# Current Circuit Splits

The following pages contain brief summaries, drafted by the members of the *Seton Hall Circuit Review*, of circuit splits identified by a federal court of appeals opinion between October 31, 2007 and March 31, 2008. This collection is organized by civil and criminal matters, then by subject matter.

Each summary briefly describes a current circuit split. It is intended to give only the briefest synopsis of the circuit split, not a comprehensive analysis. This compilation makes no claim to be exhaustive, but will hopefully serve the reader well as a reference starting point.

## CIVIL MATTERS

## CRIMINAL MATTERS

# CIVIL MATTERS

## IMMIGRATION

**Board of Immigration Appeals – A Crime of Moral Turpitude:** *Hyder v. Keisler*, 506 F.3d 388 (5th Cir. 2007)

The 5th Circuit adopted the Board of Immigration Appeals' ("BIA") definition of moral turpitude which includes "an act which is per se morally reprehensible and intrinsically wrong. . . ." *Id.* at 391. The court noted that the defendant was convicted of misusing a social security number and "almost all other courts have agreed that 'deceiving the government involves moral turpitude.'" *Id.* at 392. The 5th Circuit disagreed with the 9th Circuit to hold that a person who misuses a social security number should not be exempted from Crime of Moral Turpitude status. *Id.* The 5th Circuit noted that the 9th Circuit heavily relied on Congress's committee reports, which exempted individuals "who use a false social security number to engage in otherwise lawful conduct . . . [and] should not be considered to have exhibited moral turpitude." *Id.* The 5th Circuit reasoned that the 9th Circuit expanded a narrow exemption beyond Congress's intent by extending the exemption from moral turpitude status meant for lawful permanent residents to a class of aliens whose acts were not necessarily exempt from moral turpitude status. *Id.* at 393.

## STATUTORY INTERPRETATION

**FICA – Definition of Taxable Wages:** *Univ. of Pittsburgh v. United States*, 507 F.3d 165 (3d Cir. 2007)

The 3rd Circuit addressed whether early retirement payments made by the University of Pittsburgh to tenured faculty constitutes taxable wages under the Federal Insurance Contribution Act ("FICA"), 26 U.S.C. § 3121–28. *Id.* at 166. The 3rd Circuit held that "the relinquishment of tenure rights . . . does not alter the Plan payments' character as compensation for services, and therefore as wages." *Id.* at 171. In doing so, the court agreed with the analysis of the 6th Circuit, noting that the "weight of authority holds that compensation paid to an

employee for services to her employer constitutes wages under FICA regardless of whether it is prospective (for lost earning potential), or retrospective (as a reward for past service)." *Id.* This conclusion parted with the 8th Circuit's view that such early retirement payments represented the "relinquishment of [the faculty's] . . . constitutionally-protected tenure rights rather than as remuneration for services to [the University]." *Id.* at 170.

**Education Law – Individuals with Disabilities Education Act:**
*Blanchard v. Morton School District*, 509 F.3d 934 (9th Cir. 2007)

The 9th Circuit addressed whether 42 U.S.C. § 1983 created a cause of action for monetary damages under the Individuals with Disabilities Education Act ("IDEA") for lost wages and suffering when a parent pursued IDEA relief on behalf of a child. *Id.* at 936. The court noted that 42 U.S.C. § 1983 does not "create any right under federal law." *Id.* The court also recognized that Congress amended the statute to include 20 U.S.C. § 1415(1) in response to the Supreme Court holding that the IDEA was the exclusive means of remedying infringements on the rights it guaranteed, and that the provision generally provides judicial relief for "violations of any right 'relating to the identification, evaluation, or educational placement of [a] child.'" *Id.* at 938.

The 9th Circuit confronted a circuit split when interpreting whether the amendment of section 1415 meant that Congress "intended the IDEA rights to be enforceable under section 1983." *Id.* The court noted that the 1st, 3rd, 4th, and 10th Circuits have held that Congress did not intend such right to be enforceable under section 1983. *Id.* Conversely, the court acknowledged that the 2nd and 7th Circuits found Congress intended the right, and the 8th Circuit issued decisions reflecting both views. *Id.*

The 9th Circuit adopted the reasoning of the 3rd Circuit to hold that because the IDEA provides a comprehensive judicial remedy scheme whereby a parent can obtain relief for violations of rights incurred in the pursuit of securing rights for disabled children, therefore Congress did not intend section 1983 to provide an independent remedy to IDEA violations. *Id.* Consequently, the 9th Circuit affirmed the decision of the district court and concluded that the IDEA's enforcement scheme did not contemplate damages for lost wages and emotional distress obtained in the pursuit of obtaining benefits for a disabled child. *Id.*

**FDCPA – Lawyer Communications:** *Evory v. RJM Acquisitions Funding L.L.C.*, 505 F.3d 769 (7th Cir. 2007)

In this case, the 7th Circuit contemplated several issues split among the circuit courts of appeals regarding the Fair Debt Collection Practices Act. The 7th Circuit first explained that "any written notice sent to the lawyer must contain the information that would be required by the Act if the notice were sent to the consumer directly." *Id.* at 773. After resolving the threshold issue, the court examined the circuit split on this issue of "[w]hether communications to lawyers are subject to sections 1692d through 1692f, which forbid harassing, deceptive, and unfair practices in debt collection." *Id.* at 772.

The 7th Circuit, siding with the 9th and 2nd Circuit Courts, concluded that "a representation by a debt collector that would be unlikely to deceive a competent lawyer, even if he is not a specialist in consumer debt law, should not be actionable," since a non-specialist attorney could inform herself in order to represent her consumer clients effectively. *Id.* at 775. However, the court carved out an exception by holding that a false claim of fact that would be undiscoverable by a lawyer without extensive investigation "would be actionable whether made to the consumer directly, or indirectly through his lawyer." *Id.*

The 7th Circuit further addressed the issue of "[w]hether the determination that a representation is or is not false, deceptive, or misleading under section 1692 is always to be treated as a matter of law." *Id.* at 772. Here, the court followed its own circuit precedent, concluding that a claim of deception can be rejected on the pleadings even though issues of deception tend to be treated as ones of fact. *Id.* at 776–77. Citing a prior 7th Circuit case, the court explained that, "'undoubtedly, there will be occasions when a district court will be required to hold that no reasonable person, however unsophisticated, could construe the wording of the communication in a manner that will violate the statutory provision.'" *Id.* at 777.

# CRIMINAL MATTERS

## SENTENCING

**Sentencing Guidelines – Recidivist Provision:** *United States v. Pacheco-Diaz*, 506 F.3d 545 (7th Cir. 2007)

In this case, the 7th Circuit considered the applicability of the recidivist provision of 21 U.S.C. § 844(a) in determining a defendant's sentence increase. *Id.* at 547. Noting the district court's findings that a conviction for marijuana possession should be treated as a federal felony under the recidivist provision, the court also considered the actions of several different circuits while deliberating the issue. *Id.* Declining to follow the 9th Circuit's position disregarding section 844's penalties for repeat offenders, the court instead applied the 2nd, 5th, and 6th Circuits' approaches to find that section 844(a)'s recidivist provisions must be applied "in determining whether a defendant's prior state misdemeanor conviction should be considered an aggravated penalty." *Id.* at 549. Because the court considered the other circuit holdings similar to the 7th Circuit's holding in *United States v. Perkins*, which evaluated the crime of conviction, the 7th Circuit upheld the district court's eight-level sentencing increase. *Id.* at 549–50.

**Sentencing Guidelines – Enhancements for Prior Convictions:** *United States v. Lopez-Salas*, 513 F.3d 174 (5th Cir. 2008)

The 5th Circuit agreed with the 6th, 9th, and 10th Circuits regarding the use of a prior conviction of drug trafficking under state law, to enhance the sentence of a defendant tried for violation of federal law. *Id.* at 180. The defendant was convicted of drug trafficking under a North Carolina statute which equated trafficking solely with the amount of drugs in his possession. *Id.* at 177. The court, following the Sentencing Guidelines, had previously held that "a drug trafficking enhancement could not be supported by a conviction for transporting a controlled substance unless the predicate statute included as an element an intent to manufacture, import, export, distribute, or dispense." *Id.* 178.

In doing so, the court rejected the 11th Circuit's conclusion "that a state statute that presumes an intent to distribute creates a drug

trafficking offense, as defined in section 2L1.2(b)(1)(A)" of the Sentencing Guidelines. *Id.* at 179. The 5th Circuit instead adopted the reasoning of the 10th Circuit, which stated "[f]irst, the absence of the phrase 'that has an element' from the definition of a drug trafficking offense is not significant enough to depart from the ordinary standard of review . . . Second, incongruous results do not justify a departure from the ordinary standard of review . . . [and although] [a]nomalies occur when the evidence a court reviews is intentionally limited . . . the Guidelines cannot be rewrit[ten] . . . simply because they might . . . produce an anomalous result.'" *Id.* at 180–81.

**Post *Booker* – Supervised Release:** *United States v. Bolds*, 511 F.3d 568 (6th Cir. 2007)

The 6th Circuit addressed the standard governing the post-*Booker* review of sentences imposed upon the revocation of supervised release. *Id.* at 573. The court recognized that that two standards of review exist: *Booker*'s "unreasonableness" standard and the "plainly unreasonable" standard in sections 3742(a)(4) and 3742(b)(4). *Id.* at 575. The court recognized that the 4th and 7th Circuits apply a "plainly unreasonable" standard of review while the 2nd, 3rd, 8th, 9th, 10th, and 11th Circuits apply the "unreasonableness" standard. *Id.* The court then found that in *Booker*, "the Supreme Court . . . was simply directing appellate courts to apply the same reasonableness standard that they use to review supervised release revocation sentences to their review of all sentences." *Id.* at 575. Consequently, the 6th Circuit held that post-*Booker*, supervised release revocation sentences would be reviewed "in the same way that we review all other sentences." *Id.*

**Bureau of Prisons – Placement in Community Correction Centers:** *Muniz v. Sabol*, 517 F.3d 29 (1st Cir. 2008)

The 1st Circuit created a circuit split in holding that "the Bureau of Prisons ("BOP") may, through rulemaking, deny placement in a community corrections center ("CCC") to all prisoners during the first ninety percent of their sentences." *Id.* at 31. The court found that the BOP may make rules of general applicability, which "must conform to the strictures of the Administrative Procedure Act, 5 U.S.C. § 555." *Id.* The court remarked that the BOP, in addition to considering certain factors mandated by Congress in making a determination, must also leave room in the rules for consideration of other factors. *Id.* at 32.

The 1st Circuit remarked that its analysis differed from the other circuits in two respects. *Id.* at 31. First, it noted that its analysis of the

statute "reveals that the decision whether to transfer an inmate is not constrained by the factors Congress lists, although the decision where to transfer an inmate might be." *Id.* at 31–32. Second, the court found that, "even in initial assignment decisions, the question whether a CCC is appropriate is only a part of the overall decision with which the BOP is charged by statute." *Id.*

**Supervised Release – Tolling:** *United States v. Goins*, 516 F.3d 416 (6th Cir. 2008)

The 6th Circuit decided a question of first impression, and consequently created a circuit split as to "whether pretrial detention with respect to an indictment that later yields a conviction tolls the running of a period of supervised release under 18 U.S.C. § 3624. *Id.* at 417. The court noted that the 9th Circuit, the only other circuit to address this exact issue, concluded that "pretrial detention [does] not trigger a tolling of the period of supervised release. *Id.* at 419.

The 6th Circuit observed that the 9th Circuit distinguished between "imprisonment" and "detention," interpreting the former term to "refer to a penalty or sentence" while the latter term was "used to describe a mechanism to insure a defendant's appearance and the safety of the community." *Id.* However, the 6th Circuit was not persuaded by the 9th Circuit's reasoning that "the phrase 'in connection with a conviction' means that a conviction must occur *before* any confinement can count as imprisonment." *Id.* The court stated that if Congress only wished "imprisonment" to refer to a "confinement that is the result of a penalty or sentence, then the phrase 'in connection with a conviction' becomes entirely superfluous." *Id.* at 421. Accordingly, the court declined to adopt the 9th Circuit's distinction between "imprisonment" and "detention" and instead concluded that "'imprison' includes not only confinements as a result of a conviction, but any time the state detains the individual." *Id.*

The court then examined 18 U.S.C. § 3585(b), which "creates a connection between pretrial detention and a later conviction." *Id.* at 422. The court weighed two factors heavily in its analysis: the connection between pretrial confinements and subsequent convictions, and the fact that Congress did not intend "imprisoned" to "exclude pretrial detention from the scope of section 3624(e)." *Id.* Accordingly, the court held that "when a defendant is held for thirty days or longer in pretrial detention, and he is later convicted for the offense for which he was held, and his pretrial detention is credited as time served toward his sentence, then the pretrial detention is 'in connection with' a conviction and tolls the period of supervised release under section 3624." *Id.* at 417.

## EVIDENCE

**Balancing Test – Prior Convictions:** *United States v. Kelly*, 510 F.3d 433 (4th Cir. 2007)

The 4th Circuit analyzed the circuit split between the 7th and 9th Circuits regarding the application of the balancing test under Federal Rule of Evidence 403 when deciding whether evidence of prior offenses was admissible under Rule 414. *Id.* at 436–37. The court found that, even if a prior conviction for child molestation qualifies for admission under Rule 414, evidence of that conviction may nonetheless "be excluded if its probative value is substantially outweighed by the danger of unfair prejudice" to the defendant. *Id.* at 437.

The court concluded that the application of the Rule 403 balancing test to prior offenses admissible under Rule 414 required the district court to "consider a number of factors, including: (i) the similarity between the previous offense and the charged crime; (ii) the temporal proximity between the two crimes; (iii) the frequency of the prior acts; (iv) the presence or absence of any intervening acts; and (v) the reliability of the evidence of the past offense." *Id.* at 437.

The 4th Circuit then noted the split among the circuit courts as to whether a district court must address these or other specific factors to make findings. *Id.* The court acknowledged that the 9th Circuit required other specific factors to be considered while the 7th Circuit used a more flexible approach that did not dictate a specific analysis. *Id.* The 4th Circuit adopted the 7th Circuit's approach, stating that a district court has "'wide discretion' in admitting or excluding evidence under Rule 403." *Id.* The court noted that this standard better reflected the fact that "a district court is much closer than a court of appeals to the 'pulse of a trial.'" *Id.*