Current Circuit Splits

The following pages contain brief summaries of circuit splits identified by federal court of appeals opinions announced between February 18, 2013 and September 4, 2013. This collection, written by the members of the *Seton Hall Circuit Review*, is organized into civil and criminal matters, and then by subject matter and court.

Each summary briefly describes a current circuit split, and 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 aims to serve the reader well as a referential starting point.

Preferred citation for the summaries below: *Circuit Splits*, 10 SETON HALL CIR. REV. [n] (2013).

CIVIL MATTERS

Antitrust 149

Fair Debt Collection Practices Act – Notice Requirements; Hooks v. Forman, Holt, Eliades & Ravin, LLC, 717 F.3d 282 (2d Cir. 2013) 149

Bankruptcy 150

Chapter 11 – Avoidance of Rights and Limits; In re Quebecor World (USA) Inc., 719 F.3d 94 (2d Cir. 2013) 150

Appeals – Finality of Order Denying Proposed Bankruptcy Plan; Ranta v. Gorman, 721 F.3d 241 (4th Cir. 2013) 150

Creditor Claims – Non-Spousal Inherited IRAs; In re Heffron-Clark, 714 F.3d 559 (7th Cir. 2013) 150

Constitutional Authority Waiver & Consent – Objections to the Constitutional Authority of Bankruptcy Courts; Wellness International Network, Ltd. v. Sharif, 727 F.3d 751 (7th Cir. 2013) 151

Judicial Estoppel – Prior Position Based on Inadvertence or Mistake; Ah Quin v. County of Kauai Department of Transportation, 733 F.3d 267 (9th Cir. 2013) 151

Chapter 7 – Automatic Stays; Rajala v. Gardner, 709 F.3d 1031 (10th Cir. 2013)..... 152

Automatic Stay – Tax Deficiency Appeals; Schoppe v. Commissioner, 711 F.3d 1190 (10th Cir. 2013) 152

Civil Procedure 153

Civil Action by Prisoner – Prison Litigation Reform Act (PLRA); Ball v. Famiglio, 726 F.3d 448 (3d Cir. 2013)..... 153

Antitrust & Trade Law – Clayton Act; KM Enterprises, Inc. v. Global Traffic Technologies, Inc., 725 F.3d 718 (7th Cir. 2013) 154

Consumer Law 154

Truth in Lending Act (TILA) – Statutory Time Bar; Kerian v. Home Capital, 720 F.3d 721 (8th Cir. 2013) 154

Constitutional Law..... 155

Recess Appointment Clause – Recess Defined; NLRB v. Enterprise Leasing Company Southeast, LLC, 722 F.3d 609 (4th Cir. 2013) ... 155

Contracts 155

Maritime Law – Scope of Safe Berth Warranty; Shipping Co. v. Citgo Asphalt Refining Co., 718 F.3d 184 (3d Cir. 2013)..... 155

Environmental law 156

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) – Statutory Interpretation: Trinity Industries Inc. v. Chicago Bridge & Iron Co., No. 12-2059, 2013 U.S. App. LEXIS 17286 (3d Cir. Aug. 20, 2013)..... 156

Evidence..... 156

Jury Voir Dire – Challenging a Verdict; Warger v. Shauers, 721 F.3d 606 (8th Cir. 2013) 156

Health Law..... 157

The Affordable Care and Patient Protection Acts (PPACA) – Survivor Benefits; U.S. Steel Mining Co., LLC v. Director, 719 F.3d 1275 (11th Cir. 2013)..... 157

Immigration 158

Asylum – Social Group; Cece v. Holder, No. 11-1989, 2013 U.S. App. LEXIS 16533 (7th Cir. Aug. 9, 2013)..... 158

Labor & Employment 159

Employee Retirement Income Security Act (ERISA) – Standard of Review; Gross v. Sun Life Assurance Co. of Canada, No. 12-1175, 2013 U.S. App. LEXIS 17059 (1st Cir. Aug. 16, 2013)..... 159

Employment Retirement Income Security Act (ERISA) – Long Term Disability (LTD) Benefits Plan; Thurber v. Aetna Life Insurance Co., 712 F.3d 654 (2d Cir. 2013) 159

Employee Retirement Income Security Act (ERISA) – Fiduciary Duty; Edmonson v. Lincoln National Life Insurance Co., 725 F.3d 406 (3d Cir. 2013)..... 160

Civil Rights Act Title VII – "Employee" Definition; Juino v. Livingston Parish Fire District No. 5, 717 F.3d 431 (5th Cir. 2013) 160

Longshore & Harbor Worker's Compensation Act (LHWCA) – Situs Requirement; New Orleans Depot Services. v. Director, Office of Worker's Compensation Programs, 718 F.3d 384 (5th Cir. 2013). 161

Securities..... 161

Rule 13b2-2 – Scienter Requirement; SEC v. Das, 723 F.3d 943 (8th Cir. 2013)..... 161

Statutory Interpretation 162

False Claims Act (FCA) – First-to-File Rule; United States ex rel. Heineman-Guta v. Guidant Corp., 718 F.3d 28 (1st Cir. 2013)..... 162

CRIMINAL MATTERS

Administrative Law 163

Sex Offender and Registration Notification Act (SORNA) – Notice and Comment Requirements; United States v. Reynolds, 710 F.3d 498 (3d Cir. 2013)..... 163

Criminal Procedure..... 163

Search and Seizure – Malicious Prosecution; Hernandez-Cuevas v. Taylor, 723 F.3d 91 (1st Cir. 2013)..... 163

Jury Charge – Entrapment Defense; United States v. Cromitie, 727 F.3d 194 (2d Cir. 2013)..... 164

Habeas Corpus – Jurisdiction: United States v. Thomas, 713 F.3d 165 (3d Cir. 2013)..... 164

Wiretapping Guidelines – Territorial Jurisdiction Limitation; United States v. North, 728 F.3d 429 (5th Cir. 2013)..... 165

Appellate Review – Plain Error Definition; United States v. Remble, 520 Fed. Appx. 436 (6th Cir. 2013)..... 165

Habeas Corpus – Petitions for Relief; Brown v. Caraway, 719 F.3d 583 (7th Cir. 2013)..... 166

Fourth Amendment..... 166

Warrantless Searches – Cell Phones; United States v. Wurie, 728 F.3d 1 (1st Cir. 2013)..... 166

Stored Communications Act (SCA) – Historical Cell Site Information; In re Application of the United States for Historical Cell Site Data, 724 F.3d 600 (5th Cir. 2013)..... 167

Health Care Fraud..... 168

False Statements – Intent; United States v. Natale, 719 F.3d 719 (7th Cir. 2013)..... 168

Immigration..... 168

Proof of Citizenship – Passport; United States v. Moreno, 727 F.3d 255 (3d Cir. 2013)..... 168

Extrinsic Evidence Admissibility – Crimes Involving Moral Turpitude (CIMT); Olivas-Motta v. Holder, 716 F.3d 1199 (9th Cir. 2013)..... 169

Sentencing.....169

Federal Sentencing Act of 2010 – Rule of Lenity; United States v. Savani, 716 F.3d 66 (3d Cir. 2013).....169

Sentence Enhancement – Distribution of Pornographic Material; United States v. Robinson, 714 F.3d 466 (7th Cir. 2013).....170

Sentence Enhancement – Liability for Death Cause by Drug Use; United States v. Walker, 721 F.3d 828 (7th Cir. 2013) 170

Fraud – Loss Calculations; United States v. Torlai, 728 F.3d 932 (9th Cir. 2013).....171

Statutory Interpretation 171

Bribery – Gratuities; United States v. Fernandez, 722 F.3d 1 (1st Cir. 2013) 171

Smuggled Goods – Contrary to Law Definition; United States v. Izurieta, 710 F.3d 1176 (11th Cir. 2013) 172

CIVIL

ANTITRUST

Fair Debt Collection Practices Act – Notice Requirements; *Hooks v. Forman, Holt, Eliades & Ravin, LLC, 717 F.3d 282 (2d Cir. 2013)*

The 2nd Circuit addressed whether a consumer debtor is required to dispute the validity of a debt under 15 U.S.C. § 1692g(a)(3) in writing, although that section does not state that a writing is required. *Id.* at 284. The court noted that while the 3rd "Circuit has held that a notice imposing a writing requirement does not violate § 1692g, . . . the [9th] Circuit has held that it does." *Id.* The 2nd Circuit agreed with the 9th Circuit, finding that "[t]he language of § 1692g(a)(3) does not incorporate the writing requirement included specifically in other sections of the same statute" and that there was "no reason to ignore this difference in statutory language." *Id.* at 286. Thus, the 2nd Circuit concluded that § 1692g(a)(3) does not impose a writing requirement. *Id.*

Chapter 11 – Avoidance of Rights and Limits; *In re Quebecor World (USA) Inc., 719 F.3d 94 (2d Cir. 2013)*

The 2nd Circuit addressed whether "a transfer may qualify for the section 546(e) safe harbor even if the financial intermediary is merely a conduit." *Id.* at 99. The court noted that the 3rd, 6th, and 8th Circuits "concluded that the plain language [of section 546(e)] includes any transfer to a financial institution, even if it is only serving as a conduit or intermediary." *Id.* In contrast, the 11th Circuit held that "the financial institution must acquire a beneficial interest in the transferred funds or securities for the safe harbor to apply." *Id.* The court reasoned that "[t]he plain language of the statute refers to transfers made 'by or to (or for the benefit of)' a financial institution," and therefore "a transfer may be either 'for the benefit of' a financial institution or 'to' a financial institution, but need not be both." *Id.* at 99–100. Thus, the 2nd Circuit joined the 3rd, 6th, and 8th Circuits in holding that "a transfer may qualify for the section 546(e) safe harbor even if the financial intermediary is merely a conduit." *Id.* at 99.

Appeals – Finality of Order Denying Proposed Bankruptcy Plan; *Ranta v. Gorman, 721 F.3d 241 (4th Cir. 2013)*

The 4th Circuit addressed whether "an order denying confirmation of a proposed plan but not dismissing the underlying bankruptcy petition" is an interlocutory or final order. *Id*. at 246. The court noted that the 2nd, 8th, 9th, and 10th Circuits held that such orders are interlocutory orders, while the 3rd and 5th Circuits held that such orders "can be final for purposes of appeal." *Id*. at 247. The court agreed with the 3rd and 5th Circuits, finding their approach to be more pragmatic and recognized that it is "all but compelled by considerations of practicality." *Id.* at 248. Thus, the 4th Circuit concluded that "a denial of confirmation can be a final order for purposes of appeal even if the case has not yet been dismissed." *Id*.

Creditor Claims – Non-Spousal Inherited IRAs; *In re Heffron-Clark, 714 F.3d 559 (7th Cir. 2013)*

The 7th Circuit addressed "whether a non-spousal inherited individual retirement account ('inherited IRA' . . .) is exempt" from creditors' claims in bankruptcy. *Id*. at 559. The court noted that the 5th and 8th Circuits determined that successors to retirement accounts are

entitled to treat those funds the same as the decedent. *Id*. at 560. The 7th Circuit disagreed with the 5th and 8th Circuit's reasoning because it allowed debtors to shield money from creditors while retaining the ability to use that money for consumption. *Id*. at 561. The court distinguished inherited IRAs from other funds and assets that could be protected from creditors. *Id*. at 560–62. Thus, the 7th Circuit concluded that once the IRA was inherited, it ceased to be a retirement fund and became a source for current consumption, and was not exempt from creditors. *Id*. at 562.

Constitutional Authority Waiver & Consent – Objections to the Constitutional Authority of Bankruptcy Courts; *Wellness International Network, Ltd. v. Sharif, 727 F.3d 751 (7th Cir. 2013)*

The 7th Circuit addressed whether, based on the Supreme Court's decision in *Stern v. Marshall*, 131 S.Ct. 2594 (2011), an objection to a bankruptcy court's constitutional authority to enter a final judgment on a state law claim is waivable. *Id.* at 755. The court noted that "the 6th Circuit held that a *Stern* objection to the bankruptcy court's constitutional authority is not waivable," while the 9th Circuit held "that a party's *Stern* objection to a bankruptcy court's entry of final judgment in a core proceeding is waivable . . . because Congress has authorized litigants to consent to a bankruptcy judge's final adjudication of a noncore proceeding. *Id.* at 770, 772.

The court agreed with the 6th Circuit, finding that constitutional objections to a bankruptcy court's authority implicates both the personal rights of the parties and the structural interests concerning separation of powers such that the objection could not be waived. *Id.* at 771–72. Thus, the 7th Circuit concluded "that under current law a litigant may not waive an Article III, § 1, objection to a bankruptcy court's entry of final judgment in a core proceeding." *Id.* at 773.

Judicial Estoppel – Prior Position Based on Inadvertence or Mistake; *Ah Quin v. County of Kauai Department of Transportation, 733 F.3d 267 (9th Cir. 2013)*[1]

The 9th Circuit addressed whether the judicial estoppel doctrine should be applied where a debtor claims an initial filing error was based on inadvertent or mistaken. *Id*. at *12. The court noted that the 3rd, 6th,

[1] Specific Reporter pages were not assigned at the time of publication; pin cites reflect Lexis page numbers. The Lexis cite is: *Ah Quin v. County of Kauai Department of Transportation*, No. 10-16000, 2013 U.S. App. LEXIS 15076 (9th Cir. July 24, 2013).

and 8th Circuits determined that they must consider "whether the plaintiff knew of the claims and had a motive to conceal them." *Id.* at *26. The 9th Circuit disagreed with the 3rd, 6th, and 8th Circuits, stating that "the ordinary understanding of 'mistake' and 'inadvertence' was a more equitable and less confusing standard." *Id.* at *29. Thus, the 9th Circuit concluded that "knowledge of the pending claim and the universal motive to conceal a potential asset" are factors which may be considered by a court, but "[t]he relevant inquiry is, more broadly, the plaintiff's subjective intent when filling out and signing the bankruptcy schedules." *Id*.

Chapter 7 – Automatic Stays; *Rajala v. Gardner, 709 F.3d 1031 (10th Cir. 2013)*

The 10th Circuit considered "whether allegedly fraudulently transferred property is subject to the Bankruptcy Code's automatic stay *before* a trustee recovers the property through an avoidance action." *Id.* at 1032. The court noted that the 5th Circuit "has held that fraudulently transferred property belongs to the estate under [11 U.S.C.] § 541(a)(1), and is therefore subject to § 362's stay even before it is recovered." *Id.* at 1037. In contrast, the 2nd Circuit held that allegedly fraudulently transferred "property does not become part of the estate *until it is recovered*." *Id.* at 1038. The court stated that "although § 541 is very broad, it plainly does not include fraudulently transferred property until that property is recovered." *Id.* (internal citation omitted). Thus, the 10th Circuit held "that fraudulently transferred property is not part of the bankruptcy estate *until recovered*." *Id.* at 1039.

Automatic Stay – Tax Deficiency Appeals; *Schoppe v. Commissioner, 711 F.3d 1190 (10th Cir. 2013)*

The 10th Circuit addressed "whether the automatic bankruptcy stay in 11 U.S.C. § 362(a)(1) would apply to" an appeal on tax deficiencies. *Id* at 1191. The court noted that the 1st, 3rd, 5th, and 11th Circuits determined that § 362 does not stay an appeal when "the proceeding before the Tax Court was brought by the debtor." *Id* at 1192. In contrast, the 9th Circuit held that an appeal was a continuation of the proceeding "which is initiated by IRS administrative proceedings against the taxpayer." *Id*. The 10th Circuit agreed with the 1st, 3rd, 5th, and 11th Circuits and applied the bright-line rule that "a petition filed in Tax Court is an independent judicial proceeding initiated by the debtor, not the continuation of an administrative proceeding against the debtor." *Id*.

Thus, the 10th Circuit concluded that the automatic bankruptcy stay in § 362 does not apply to an appeal on tax deficiencies. *Id*.

Chapter 7 – Involuntary Petition Dismissal; *In re Piazza*, 719 F.3d 1253 (11th Cir. 2013)

The 11th Circuit addressed "whether prepetition bad faith constitutes 'cause' to dismiss involuntarily a Chapter 7 petition under [11 U.S.C.] § 707(a)." *Id.* at 1260. The court noted that the 2nd, 3rd, and 6th Circuits permit a § 707(a) dismissal based on bad faith, while the 8th and 9th Circuits have held that "although many grounds for dismissal under § 707(a) may be characterized as 'bad faith,' 'bad faith' should not be a freestanding 'cause' for dismissal." *Id.* at 1260 n.3. The court reasoned that if "bankruptcy courts may sanction litigants for filing documents with 'any improper purpose,'" as well as "tak[e] any action . . . necessary or appropriate . . . to prevent an abuse of process," the court saw "no reason why prepetition bad faith should not constitute an adequate or sufficient reason for dismissal." *Id.* at 1262. Thus, the 11th Circuit concluded that "the power to dismiss 'for cause' in § 707(a) includes the power to involuntarily dismiss a Chapter 7 case based on prepetition bad faith." *Id.* at 1260–61.

CIVIL PROCEDURE

Civil Action by Prisoner – Prison Litigation Reform Act (PLRA); *Ball v. Famiglio, 726 F.3d 448 (3d Cir. 2013)*

The 3rd Circuit addressed whether "failure to exhaust [i]s an affirmative defense, so that a prisoner's failure to exhaust administrative remedies is statutorily distinct from his failure to state a claim upon which relief may be granted." *Id.* at 456. The court noted that the 2nd, 4th, 7th, and 8th Circuits "treat failure to exhaust as an affirmative defense, so that a prisoner's failure to exhaust administrative remedies is statutorily distinct from his failure to state a claim upon which relief may be granted," while the 10th and 11th Circuits found that "failure to exhaust constitutes a strike . . . ." *Id*. (internal quotation marks and citations omitted). The court further noted that the D.C. Circuit "follows neither the majority nor the minority approach," but rather has established a bright-line rule that "if the court dismisses an unexhausted complaint on a Rule 12(b)(6) motion or if it dismisses the complaint *sua sponte* and expressly declares the complaint fails to state a claim, the dismissal counts as a strike." *Id*. at 457 (internal quotation marks omitted). The court agreed with the D.C. Circuit in finding that dictum in *Jones v. Bock*, 549 U.S. 199 (2007) suggests that "the possibility that

even when failure to exhaust is treated as an affirmative defense, it may be invoked in a Rule 12(b)(6) motion if the complaint somehow reveals the exhaustion defense on its face" consistent with 3rd Circuit precedent. *Id*. at 459 (internal quotation marks omitted). Thus, the 3rd Circuit concluded that "dismissal based on a prisoner's failure to exhaust administrative remedies does not constitute a PLRA strike, unless a court explicitly and correctly concludes that the complaint reveals the exhaustion defense on its face and the court then dismisses the unexhausted complaint for failure to state a claim." *Id*. at 460.

Antitrust & Trade Law – Clayton Act; *KM Enterprises, Inc. v. Global Traffic Technologies, Inc., 725 F.3d 718 (7th Cir. 2013)*

The 7th Circuit addressed whether venue and service-of-process provisions under Section 12 of the Clayton Act should be read as an integrated whole or as two separate provisions. *Id.* at 724–25. The court noted that the 3rd and 9th Circuits held that the Section's clauses may be decoupled, taking what might be termed the "independent" view of Section 12, while the 2nd and D.C. Circuits held that Section 12's venue and service-of-process provisions must be read together. *Id.* at 726–28. The 7th Circuit agreed with the 2nd and D.C. Circuits in finding that the provision must be read together but without relying on the "plain meaning" rationale endorsed by the 2nd and D.C. Circuits. *Id.* at 730. Instead, the 7th Circuit reasoned that "the practical effects of decoupling the clauses of Section 12 are ultimately too bizarre and contrary to Congress's apparent intent . . . ." *Id.* Thus, the 7th Circuit held that Section 12 must be read as an integrated whole. *Id.*

CONSUMER LAW

Truth in Lending Act (TILA) – Statutory Time Bar; *Kerian v. Home Capital, 720 F.3d 721 (8th Cir. 2013)*

The 8th Circuit addressed whether "inform[ing] the lender [in writing], within three years [(of the consummation of their loan transactions)] of . . . intent to rescind" preserves a plaintiff's right to rescission under the TILA. *Id.* at 726. The court noted that the 3rd and 4th Circuits have held "giving the creditor written notice, in any form, was enough to satisfy the statue of repose," while the 9th and 10th Circuits have held that "rescission suits must be brought within three years from the consummation of the loan, regardless whether notice of rescission is delivered within that three year period." *Id.* at 726–27

(internal quotation marks omitted). The court agreed with the 9th and 10th Circuit's reasoning based on "[t]he nature of a statute of repose and the remedy of rescission, in addition to the uncertainties as to title that would likely occur if the right is not effectuated by court filing within three years of the underlying transaction." *Id.* at 728. Thus, the 8th Circuit held that "a plaintiff seeking rescission must file suit, as opposed to merely giving the bank notice, within three years in order to preserve that right pursuant to [TILA]." *Id.*

CONSTITUTIONAL LAW

Recess Appointment Clause – Recess Defined; *NLRB v. Enterprise Leasing Company Southeast, LLC, 722 F.3d 609 (4th Cir. 2013)*

The 4th Circuit considered whether the term "recess" in the Recess Appointment Clause of the United States Constitution included intersession breaks and intrasession breaks. *Id.* at 646–47. The court noted that the 2nd, 9th, and 11th Circuits have defined the term "recess" to include "intersession breaks as well as intrasession breaks," while the 3rd and D.C. Circuits defined "recess" as "intersession breaks." *Id.* The court found that the interpretation of the D.C. and 3rd Circuits "adhere[d] to the plain language of the Appointments and Recess Appointments Clauses, and is consistent with the structure of the Constitution, the history behind the enactment of these clauses, and the recess appointment practice of at least the first 132 years" of the nation. *Id* at 652. Thus, the 4th Circuit agreed with the 3rd and D.C. Circuits and held that the term "recess" refers to intersession breaks. *Id.*

CONTRACTS

Maritime Law – Scope of Safe Berth Warranty; *Shipping Co. v. Citgo Asphalt Refining Co., 718 F.3d 184 (3d Cir. 2013)*

The 3rd Circuit addressed whether "the safe berth warranty is an express assurance made without regard to the amount of diligence taken by the charterer." *Id.* at 203. The court noted that the 2nd Circuit "has long held that promising a safe berth effects an 'express assurance' that the berth will be as represented," while the 5th Circuit found "that a safe berth warranty merely imposes upon the charterer a duty of due diligence to select a safe berth." *Id*. at 201. The 3rd Circuit agreed with the 2nd Circuit finding that "an express assurance warranty is most consistent with industry custom." *Id*. The court disagreed with the 5th Circuit's

due diligence legal framework because the court found "it would make contractual language explicitly adopting a due diligence metric pointless." *Id.* at 203. Thus, the 3rd Circuit concluded "that the safe berth warranty is an express assurance made without regard to the amount of diligence taken by the charterer." *Id*.

ENVIRONMENTAL LAW

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) – Statutory Interpretation: *Trinity Industries Inc. v. Chicago Bridge & Iron Co., No. 12-2059, 2013 U.S. App. LEXIS 17286 (3d Cir. Aug. 20, 2013)*

The 3rd Circuit considered "whether CERCLA § 113(f)(3)(B) provides a contribution claim where the party seeking contribution has settled its state-law liability (as opposed to its liability under CERCLA) . . . ." *Id.* at *7. The court noted that the 2nd Circuit held that "§ 113(f)(3)(B) claims create a contribution right only when liability for CERCLA claims, rather than some broader category of legal claims, is resolved." *Id.* at *9. (internal quotation marks omitted). The court disagreed with the 2nd Circuit's interpretation of the statute, finding that "[t]he statutory language of § 113(f)(3)(B) requires only the existence of a settlement resolving liability to the United States or a state for some or all of a response action." *Id.* at *11 (internal quotation marks omitted). Additionally, the court reasoned that "Section 113(f)(3)(B) does not state that the 'response action' in question must have been initiated pursuant to CERCLA . . . ." *Id.* The court noted that "the legislative history that the . . . [2nd] Circuit relied upon in reading the CERCLA-specific requirement into § 113(f)(3)(B) actually concerns the enactment of a different provision—§ 113(f)(1)." *Id.* at *12. Thus, the 3rd Circuit held that "§ 113(f)(3)(B) does not require resolution of CERCLA liability in particular." *Id.* at *11.

EVIDENCE

Jury Voir Dire – Challenging a Verdict; *Warger v. Shauers, 721 F.3d 606 (8th Cir. 2013)*

The 8th Circuit considered whether juror dishonesty during voir dire is grounds to challenge a verdict under Fed. R. Evid. 606(b). *Id*. at 611. The court noted that the 9th Circuit held that "statements by jurors regarding dishonesty during voir dire may be admitted into evidence for

the purpose of challenging a verdict." *Id.* In contrast, the 3rd and 10th Circuits held that trial courts may exclude such evidence because the Fed. R. Evid. "categorically bar juror testimony as to any matter or statement occurring during the course of jury deliberations even if the testimony is not offered to explore the jury's decision-making process in reaching the verdict." *Id.* at 611–12 (internal quotation marks omitted). The court agreed with the 3rd and 10th Circuits, finding that allowing "juror testimony through the backdoor of voir dire challenge risks swallowing the rule. A broad question during voir dire could then justify the admission of any number of jury statements that would now be re-characterized as challenges to voir dire rather than challenges to the verdict." *Id*. at 612 (internal quotation marks omitted). Thus, the 8th Circuit concluded that juror testimony that shows a failure to answer honestly during voir dire cannot be used to overturn a verdict. *Id.*

HEALTH LAW

The Affordable Care and Patient Protection Acts (PPACA) – Survivor Benefits; *U.S. Steel Mining Co., LLC v. Director, 719 F.3d 1275 (11th Cir. 2013)*

The 11th Circuit addressed whether, under 30 U.S.C. § 932(l), as amended by PPACA, a survivor seeking benefits based on automatic entitlement is required "to prove that the miner spouse died due to pneumoconiosis." *Id.* at 1280. The court noted that the 3rd and 4th Circuits held that the amended § 932(l) "removed the need for a surviving spouse to prove what caused the miner's death," while the 6th Circuit concluded that surviving spouses must still prove that the miner died of pneumoconiosis. *Id.* The 11th Circuit agreed with the 3rd and 4th Circuits and reasoned that interpreting the term "eligible survivors" not to require a showing that the miner died due to pneumoconiosis, allows the statute to be interpreted in a way that does not render § 932(l) "an altogether meaningless repetition of the existing requirements for obtaining survivors' benefits." *Id.* Thus, the 11th Circuit concluded that a survivor is only required to show the appropriate relational and dependency requirements to be considered an "eligible survivor" and is not required to show that the miner died due to pneumoconiosis. *Id*. at 1284.

IMMIGRATION

Asylum – Social Group; *Cece v. Holder, No. 11-1989, 2013 U.S. App. LEXIS 16533 (7th Cir. Aug. 9, 2013)*

The 7th Circuit addressed whether an asylum petitioner having a "common and immutable characteristic of being (1) young, (2) Albanian, (3) women, (4) living alone" is "a particular social group that is cognizable under 8 U.S.C. § 1101(a)(42)(A)," the Immigration and Nationality Act. *Id*. at *8, 19. The 7th Circuit agreed with the Board of Immigration Appeals in finding social groups are "limit[ed] to groups whose membership is defined by a characteristic that is either immutable or is so fundamental to individual identity or conscience that a person ought not be required to change." *Id*. at *10. The court disagreed with the 6th Circuit's finding "that the social group of young (or those who appear to be young), attractive Albanian women who are forced into prostitution does not constitute a social group because it is circularly defined by the fact that it suffers persecution." *Id*. at *19 (internal quotation marks omitted). Thus, the 7th Circuit concluded that "characteristics of the group consist[ing] of the immutable or fundamental traits of being young, female, and living alone in Albania" is sufficient to qualify as a particular social group cognizable under the Immigration and Nationality Act. *Id.* at *17.

Denaturalization Proceedings – Standard of Review; Mondaca-Vega v. Holder, 718 F.3d 1075 (9th Cir. 2013)

The 9th Circuit addressed whether the clearly erroneous standard of review should apply to a district court's factual findings in proceedings pursuant to 8 U.S.C. § 1252(b)(5)(B). *Id.* at 1078. The 9th Circuit noted that the 1st Circuit found the "clearly erroneous" standard inappropriate when reviewing the "district court's factual findings in a denaturalization proceeding." *Id.* at 1081 n.3. The court found the reasoning of the 1st Circuit unpersuasive and disagreed with its prior decision in *Lim v. Mitchell*, 431 F.2d 197 (9th Cir. 1970) compelling *de novo* review. The court reasoned that Federal Rule of Civil Procedure "52(a) unambiguously requires that, in an action thus tried by the court instead of a jury, the court 'finds facts specially' and that on review, those factual findings be set aside only if 'clearly erroneous.'" *Id.* at 1080. Thus, 9th Circuit concluded that the "clearly erroneous" standard should apply to district court's factual findings in citizenship proceedings. *Id.* at 1083.

Employee Retirement Income Security Act (ERISA) – Standard of Review; Gross v. Sun Life Assurance Co. of Canada, No. 12-1175, 2013 U.S. App. LEXIS 17059 (1st Cir. Aug. 16, 2013)

The 1st Circuit addressed whether "'the satisfactory to us' wording [of an ERISA benefit's policy], without more, fail[s] to meet the requisite . . . minimum clarity necessary to shift [review of an ERISA plan's administrator's denial of an employee's claim for benefits] from de novo to deferential review." *Id*. at *37–39 (internal quotation marks omitted). The court noted that the 10th and 8th Circuits determined that "the use of 'to us' after 'satisfactory' [is] an indicator of subjective, discretionary authority on the part of the administrator, distinguishing such phrasing from policies that simply require 'satisfactory proof' of disability, without specifying who must be satisfied," while the 6th Circuit found "that discretionary review is triggered by a requirement of 'satisfactory proof' without specification of who must be satisfied." *Id*. at *28. The 1st Circuit agreed with the 3rd, 7th, and 9th Circuits in finding that "the 'satisfactory to us' wording, without more, will ordinarily fail to meet the requisite if minimum clarity necessary to shift from de novo to deferential review." *Id*. at *37–38. Thus, the 1st Circuit concluded that "no precise words are required." *Id*. at *38.

Employment Retirement Income Security Act (ERISA) – Long Term Disability (LTD) Benefits Plan; *Thurber v. Aetna Life Insurance Co., 712 F.3d 654 (2d Cir. 2013)*

The 2nd Circuit addressed whether insurers in "subrogation-like actions . . . under an ERISA plan" pursuant to 29 U.S.C. § 1132(a)(3) must identify the particular fund from which they seek reimbursement and whether it matters that the funds sought have dissipated. *Id.* at 661. The court noted that the 1st Circuit held "that an insurer need not identify a specific account in which the funds are kept" and the 3rd Circuit held "that dissipation of funds is immaterial if an equitable lien by agreement is in place." *Id.* at 663 (internal quotation marks omitted). In contrast, the 9th Circuit held that fiduciaries must identify specific funds the beneficiary still possesses. *Id.* The 2nd Circuit agreed with the 1st and 3rd Circuits in finding that there is no "basis for distinguishing between certain 'funds' identified by ERISA plans." *Id.* at 664. The court "reject[ed] the [9th] Circuit's . . . view that insurers may not reach specifically identified assets that have dissipated." *Id.* Thus, the 2nd

Circuit concluded that an insurer's claim sounds in equity when it seeks "return of property over which it asserts a lien" and "whether or not the beneficiary remains in possession of those particular dollars is not relevant as long as she was on notice that the funds under her control belonged to the insurer; she held the money in a constructive trust." *Id.*

Employee Retirement Income Security Act (ERISA) – Fiduciary Duty; *Edmonson v. Lincoln National Life Insurance Co., 725 F.3d 406 (3d Cir. 2013)*

The 3rd Circuit addressed whether an issuer of a life insurance plan violates its fiduciary duties under ERISA when it uses retained asset accounts for the benefit of an employee-beneficiary. *Id.* at 420. The court noted that the 2nd Circuit determined that "the use of a retained asset account did not violate ERISA when the insurance policy provided for it," while the 1st Circuit determined that "the use of a retained asset account did violate ERISA when the insurance policy required a lump sum payment." *Id*. The 3rd Circuit agreed with the 2nd Circuit in finding that an issuer of a life insurance plan is no longer acting as a fiduciary "once it satisfied its obligation to pay the benefits [to the employee-beneficiary]," and thus, "it was no longer managing or administering the plan." *Id*. at 424–25. Thus, the 3rd Circuit held that the insurer of the life insurance plan "did not breach its fiduciary duties under ERISA when it chose to pay [the employee-beneficiary] with a retained asset account." *Id.* at 429.

Civil Rights Act Title VII – "Employee" Definition; *Juino v. Livingston Parish Fire District No. 5, 717 F.3d 431 (5th Cir. 2013)*

The 5th Circuit addressed whether a volunteer is an "employee" within the meaning of Title VII of the Civil Rights Act of 1964. *Id.* at 432. The court noted that the 2nd, 4th, 8th, 10th, and 11th "Circuits have adopted the threshold-remuneration test" to determine whether a volunteer can be deemed an employee for purposes of the Act. *Id.* at 435. This test requires a court to "conduct a two-step inquiry by requiring that volunteer first show remuneration as a threshold matter before proceeding to the second step—analyzing the putative employment relationship under the common law agency test." *Id.* at 435. The court also noted that "the [6th] and [9th] Circuits view remuneration as only one . . . nondispositive factor in conjunction with other common law agency test factors." *Id.* The court agreed with the 2nd, 4th, 8th, 10th, and 11th Circuits, finding that the threshold-remuneration test is "uniquely suited to assessing a plausible employment relationship within

the volunteer context." *Id.* at 439. Thus, the 5th Circuit held that for purposes of establishing an employer-employee relationship, "a volunteer is distinguishable from the employee-independent contractor situation because there is a prerequisite of a 'hire' in the latter." *Id.*

Longshore & Harbor Worker's Compensation Act (LHWCA) – Situs Requirement; *New Orleans Depot Services. v. Director, Office of Worker's Compensation Programs, 718 F.3d 384 (5th Cir. 2013).*

The 5th Circuit addressed whether the term "adjoining navigable waters" in the LHWCA's situs requirement includes locations that adjoin waters based on a functional relationship or only includes locations that physically adjoin waters. *Id.* at 389. The 5th Circuit noted that the 3rd and 9th Circuits have held that "[t]he phrase 'adjoining area' should be read to describe a functional relationship that does not in all cases depend on physical contiguity," while the 4th Circuit has held that "[t]he plain language of the LHWCA requires that covered situses actually 'adjoin' navigable waters, not that they merely be in 'the general proximity' of the waterfront. *Id.* at 390–91. The 5th Circuit agreed with the 4th Circuit's reasoning that a narrow definition was "more faithful to the plain language of statute." *Id.* at 394. Thus, the 5th Circuit concluded that "adjoining navigable water[s] . . . mean[s] [to] border on or be contiguous with navigable waters." *Id.* at 393–94 (internal quotation marks omitted).

SECURITIES

Rule 13b2-2 – Scienter Requirement; *SEC v. Das, 723 F.3d 943 (8th Cir. 2013)*

The 8th Circuit considered whether the SEC, in a civil enforcement action against a former corporate officer for allegedly making materially false or misleading statements to accountants, was required to show that the officer acted "knowingly" in violation of SEC Rule 13b2-2. *Id.* at 954. The court noted that "[t]he [2nd] and [7th] Circuits have stated generally, that section 13(b) of the Exchange Act does not impose a scienter requirement. that, as a general matter, § 13(b) of the Exchange Act does not impose a knowledge requirement. *Id.* & n.8. In contrast, the 9th Circuits held that to be liable under 13b2-2, "one must knowingly make false statements." *Id.* at 955 (internal quotation marks omitted). The court reasoned that "[a]pplying section 13(b)(5)'s knowing requirement to Rule 13b2-2 conflicts with the plain language of the statute: criminal liability triggers section 13(b)(5)'s knowing requirement

under section 13(b)(4), indicating that it is otherwise not an element of a civil claim." *Id.* (internal quotation marks omitted). The court also reasoned that the SEC has found that 13b2-2 does not contain a scienter requirement and that "it is well established that an agency's construction of its own regulations is entitled to substantial deference." *Id.* at 956 & n.13. Thus, the 8th Circuit held that the SEC was only required to show negligence in making materially false or misleading statements to accountants under Rule 13b2-2. *Id.* at 955.

STATUTORY INTERPRETATION

False Claims Act (FCA) – First-to-File Rule; United States ex rel. Heineman-Guta v. Guidant Corp., 718 F.3d 28 (1st Cir. 2013)

The 1st Circuit considered whether the FCA's first-to-file rule "requires a first-filed complaint to meet the heightened pleading standard of Rule 9(b) [of the Federal Rules of Civil Procedure] to bar a later-filed complaint." *Id.* at 29–30. The court noted that the D.C. Circuit determined "a complaint need not satisfy Rule 9(b) requirements to serve as a preclusive first-filed complaint under 31 U.S.C. § 3730(b)(5)," while the 6th Circuit "imposed Rule 9(b)'s heightened pleading standard on first-filed complaints . . . ." *Id.* at 34, 37 n.10. The court agreed with the D.C. Circuit, finding that the first-to-file bar served to provide the government with sufficient notice as to the alleged fraud while also deterring opportunistic whistle-blowers. *Id.* 35–36. The court found the 6th Circuit's reasoning "that failing to impose Rule 9(b)'s particularity requirements on earlier-filed complaints under § 3730(b)(5) would encourage would-be *qui tam* relators to file overly broad, vague and speculative complaints simply to prevent other potential relators from filing more-detailed complaint" unpersuasive. *Id.* at 38. Thus, the 1st Circuit concluded that "for the purposes of the first-to-file rule, the earlier-filed complaint need not meet the heightened pleading standard of Rule 9(b) . . . [rather] earlier-filed complaints must provide only the essential facts to give the government sufficient notice to initiate an investigation into allegedly fraudulent practices." *Id.* at 36–37.

CRIMINAL

ADMINISTRATIVE LAW

Sex Offender and Registration Notification Act (SORNA) – Notice and Comment Requirements; *United States v. Reynolds, 710 F.3d 498 (3d Cir. 2013)*

The 3rd Circuit addressed whether "the Attorney General had good cause to waive the Administrative Procedure Act's (APA) notice and comment requirements in promulgating a rule governing the retroactivity of . . . [SORNA's] registration requirements." *Id.* at 502. The court noted that the 4th and 11th Circuits have held that the Attorney General's justifications are sufficient to waive the notice and comment requirements of the APA, while the 5th, 6th, and 9th Circuits have held that they are not. *Id.* at 509. The court agreed with the 5th, 6th, and 9th Circuits in finding that the Attorney General's stated justifications of eliminating any possible uncertainty whether SORNA applied retroactively and protecting the public from sex offenders who fail to register creating practical dangers were insufficient and would "eviscerate the APA's notice and comment requirements." *Id.* at 509. Thus, the 3rd Circuit concluded that the "Interim Rule did not provide sufficient justification to constitute good cause for the waiver of notice and comment." *Id.* at 514.

CRIMINAL PROCEDURE

Search and Seizure – Malicious Prosecution; *Hernandez-Cuevas v. Taylor, 723 F.3d 91 (1st Cir. 2013)*

The 1st Circuit addressed whether an individual alleging unlawful conduct of law enforcement officers while being held in custody during pretrial detention without probable cause, "states a Fourth Amendment claim actionable through a *Bivens* suit." *Id.* at 93. The court noted that the 4th, 5th, 6th and 10th Circuits have "adopted a purely constitutional approach, requiring the plaintiff to demonstrate only a Fourth Amendment violation." *Id.* at 99. "The 2nd, 3rd, 9th and 11th Circuits, on the other hand, have adopted a blended constitutional/common law approach, requiring the plaintiff to demonstrate a Fourth Amendment violation and all the elements of a common law malicious prosecution claim." *Id*. The court agreed with the 4th, 5th, 6th and 10th Circuits,

indicating that because "the rights guaranteed by the Fourth Amendment are not superseded by the common law," there is no reason why a plaintiff should have to establish every element of a common law claim. *Id.* at 101. Thus, the 1st Circuit concluded that "the 4th Amendment protection against seizures but upon probable cause does not end when an arrestee becomes held pursuant to legal process and therefore an individual does not lose his 4th Amendment right to be free from unreasonable seizure when he becomes detained pursuant to judicial process." *Id.* at 100.

Jury Charge – Entrapment Defense; *United States v. Cromitie, 727 F.3d 194 (2d Cir. 2013)*

The 2nd Circuit considered whether the second element of an entrapment defense, that the defendant lacks a predisposition to engage in criminal conduct, includes a positional inquiry the absence of which provides a defense as a matter of law. *Id.* at 216–17. The court noted that the 7th Circuit determined that "an entrapment defense succeeds as a matter of law unless a defendant, whom government agents have induced to commit an offense, is in a position without the government's help to become involved in illegal activity." *Id.* at 216 (internal quotation marks omitted). The 9th Circuit, in contrast, has rejected such a conclusion. *Id* at 217. The court disagreed with the 7th Circuit's finding that "[a] person who has a pre-existing [criminal] design . . . or who promptly agrees to play a part in such [criminal] activity should not escape punishment just because he was not [otherwise] in a position to obtain" the means to commit the intended crime. *Id.* Thus, the 2nd Circuit rejected the expansion of the entrapment defense, concluding that"[t]he Government need not leave [the defendant] at large until a real terrorist [and not the informant] suggests such action and supplies real missiles." *Id.*

Habeas Corpus – Jurisdiction: *United States v. Thomas, 713 F.3d 165 (3d Cir. 2013)*

The 3rd Circuit addressed whether a "sentencing court has jurisdiction over 28 U.S.C. § 2255 preliminary matters before a formal request for § 255 relief is filed." *Id.* at 169. The court noted that the 2nd Circuit has held that a district court does not have jurisdiction to rule on such a § 2255 motion for an extension of time because "no case or controversy exists until a formal request for §2255 relief is made." *Id*. The 3rd Circuit rejected this approach because it essentially characterized "§ 2255 proceedings as civil actions separate from

prisoners' underlying criminal cases." *Id*. Rather, the 3rd Circuit found that a § 2255 proceeding "is a continuation of a [prisoner's] federal criminal case," even though certain aspects "may be considered civil." *Id.* Thus, the 3rd Circuit concluded that "under § 2255, a motion for an extension of time can be decided prior to a formal request for relief because the underlying prosecution satisfies Article III's case or controversy requirement." *Id.*

Wiretapping Guidelines – Territorial Jurisdiction Limitation; *United States v. North, 728 F.3d 429 (5th Cir. 2013)*

The 5th Circuit addressed whether a district court's lack of territorial jurisdiction limitation in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2516, mandates suppression. *Id.* at 436. The court noted that the 2nd and 11th Circuits determined that "the territorial jurisdiction limitation in Title III does not directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." *Id*. (internal quotation marks omitted). The court disagreed with the 11th Circuit, finding that "the territorial jurisdiction limitation serves important substantive interests and implicates core concerns of the state, despite the lack of legislative history." *Id.* at 437. Thus, the 5th Circuit concluded that "[t]erritorial limitations on a district court directly implicate Congress's intent to guard against the unwarranted use of wiretapping." *Id.*

Appellate Review – Plain Error Definition; *United States v. Remble, 520 Fed. Appx. 436 (6th Cir. 2013)*

The 6th Circuit addressed whether error is measured at the time of appeal "where the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified." *Id.* at 440. The court noted that the 5th, 9th, and D.C. Circuits have held that *Johnson v. United States*, 520 US 461 (1997) "provides a narrow exception to a generally broad rule that error is plain only if it was clear at the time of the district court's ruling." *Id.* In contrast, the 7th, 10th, and 11th Circuits have held "that plain error is measured at the time of the appeal regardless of where the law was settled at the time of trial." *Id*. The court agreed with the 7th, 10th, and 11th Circuits, finding that this approach has the "advantage of avoiding the necessity of distinguishing between cases in which 'the law at the time of trial was settled and clearly contrary to the law at the time of the appeal' on one hand and

cases in which was merely unsettled on the other." *Id*. (internal quotation marks omitted). Thus, the 6th Circuit concluded that "irrespective of whether the matter is settled at the time of trial or merely at the time of the appeal an obvious and plain error is one that is clear and uncontroverted at the time of the appeal." *Id.* at 441 (internal quotation marks omitted).

Habeas Corpus – Petitions for Relief; *Brown v. Caraway, 719 F.3d 583 (7th Cir. 2013)*

The 7th Circuit addressed whether the savings clause of 28 U.S.C. § 2255(e) permits a prisoner to submit a 28 U.S.C. § 2241 petition under a sentencing guidelines miscalculation claim when § 2255 is an inadequate or ineffective remedy. *Id*. at 588. The court noted that the 11th Circuit determined that "savings clause relief is unavailable . . . [because] the clause's text does not . . . authorize[] the filing of a § 2241 petition to remedy a miscalculation of the sentencing guidelines that already has been, or may no longer be, raised in a § 2255 motion." *Id.* (internal quotation marks omitted). The 5th Circuit "similarly disallowed federal prisoners from pursuing relief under the savings clause when they challenge only their status as career offenders, [because] . . . the savings clause is available only to prisoners asserting actual innocence." *Id.* The court disagreed with both the 11th and 5th Circuits as "the text of the clause focuses on the legality of the prisoner's detention, . . . applicable where § 2255 remedy is inadequate or ineffective to test the legality of [a petitioner's] detention . . . ." *Id*. (internal quotation marks omitted). Thus, the 7th Circuit conclude[d] that a petitioner may utilize the savings clause to "challenge the misapplication of the sentencing guidelines, where the defendant was sentenced in the pre–*Booker* era." *Id.*

FOURTH AMENDMENT

Warrantless Searches – Cell Phones; *United States v. Wurie, 728 F.3d 1 (1st Cir. 2013)*

The 1st Circuit addressed whether warrantless searches of cell phones "were protecting officer safety and ensuring the preservation of evidence." *Id*. at 4. The court noted that the 4th, 5th, and 7th Circuits have found that warrantless cell phone data searches are valid, especially for preserving evidence, but have employed different reasons for their conclusions. *Id*. at 5. The 7th Circuit reasoned that "evidence

preservation concerns outweighed the invasion of privacy at issue because the search was minimally invasive." *Id*. The court disagreed and noted that modern day cell phones contain massive amounts of personal information that "would previously have [been] stored in one's home and that would have been off-limits to officers performing a search incident to arrest." *Id*. at 8. The court further noted evidence preservation was not a major concern because there are several methods to prevent remote destruction of evidence stored on the cell phone. *Id*. at 10–11. The court observed that there are exceptions to "the warrant requirement . . . that might justify a warrantless search of cell phone data under the right conditions" including "where the phone is believed to contain evidence necessary to locate a kidnapped child or to investigate a bombing plot or incident." *Id*. at 13. Thus, the 1st Circuit concluded that "allowing the police to search [cell phone] data without a warrant any time they conduct a lawful arrest" would constitute "a serious and recurring threat to the privacy of countless individuals." *Id.* at 14 (internal quotation marks omitted).

Stored Communications Act (SCA) – Historical Cell Site Information; *In re Application of the United States for Historical Cell Site Data, 724 F.3d 600 (5th Cir. 2013)*

Issue 1; The 5th Circuit addressed whether a magistrate judge has "discretion under the SCA to require the Government to seek a warrant rather than a §2703(d) order to obtain historical cell cite information. *Id.* at 606. The court noted the 3rd Circuit held that magistrates could require a warrant instead of an order by interpreting the language of the SCA to include permissive language and "that Congress's use of this phrase strongly implies court discretion." *Id*. The court disagreed with the 3rd Circuit's reasoning because its "construction of the SCA . . . ignores the intervening 'shall' in the provision." *Id.* at 607. Thus, the 5th Circuit concluded that a court shall issue the order if the government met the three necessary conditions in the statute. *Id*.

Issue: 2; The 5th Circuit addressed whether the cell site information is protected by the Fourth Amendment. *Id*. at 608. The court noted that the 3rd Circuit held that cell site information is protected under the Fourth Amendment because the user only directly conveys the number he dials and not the cell site information. *Id*. at 613. The court disagreed, noting that the cellphone user "voluntary conveys his cell site data each time he makes a call" because he selects "a particular service provider, and to make call, and because he knows that the call conveys cell site information." *Id*. at 614. Thus, the 5th Circuit concluded that

§ ”2703(d) orders to obtain *historical* cell cite information for specified cell phones at the points at which the user places and terminates a call are not categorically unconstitutional. *Id.* at 615.

HEALTH CARE FRAUD

False Statements – Intent; *United States v. Natale, 719 F.3d 719 (7th Cir. 2013)*

The 7th Circuit addressed whether specific intent is a requirement for a conviction under 18 U.S.C. § 1035. *Id*. at 739. The court noted that the Supreme Court had previously not found specific intent to be required under similar language within 18 U.S.C. § 1001. *Id.* The court stated that the 6th, 9th, and 11th Circuits have held that a finding of specific intent to deceive the United States government is required to convict someone under § 1001. *Id.* at 740 n.12. The 1st, 8th, and 10th Circuits have no such requirement, and have held that willful was nothing more than a requirement that, “the defendant knew that his statement was false when he made it” or “that the defendant did the forbidden act ‘deliberately and with knowledge.’” *Id*. Thus, the 7th Circuit joined the 1st, 8th, and 10th Circuits in holding that “§ 1001 requires no intent to deceive” and that § 1035 must also be read to have no such requirement. *Id.* at 741.

IMMIGRATION

Proof of Citizenship – Passport; *United States v. Moreno, 727 F.3d 255 (3d Cir. 2013)*

The 3rd Circuit addressed whether “[a] passport constitutes conclusive proof of U.S. citizenship under 22 U.S.C. § 2705.” *Id.* at 257. The court noted that the 3rd and 9th Circuits have held that § 2705 “establish[ed] that a valid passport is “conclusive proof of [United States] citizenship.” *Id.* at 260. The court disagreed with the 9th Circuit’s reasoning and its own prior reasoning because the “interpretation . . . effectively reads the phrase ‘to a Citizen of the United States’ out of the statute.” *Id.* Thus, the 3rd Circuit concluded that “because the text of § 2705 is unambiguous, . . . a passport is conclusive proof of citizenship only if its holder was actually a citizen of the United States when it was issued.” *Id.* at 261.

Extrinsic Evidence Admissibility – Crimes Involving Moral Turpitude (CIMT); *Olivas-Motta v. Holder, 716 F.3d 1199 (9th Cir. 2013)*

The 9th Circuit addressed whether an Immigration Judge and the Board of Immigration Appeals (BOA) "may rely on evidence outside the record to determine whether a petitioner has been convicted" of CIMTs under 8 U.S.C. § 1227(a)(2)(A)(ii) of the Immigration and Naturalization Act (INA). *Id.* at 1200. Specifically at issue was the Attorney General's finding in *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (A.G. 2008) that consideration of such extrinsic evidence was permissible. *Id.* The 3rd, 4th and 11th Circuits have rejected the conclusions in *Silva-Trevino*, holding the Attorney General's construction of "conviction" incompatible with § 1227's unambiguous definition requiring a "formal judgment of guilt." *Id.* at 1208. In contrast, the 7th and 8th Circuits both permit the Immigration Judge to consider evidence outside the record of conviction to determine whether an alien has been convicted of a CIMT. *Id.* at 1209. Thus, the 9th Circuit joined the 3rd, 4th, and 11th Circuits in holding "the relevant provisions of the INA are not ambiguous" and that the Immigration Judges and the BOA are not permitted to rely on extrinsic evidence in finding prior convictions of CIMTs. *Id.*

SENTENCING

Federal Sentencing Act of 2010 – Rule of Lenity; *United States v. Savani, 716 F.3d 66 (3d Cir. 2013)*

The 3rd Circuit addressed how to resolve the "ambiguity in the Sentencing Commission's new definition of 'applicable guideline range'" in determining whether a sentencing court may apply a departure provision under 18 U.S.C. § 3582(c)(2). *Id.* at 73. The court noted that the 11th Circuit determined that a criminal defendant was not entitled to a reduced sentence because the defendant's original sentence was not below the mandatory minimum. *Id.* at 76 n.6. The court disagreed with the 11th Circuit's decision because it "was based on an incorrect interpretation of the phrase 'applicable guidelines range'" and the analysis failed to "address the use of 'applicable guidelines range' as it appears in U.S.S.G. § 5G1.1(b)." *Id.* Rather the court found that the Sentencing Commissions description of "applicable guideline range," contained within the revised Application Note 1(A) to the commentary of § 1B1.10, is a "grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended." *Id.* at 76.

Thus, the 3rd Circuit concluded that the rule of lenity required this ambiguity to be construed in favor of the defendant. *Id.*

Sentence Enhancement – Distribution of Pornographic Material;
United States v. Robinson, 714 F.3d 466 (7th Cir. 2013)

The 7th Circuit addressed whether, under U.S.S.G. § 2G2.2, a sentencing judge must find that the defendant who downloaded child pornography from a file-sharing program had knowledge or was reckless in failing to discover that the files were also accessible to other subscribers in order to render defendant a "distributor" of those files. *Id*. at 468–69. The court noted that the 10th Circuit determined that the distribution guidelines do not require that the defendant know of his being a potential distributor of the files, while the 8th Circuit found there must be proof that the defendant knew, or was reckless in failing to discover, such files could be viewed online by other people. *Id*. at 468. Thus, the 7th Circuit agreed with the 8th Circuit in finding that the sentencing judge "must find that the defendant knew, or was reckless in failing to discover, that the files he was downloading were accessible to other individuals." *Id*.

Sentence Enhancement – Liability for Death Cause by Drug Use;
United States v. Walker, 721 F.3d 828 (7th Cir. 2013)

The 7th Circuit considered whether all members of a drug conspiracy must be held strictly liable for death or serious bodily harm that results from drugs supplied by the conspiracy under § 841(b)(1)(A) of the U.S. Sentencing Guidelines, which imposes a minimum prison sentence of twenty years. *Id.* at 831. The court noted that the "[1st] and [8th] Circuits have described a defendant's liability under this provision as strict . . . ." *Id.* at 834 (internal quotation marks omitted). "In contrast, the [9th] Circuit stop[ped] short of ascribing to the . . . strict liability language used by other circuits" and held that "there may be some fact scenarios in which the distribution of a controlled substance is so removed and attenuated from the resulting death that criminal liability could not be imposed . . . ." *Id.* (internal quotation marks omitted). The court observed that the 6th Circuit has held that members of a conspiracy should be subject to sentence enhancement only if the district court finds the members are "part of the distribution chain that led to an individual's death." *Id.* at 835 (internal quotation marks omitted). The court adopted the 6th Circuit's reasoning and held that "a district court must make specific factual findings to determine whether each defendant's relevant

conduct encompasses the distribution chain that caused a victim's death before applying the twenty-year penalty." *Id.* at 831.

Fraud – Loss Calculations; *United States v. Torlai, 728 F.3d 932 (9th Cir. 2013)*

The 9th Circuit addressed whether government subsidies to farmers for the acquisition of crop insurance should, in the context of a fraud conviction, be considered a loss to the government for the purposes of determining sentencing. Id. at 943. The court noted that the 7th Circuit addressed this issue, holding that "if [a defendant] had [not been caught committing fraud before the] payment [by the government], the insurance company would have deducted the premium from the amount of [defendant's] claim" which would have reduced the loss by the government. Id. at 944. The court disagreed with the 7th Circuit's finding, noting that it "overlooks basic economic realities and common sense." Id. The court reasoned that "[a] farmer must pay the crop insurance producer premium regardless of whether an indemnity will be paid . . . and the fact that a farmer can delay payment . . . does not negate the farmer's responsibility for the amount." Id. 944–45. Thus, the 9th Circuit held "whether the producer premium is paid when the policy is purchased or whether the government subtracts the producer premium from the indemnity paid, the government is in the same economic position." Id. at 946.

STATUTORY INTERPRETATION

Bribery – Gratuities; *United States v. Fernandez, 722 F.3d 1 (1st Cir. 2013)*

The 1st Circuit addressed whether 18 U.S.C. § 666(a) prohibits not only bribes but also illegal gratuities. *Id.* at 22–23. The court first clarified that § 666 prohibits the offering and accepting of something with intent "to influence or reward." *Id.* The court noted that the 2nd, 7th, and 8th Circuits treat a bribe, which requires a payor's intent to influence the official's future conduct, as separate from a gratuity, which requires a payor's intent to reward past conduct. *Id.* at 23. In contrast, the 4th Circuit reasoned that "the word 'reward' does not create a separate gratuity offense in § 666," but merely clarifies "that a bribe can be promised before, but paid after, the official's action on the payor's behalf." *Id.* at 23. The 1st Circuit adopted the 4th Circuit's view,

finding that "influence" describes a situation where the payor makes a prepayment to induce action, while "reward" portrays a promise of payment, contingent upon the official's act. *Id.* Thus, the 1st Circuit concluded that gratuities are not criminalized under § 666. *Id.* at 26.

Smuggled Goods – Contrary to Law Definition; *United States v. Izurieta, 710 F.3d 1176 (11th Cir. 2013)*

The 11th Circuit addressed whether "the term 'contrary to law' as used in 18 U.S.C. § 545 is limited to laws for the violation of which a penalty is imposed." *Id.* at 1181. The court noted that the 9th Circuit adopted a narrow approach and determined that "regulations are included within the definition of 'law' for purposes of 18 U.S.C. § 545 only if there is a statute (a 'law') that specifies that violation of that regulation is a crime." *Id*. at 1180. Conversely, the 4th Circuit determined that "§ 545 criminalizes importation in violation of any regulation having the force and effect of law." *Id*. at 1181 (internal quotation marks omitted). The 11th Circuit noted that the 9th Circuit's "reasoning result[ed] in complete rejection of regulatory law absent a coordinate criminal statute." *Id*. Thus, the 11th Circuit joined the 4th Circuit's general interpretation of "law," and concluded that "there is nothing indicate that the term 'contrary to law' as used in 18 U.S.C. § 545 is limited to laws for the violation of which a penalty is imposed." *Id*.