that same day and, following *Miranda* warnings, admitted that both the firearm and the heroin belonged to him. Page was charged with five counts of drug offenses, and a sixth count of being a felon in possession of a firearm. The District Court refused to sever count six, noting that Page’s stipulation to the felony conviction did not describe its underlying facts, and that there would be a limiting instruction. The stipulation and instruction together, the District Court, found, assured a lack of undue prejudice.¹³ Page was convicted following trial.

On appeal, Page argued that the gun count should have been severed, or alternatively, bifurcated, relying on *United States v. Jones*, 16 F.3d 487 (2d Cir. 1994). The Circuit distinguished its decision in *Jones* and found that there was a “sufficient logical connection” between the drug counts and the gun count. It found that the gun was recovered along with drugs and Page admitted that both were his. The Circuit reasoned that even in separate trials, evidence of the drugs would have been probative of his knowing possession of the gun, while conversely, evidence of the gun would have been admissible as a “tool of the drug trade.”¹⁴ The Circuit found that where “there is a similarity in the evidence necessary to prove the different charges,” the trial court takes steps to limit the danger of prejudice and gives a proper limiting instruction, and there is no unfair prejudice, it is not an abuse of discretion to refuse to sever or bifurcate a felon in possession charge from other charges.¹⁵

Our fifth criminal case is *United States v. Leslie*. At sentencing, Sadiki Komunyakya Leslie argued that his incarceration during the period of a conspiracy to commit bank fraud was prima facie evidence of his withdrawal from the conspiracy, shifting the burden to the government to prove otherwise. Judge Alvin W. Thompson disagreed and sentenced Leslie 51 months based on the actual losses incurred during the entire term of the conspiracy.¹⁶

On appeal, the Second Circuit observed that it had yet to address whether, in the sentencing context, a defendant’s incarceration was prima facie evidence of withdrawal from a conspiracy. The Circuit found that its precedent counseled in favor of keeping the burden of proving withdrawal on the defendant. Notwithstanding incarceration, “[t]he burden remains on the defendant to present affirmative evidence that he withdrew from the conspiracy. The defendant’s imprisonment is but one fact to consider in deciding whether withdrawal occurred.” The Circuit observed that it had never held that a jury must find withdrawal if the government didn’t prove that the defendant continued in the conspiracy after imprisonment. For the same reason, the Circuit would not require a judge to make a similar finding at sentencing.¹⁷

In our sixth and final criminal case of 2011, *United States v. Ferguson*, the Second Circuit vacated the convictions of all defendants found guilty following a seven-week jury trial in an AIG-related prosecution.¹⁸ The convictions were reversed because, the Circuit found, the District Court erred in admitting three government exhibits demonstrating stock-price data, and in giving jury instructions concerning the phrase “willfully causing.”

AIG’s stock price dropped significantly in the third quarter of 2000. The indictment alleged that AIG believed that a \$59 million decline in its loss reserves had caused the drop; to correct this perceived impact, AIG principals engaged in an accounting fraud by entering into an alleged sham reinsurance contract with Gen Re. The deal was structured to create the illusion of causing an increase in AIG’s loss reserves, but did not actually transfer any risk to Gen Re, the *sine qua non* of a reinsurance contract. AIG booked the transaction (referred to as the “Loss Portfolio Transfer” or “LPT”) as a reinsurance contract, while Gen Re booked it as a deposit.¹⁹

The defendants were convicted of conspiracy, mail and securities fraud, and making false statements to the SEC. On appeal, the Circuit rejected most of defendants’ arguments, including a conscious avoidance instruction, claims of insufficiency of the evidence, severance claims, evidentiary errors, and alleged prosecutorial misconduct. The Circuit vacated the convictions, however, based on two alleged errors—one evidentiary and one involving the jury charge.

Materiality was an element of most of the charged offenses. The government had to prove a substantial likelihood that the LPT misstatements would be important to a reasonable investor. To prove materiality, the District Court allowed the government to introduce charts showing single-day stock prices for the days following news publications involving the alleged impropriety of the LPT. The Circuit found that allowing the introduction of the charts was error because they “suggested that this transaction [alone] caused AIG’s shares to plummet 12 percent during the relevant time period, which is without foundation, and...prejudicially cast the defendants as causing an economic downturn that has affected every family in America.”²⁰

The Court of Appeals also found error in the District Court’s jury instruction concerning the government’s theory that the defendants “willfully caused” each of the substantive offenses. Willful causation is a theory of culpability akin to aiding and abetting. Under 18 U.S.C. § 2(b), a defendant commits an offense if he “willfully causes an act to be done which if directly performed by him or another would be an offense.” Here, relying on various requests to charge, the District Court structured the § 2(b) part of its jury instruction as a series of questions that omitted the concept of causation. Instead, the jury was instructed to consider only whether each defendant acted knowingly, willfully, and with the intent to defraud, and whether he intended that the crime would actually be committed by others. The Circuit found plain error with the charge since the government “argued for guilt on a causation theory.”²¹

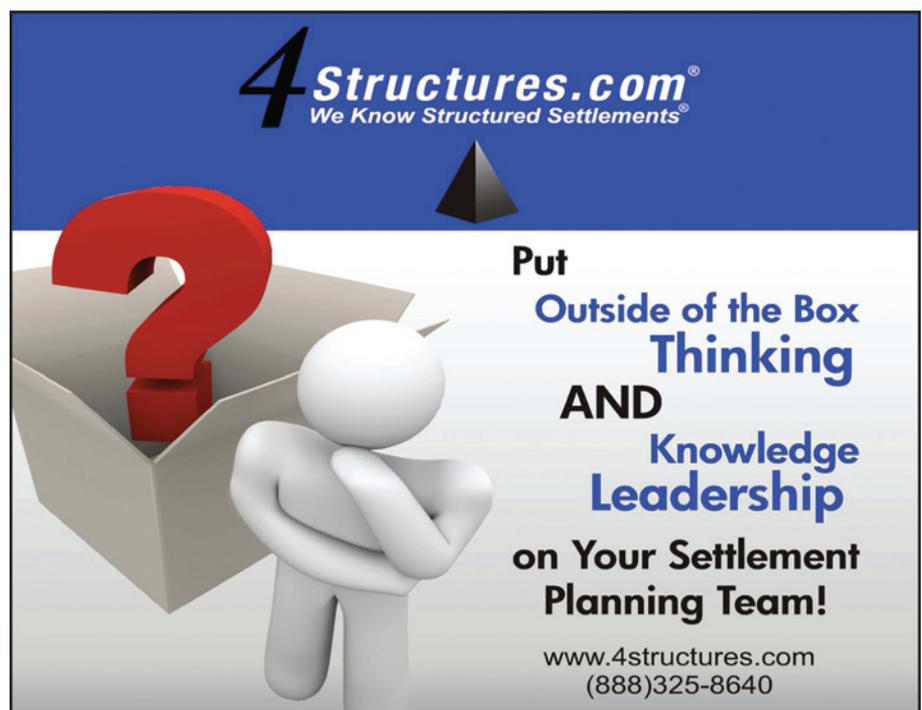
On September 14, 2011, the government filed an unusually strident petition for rehearing. Despite the passage of several months, that petition has not yet been acted upon. Perhaps we will have more to report next year.

Civil Cases

Turning now to the top civil cases of 2011, we start with the most prominent, *Briscoe v. City of New Haven*, “the first in our Circuit to require a precedential examination of *Ricci v. Destafano*, 129 S. Ct. 2658 (2009)”

and directly arising from that case.²² In *Ricci*, the Supreme Court found that the City of New Haven’s refusal to certify the results of certain firefighter promotion exams—which the city had feared would subject it to a disparate impact claim by minority firefighters—constituted disparate treatment against white firefighters. The Supreme Court held that disparate treatment may be excused only if there is a “strong basis in evidence” that the employer would have faced disparate impact liability had it acted otherwise, and—not finding such evidence—ordered the city to certify the results.²³

After the city certified the results, Michael Briscoe brought the anticipated disparate impact claim. In the District Court, the city appeared to argue, and the court held, that the Supreme Court’s decision in *Ricci* precluded Briscoe’s claims, even though Briscoe was not a party in the earlier case. On Briscoe’s appeal to the Second Circuit, however, the city disavowed the preclusion argument and argued instead that *Ricci* had established a “strong basis in evidence” test for disparate impact as well as disparate treatment claims. In other words, the city argued that its conduct having a disparate impact (i.e., certification of the test results) was excused since there was a strong basis in evidence that it would face disparate treatment claims had it acted otherwise (the evidence here being the *Ricci* suit itself).²⁴



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The Second Circuit disposed of the (abandoned) preclusion argument first. Briscoe had not been a party in *Ricci*, and did not fall within any of six recognized categories of nonparty-exclusion: he did not agree to be bound by *Ricci*, did not have a special relationship with the city, was not adequately represented by the city, did not have an opportunity to present evidence or argument in *Ricci*, was not serving as a proxy for a party in *Ricci*, and, finally, no special statutory scheme applied here.²⁵

The Circuit also rejected the city's argument for a "broad, two-way reading" of *Ricci*'s "strong basis in evidence" standard. While acknowledging that some support for the city's position could be found in *Ricci*'s dicta, the Circuit held that the two-way reading would contravene the Court's express holding limiting the "strong basis in evidence" standard to disparate treatment claims. Moreover, there is already a statutory standard for determining when an employment practice that would otherwise trigger disparate impact liability is excusable due to concern over disparate treatment: under 42 U.S.C. § 2000e-2(k) (1), conduct that is "job related" and "consistent with business necessity" is permissible. If the Court had intended for *Ricci* to modify this statutory standard, the Court would have at least mentioned the statute, and this it did not do.²⁶

In concluding, the Circuit noted that it was

"sympathetic" to the city's plight. But the city could have avoided this situation had it joined all interested parties (i.e., the test-takers) in the first litigation, or taken advantage of a special procedure in Title VII which allows for nonparties to be bound after notice and a fairness hearing.²⁷ We suspect that this won't be the last we see of *Ricci/Briscoe*.

In our next civil case, *Call Center Technologies, Inc. v. Grand Adventures Tour & Travel Publishing Corp.*, Call Center, a seller of refurbished phone equipment, had a less-than-grand adventure with Grand Adventures, a now-defunct travel-services provider. On the bright side, the case gave the Second Circuit an opportunity to weigh in on questions of successor liability, which "Connecticut's appellate courts have only rarely had occasion to consider."²⁸

Call Center installed a telephone system for Grand Adventures in 1998. Grand Adventures failed to pay, and Call Center brought suit in Connecticut state court. Not surprisingly, Grand Adventures was having financial difficulties. It brought in two individuals—Duane Boyd and Lawrence Fleischman—as unpaid consultants in early 2001. Boyd and Fleischman also extended Grand Adventure various loans in exchange for interests in the company. But Grand Adventures' business took a turn for the worse after the September 11, 2001 terrorist attacks. Boyd and Fleischman formed a new

company, Interline Travel & Tour, Inc. The pair transferred all their Grand Adventures rights to Interline, then forced a foreclosure sale of Grand Adventures. Interline was the sole bidder, and purchased Grand Adventures' remaining assets.

Meanwhile, Grand Adventures failed to appear in the Connecticut state court action. Call Center added Interline as a defendant in 2003, alleging that Interline was Grand Adventures' successor interest. Interline removed the action to the District of Connecticut, and, in 2009, secured summary judgment on the ground that it had no successor liability.²⁹

The Second Circuit reversed the grant of summary judgment. Connecticut follows the general common law rule against successor corporate liability, i.e., that a corporation which purchases the assets of another company does not become liable for that company's debts and liabilities "unless (1) the purchase agreement expressly or impliedly so provides, (2) there was a merger or consolidation of the two firms, (3) the purchaser is a 'mere continuation' of the seller, or (4) the transaction was entered into fraudulently for the purpose of escaping liability."³⁰ The mere continuation and fraud exceptions were at issue here.

The Court of Appeals agreed with the District Court that Call Center failed to identify any facts to substantiate its allegations of fraud. Because the "general rule" is that a purchaser of assets does not assume liability, the proponent of successor liability has the burden of coming forward with proof that an exception to the rule applies.³¹

The Court of Appeals disagreed with the District Court's assessment of the "mere continuation" exception, however. The Connecticut Appellate Court has identified two separate but related theories for finding mere continuation: (1) the "common law mere continuation" theory, which focuses on continuity of ownership; and (2) the "continuity of enterprise" theory, which asks whether the successor "maintains the same business, with the same employees doing the same jobs, under the same supervisors, working conditions, and production processes, and produces the same products for the same customers."³² Looking at the continuity of enterprise factors, the Circuit found sufficient questions of fact to

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preclude summary judgment for Interline. Interline “shared the same core business” as Grand Adventures, and had picked up Grand Adventures’ customers without significant interruption. The majority of Grand Adventures’ employees had reported for work the day after the foreclosure sale, and continued operating out of the same offices. As for management, while Boyd and Fleischman had not been managers at Grand Adventures, they had been consultants and had held security interest, and Boyd had been on the board. Finally, the fact that Interline was formed for the specific purpose of obtaining Grand Adventures’ assets, and had not previously possessed any assets or employees of its own, was another factor pointing toward “continuity of enterprise,” and hence, successor liability.³³

In our third civil case, *Ross v. New Canaan Environmental Commission*, the Second Circuit added its voice to an issue Connecticut’s appellate courts have considered often: the precise contours of res judicata. Plaintiff Christina Ross previously brought—and lost—an administrative appeal under the Connecticut Inland Wetlands and Watercourses Act in Connecticut Superior Court. She then brought suit in District Court, alleging that the defendants had vio-

lated her constitutional rights and claiming damages in the form of legal fees from the state court proceedings, losses from delayed construction, and stress, anxiety, and emotional pain.³⁴ The District Court dismissed Ross’ second suit as barred by res judicata.

In Connecticut, the doctrine of res judicata “bars not only subsequent relitigation of a claim previously asserted, but subsequent relitigation of any claims relating to the same cause of action which were actually made or which might have been made.”³⁵ Connecticut recognizes an exception, however, where the plaintiff was “unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action” due to limitations on the court’s jurisdiction or authority.³⁶

The Second Circuit found that the District Court failed to properly apply this exception in Ross’ case. In Connecticut, the superior court cannot award a monetary remedy in an administrative action.³⁷ Thus, notwithstanding that Ross’ federal claims relied on the same facts that were before the superior court, she would not have been able to assert her claims for damages, and res judicata did not apply.

Our fourth civil case of 2011 wades into the area where the Connecticut Inland Wetlands and Watercourses Act meets federal air safety regulations. In *Goodspeed Airport, LLC v. East Haddam Inland Wetlands & Watercourses Comm’n*, the Airport sought to cut down certain trees on its property, part of which was protected wetlands.³⁸ The Airport argued that some of the trees were “obstructions to air navigation” under FAA regulations, and that the federal regulations preempted the state and local laws and regulations requiring it to obtain a permit before cutting down any trees on protected wetlands.³⁹

The District Court disagreed, as did the Second Circuit. The Court of Appeals held—apparently for the first time—that Congress intended to occupy the entire field of air safety and thereby preempt state regulation of that field. However, the regulatory scheme here did not sufficiently intrude upon the field of air safety to be preempted. Goodspeed Airport received no federal funding and was not licensed by the FAA. The FAA had not approved or mandated the removal of the trees in question, and, in fact, had disclaimed any authority to do so in response to a formal inquiry by the District Court in this case.⁴⁰ The Circuit dis-

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tinguished the facts in this case with those in another recent District of Connecticut case finding preemption—in *Tweed-New Haven Airport Auth. v. Town of East Haven*, East Haven officials had tried to obstruct construction of a “federally-mandated, federally-funded, and state- and federally-approved” runway project.⁴¹

The Circuit also distinguished this case from its recent decision holding that the New York Passenger Bill of Rights (requiring airlines to provide food, water, electricity, and restrooms to passengers during lengthy ground delays) was expressly preempted by a Federal Aviation Act provision preempting any state or local law “related to a price, route, or service of an air carrier.”⁴² The impact on air carriers of the wetlands permit requirements here, if any, was simply too remote.

Finally, in *Hutchinson v. Deutsche Bank Secs., Inc.*, the Court clarified the standard for determining whether a misstatement or omission is quantifiably material for purposes of a securities fraud claim.⁴³ Plaintiffs brought a class action alleging that CBRE Realty Finance, a Hartford-based real estate financing company, made material misrepresentations in connection with its 2006 initial public offering. Specifically, the plaintiffs alleged that CBRE failed to disclose that certain of its mezzanine loans were impaired. The District Court granted CBRE’s motion to dismiss, finding that the omission was immaterial because the loans were fully collateralized by real estate at the time of the IPO.⁴⁴

The Second Circuit affirmed, but on different grounds. The Circuit held that, under CBRE’s own definition of “impairment” in its Registration Statement—to include all situations “when it is deemed probable that the Company will be unable to collect all amounts due according to the contractual terms of the original agreements”—the mere fact of collateralization would not render the loans immaterial. Even if the loans were fully collateralized, foreclosure proceedings would entail delay, costs, and

uncertainty, i.e., not collecting all amounts due according to the original contractual terms.⁴⁵

The Circuit nevertheless found that the alleged omissions were quantitatively immaterial. Reconciling two of its recent decisions, which appeared to go in opposite directions on materiality, the court held that 5 percent may continue to provide an initial threshold basis for determining materiality; however: if a particular product-line or segment of a company’s business has “independent significance for investors”—for example, the company’s “original niche, its iconic or eponymous business, critical to its reputation, or most promising for growth or as an engine of revenue”—then “even a matter material to less than all of the company’s business may be material for purposes of the securities laws.”⁴⁶ In this case, the Circuit was not persuaded that the mezzanine loans held any special interest for investors. Thus, measured against CBRE’s overall business, the alleged omissions about the loans were not quantitatively material.

That rounds out our review of the top Second Circuit decisions emanating from the District of Connecticut in 2011. We look forward to returning next year with the top cases of 2012, including, perhaps, some postscripts on some of this year’s decisions.

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Notes

1. 629 F.3d 290 (2d Cir. 2011) (per curiam).
2. 18 U.S.C. § 924(e)(1).
3. *Id.* at 296.
4. *Id.* (emphasis in original).
5. 420 Fed Appx. 30 (2d Cir. 2011).
6. *See United States v. Bell*, 584 F.3d 478 (2d Cir. 2009).

7. 420 Fed Appx. at 35.
8. *Id.* at 35-36.
9. 635 F.3d 39 (2d Cir. 2011).
10. *Id.* at 41 and n.4.
11. *Id.* at 45.
12. 657 F.3d 126 (2d Cir. 2011)
13. *Id.* at 128.
14. *Id.* at 130.
15. *Id.* at 132.
16. 658 F.3d 140, 142 (2d Cir. 2011).
17. *Id.* at 144.
18. 653 F.3d. 61 (2d Cir. 2011).
19. *Id.* 68-74.
20. *Id.* at 76.
21. *Id.* at 78.
22. 654 F.3d 200, 209 (2d Cir. 2011).
23. *Id.* at 201.
24. *Id.* at 202-03.
25. *Id.* at 203.
26. *Id.* at 206-07.
27. *Id.* at 209.
28. 635 F.3d 48, 52 (2d Cir. 2011)
29. *Id.* at 49-51.
30. *Id.* at 52.
31. *Id.*
32. *Id.* at 53 (citing *Kendall v. Amster*, 108 Conn. App. 319, 948 A.2d 1041, 1051 (Conn. App. Ct. 2006)).
33. *Id.* at 54-55.
34. *Ross v. New Canaan Envtl. Comm’n*, 433 Fed. Appx. 7, 8-9 (2d Cir. 2011).
35. *Id.* at 7 (citing *Isaac v. Truck Serv., Inc.*, 253 Conn. 416, 421, 752 A.2d 509 (2000)).
36. *Id.* at 8 (citing Restatement (Second) of Judgments § 26(1)(c) and noting that this provision has been adopted as law in Connecticut) (emphasis added).
37. *Id.* at 9 (citing *Cumberland Farms, Inc. v. Town of Groton*, 262 Conn. 45, 63 (2002)
38. 634 F.3d 206, 207 (2d Cir. 2011)
39. *Id.* at 208.
40. *Id.* at 210-11.
41. *Id.* (citing *Tweed-New Haven Airport Auth. v. Town of East Haven*, 582 F. Supp. 2d 261, 267 (D. Conn. 2008).
42. *Id.* at 212 (citing *Air Transport Ass’n of America, Inc. v. Cuomo*, 520 F.3d 218, 223 (2d Cir. 2008)).
43. 647 F.3d 479 (2d Cir. 2011).
44. *Id.* at 481.
45. *Id.* at 486-87.
46. *Id.* at 487-88 (citing *ECA & Local 134 IBEW Joint Pension Trust of Chicago v. JP Morgan Chase Co.*, 553 F.3d 187 (2d Cir. 2009) (conducting a quantitative materiality analysis that compared the value of the troubled investment to the value of the defendant’s entire investment portfolio) and *Litwin v. Blackstone Grp., L.P.*, 634 F.3d 706 (2d Cir. 2011) (weighing the impact of the troubled loan on the part of defendant’s business in which the loan was located).