Current Circuit Splits

The following pages contain brief summaries of circuit splits identified by federal court of appeals opinions announced between September 3, 2015 and January 31, 2016. 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.

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CIVIL MATTERS

CIVIL

ADMINISTRATIVE LAW

Social Security Act – Disability Insurance: *Hunter v. SSA*, 808 F.3d 818 (11th Cir. 2015)

The 11th Circuit addressed whether an administrative law judge's decision, finding that a person is disabled constitutes new evidence when appealing a denial for disability insurance under 42 U.S.C. § 405(g). *Id.* at 820–21. The court noted that the 9th Circuit held that a decision from an administrative law judge determining that a person is disabled is new evidence that should be considered when that person is appealing a decision denying him or her disability insurance; while the 6th Circuit held that this is not considered new evidence. *Id.* at 821–22. The court disagreed with the 9th Circuit that a later decision determining that a person is disabled is considered new evidence when appealing a decision denying disability insurance, because "a decision is not evidence any more than evidence is decision." *Id.* at 822. The 11th Circuit reasoned that unless there is substantial evidence saying otherwise, great deference must be given to the administrative law judge's findings. In the present case,

such substantial evidence was not presented. *Id.* Thus, the 11th Circuit concluded that a later favorable decision is not considered new evidence. *Id.*

AVIATION LAW

Aviation – Statutory Interpretation: *Nat'l Fed'n of the Blind v. United Airlines Inc.*, 2016 U.S. App. LEXIS 811 (9th Cir. 2016)

The 9th Circuit addressed whether United Airlines' ticketing kiosks are considered services pursuant to 49 U.S.C. § 41713(b)(1) as applied to disabled passengers. *Id.* at *4. The court noted that the 1st, 4th, 7th, 10th and 11th Circuits determined that services pursuant to § 41713(b)(1) included food provisions, baggage handling, and transportation; while the 3rd Circuit found that "services" only related to the essential details of the carriage itself. *Id.* at *17–18. The 9th Circuit agreed with the 3rd Circuit in finding that the word "services" does not have such an expansive meaning pursuant to § 41713(b)(1). *Id*. at *18. The court disagreed with the 1st, 4th, 7th, 10th and 11th Circuits arguing that the language of the applicable statute was only concerned with services in relation to public transportation and not the amenities of the transportation. *Id.* at *14. Thus, the 9th Circuit concluded that United Airlines' kiosk for ticketing are not considered services pursuant to § 41713(b)(1) as applied to disabled passengers. *Id.* at *20.

BANKRUPTCY LAW

Standard of Review – Bad Faith under Section 303: *In re Forever Green Ath. Fields, Inc.*, 804 F.3d 328 (3d Cir. 2015)

The 3rd Circuit addressed what the proper "standard for evaluating bad faith, which is not defined in the [Bankruptcy] Code[,]" should be in deciding whether a case has been involuntarily filed in bad faith. *Id*. at 335. The court noted that other circuit courts apply a wide array of standards. *Id*. The 11th Circuit, applies an "improper use" test, which asks whether a "petitioning creditor uses involuntary bankruptcy procedures in an attempt to obtain a disproportionate advantage for itself, rather than to protect against other creditors obtaining disproportionate advantages, particularly when the petitioner could have advanced its own interest in a different forum." *Id*. Contrarily, the 2nd Circuit applies an "improper purpose" test, which looks to whether the filling "was motivated by ill will, malice, or a desire to embarrass or harass the alleged debtor." *Id*. at 335–36. Differentially, the 9th Circuit applies an "objective test," which assesses what a reasonable person would have believed and

what a reasonable person would have done in the creditor's position. *Id*. at 336. Lastly, the court noted that the 6th Circuit applies a broad "totality of the circumstances" standard, which effectively combines all the tests and looks to both subjective and objective evidence of bad faith. *Id*. The court agreed with the 6th Circuit and adopted the "totality of the circumstances test" because "[t]his standard is most suitable for evaluating the myriad ways in which creditors filing an involuntary petition could act in bad faith." *Id*. Furthermore, "[i]t also is the same standard [the court] appl[ies] when reviewing allegations that a debtor filed a voluntary petition in bad faith." *Id*. Thus, the 3rd Circuit held that it would use a "totality of the circumstances" test when evaluating whether involuntary petitions were filed in bad faith. *Id*.

CIVIL PROCEDURE

Removal – Jurisdiction: *Etienne v. Lynch*, 2015 U.S. App. LEXIS 22873 (4th Cir. Dec. 30, 2015)

The 4th Circuit addressed "whether DHS's expedited removal procedures provide an alien with the opportunity to challenge the legal basis of his or her removal—and thus whether an appellate court has jurisdiction to hear such a challenge when a petitioner fails to raise it before DHS." *Id*. at *5–6. The court noted that the 5th Circuit, having previously decided this issue, found that jurisdiction lies; while the 11th Circuit held that there was no jurisdiction. *Id.* at *6. The court joined the 5th Circuit reasoning that its' view "is more consistent with the language and structure of the expedited removal regulations. Crucially, such a reading is more consistent with Form I-851, the form DHS must provide to aliens in expedited proceedings for aliens to respond to the charge of removability." *Id.* at *11–12. Thus, the 4th Circuit held that "in expedited removal proceedings, an alien has no opportunity to challenge the legal basis of his removal. The Immigration and Nationality Act's administrative-exhaustion requirement therefore does not deprive a court of jurisdiction to consider such a challenge in the first instance on appeal." *Id.* at *6.

Federal Registration Statute – Registered Judgments: *Fid. Nat'l, Inc. v. Friedman*, 803 F.3d 999 (9th Cir. 2015)

The 9th Circuit addressed whether a registered judgment may be registered in another district. *Id.* at 1001. The court stated that 28 U.S.C. § 1963 essentially states that any judgment in an action for the recovery of money or property entered in any district court may be registered by filing a certified copy of the judgment in any other district. *Id.* at 1002. The

court noted that the 5th Circuit reversed a judgment and concluded that if a registered judgment is to be given the same effect as a judgment of the district court of the district where registered there is no reason why the registered judgment should not also be capable of being registered in another federal court and enforced in that court. *Id.* The 10th Circuit, however, rejected the reasoning of the 5th Circuit. *Id.* The 10th Circuit held that while a judgment is a document reflecting the determination of a claim on its merits, a registered judgment is simply the perfection of an existing judgment in another jurisdiction so as to permit foreign enforcement. *Id.* Therefore, only an original judgment resolving an adversarial proceeding for tangible relief can be registered in another jurisdiction. *Id*. The court agreed with the 5th Circuit's interpretation of §1963 and its holding. *Id.* Thus, the 9th Circuit concluded that a registered judgment is a judgment in an action for the recovery of money or property entered in any district court and itself may be registered. *Id.* at 1001.

Statutes of Limitations – Jurisdictional Bars to Suits Against Government: *Herr v. U.S. Forest Serv.*, 803 F.3d 809 (6th Cir. 2015)

The 6th Circuit addressed whether the time limit component of a statute of limitations, 28 U.S.C. § 2401(a), imposes a jurisdictional barrier against federal courts' subject-matter jurisdiction over claims against the United States. *Id.* at 813. The court noted that the 8th, 11th, D.C., and Federal Circuits determined that such time limits are jurisdictional, while the 5th and 9th Circuits found that they are not jurisdictional. *Id.* at 818. The 6th Circuit agreed with the 5th and 9th Circuits in finding this statute of limitations to be non-jurisdictional. *Id*. In coming to its conclusion, the court relied on a recent Supreme Court case, *U.S. v. Kwa Fun Wong*, 135 S. Ct. 1625, 1637 (2015) which "declined to count time bars as jurisdictional merely because they condition waivers of immunity." *Id*. at 817. The court disagreed with the position of the 8th, 11th, D.C., and Federal Circuits that § 2401(a) creates a jurisdictional bar because those circuits' decisions had "not grappled with the Supreme Court's recent cases limiting the concept of jurisdiction," nor considered the impact of *Kwa Fun Wong*. *Id* at 817–18. Thus, the 6th Circuit concluded that § 2401(a) does not limit a federal court's subject-matter jurisdiction. *Id.* at 818.

Defenses – Motions to Dismiss: *Leyse v. Bank of Am. Nat'l Ass'n*, 804 F.3d 316 (3d Cir. 2015)

The 3rd Circuit addressed whether, under Federal Rules of Civil Procedure Rule 12, a party may make a second motion to dismiss containing an argument that could have been raised in the first motion to

dismiss. *Id.* at 319. The 7th Circuit has held that Rule 12 does not prohibit motions to dismiss that raise new arguments because Rule 12 (h)(2) allows for a failure-to-state-a-claim defense under the consolidation requirement. *Id.* at 321. Conversely, the 10th Circuit has held that a party may not make a second motion to dismiss raising new arguments that could have been raised in the initial motion because the 7th Circuit's interpretation of the rule does not address the language of Rule 12(h)(2) which limits the defense to pleadings, motion for judgment, or trial. *Id.* at 322. The 3rd Circuit noted that the Rule creates restrictions for excessive filing to prevent unnecessary delays in the legal process. *Id.* at 320. The court determined that for such a motion to dismiss to be allowed, it must meet one of the exceptions set out in Rule 12(h)(2) or Rule 12(h)(3). *Id.* at 320. Thus, the 3rd Circuit agreed with the 10th Circuit concluding that a party is not permitted to make a second motion to dismiss when it does not meet the exceptions in Rule 12(h)(2) or Rule 12(h)(3). *Id.* at 321.

COMPUTER LAW

Statutory Interpretation – Anticybersquatting Consumer Protection Act (ACPA): *Jysk Bed'N Linen v. Dutta-Roy*, 25 Fla. L. Weekly Fed. C 1877 (11th Cir. 2015)

The 11th Circuit discussed whether a re-registration falls within the ACPA's purview under the ACPA's registration hook. *Id.* at 9. The court noted that the 3rd Circuit found that a re-registration falls within the registration hook of the ACPA as the statute does not limit the term "registration" to "initial" or "creation." *Id.* at 17. The 9th Circuit found that a re-registration is not a registration for purposes of the ACPA as a domain name is a registrant's property when he registers it, and therefore the registrant is entitled to the rights that come with owning a property, and one of these rights includes the right to transfer ownership to another owner without having to register the domain name again. *Id.* at 18–19. The 11th Circuit agreed with the 3rd Circuit as the plain language of the ACPA does not define the term "register" and thus, to include "initial" and "creation" would not comport with the purpose of Congress in enacting the ACPA. *Id.* at 19.

EDUCATION

Disabled Students – Attorney Fees: *D.G. v. New Caney Indep. Sch. Dist.*, 806 F.3d 310 (5th Cir. 2015)

The 5th Circuit addressed whether there is a time limit for the prevailing party to file for attorney's fees under the Individuals with

Disabilities Education Act (IDEA). *Id.* at 321. The court noted that the 6th and 7th Circuits "have applied relatively short administrative periods, reasoning that IDEA fees actions are ancillary to the underlying administrative proceedings," while the 9th and 11th Circuits "have applied multi-year statutes of limitations for actions based on a statutory liability, finding short limitations periods inconsistent with the Act's policy goals and stressing that unlike an appeal from an agency decision, an IDEA fees action seeks relief that the agency below had no authority to award." *Id.* at 320. The 5th Circuit agreed with the 6th and 7th Circuits reasoning that "if a limitations period shorter than ninety days . . . ran from the date of the hearing officer's decision, the prevailing party would have to file a new lawsuit seeking fees before the aggrieved party has to decide whether to challenge the decision in court. And that could burden courts and litigants . . . with a blizzard of protective suits filed before the plaintiff knows whether he has even the ghost of a chance of obtaining relief." *Id.* at 320–21 (internal quotation marks and citations omitted). The court also noted that "[i]n addition to encouraging the filing of protective complaints in an already-overburdened court system, running a short limitations period from the time of the hearing officer's decision would leave little time for parents and school districts to agree on attorneys' fees and costs without resorting to litigation. That would contravene Congress' intent that IDEA fees and costs will usually . . . be agreed to by the public agency, and that parents will only sue for fees when no agreement is possible." *Id.* at 321 (internal quotation marks and citations omitted). Thus, the court held that the time limit for the prevailing party in an IDEA administrative hearing to seek attorney's fees does not begin to run until the aggrieved party's time for challenging the hearing officer's decision expires. *Id.*

EMPLOYMENT

Statute of Limitations – Time Barred Suits under the Family and Medical Leave Act (FMLA): *Barrett v. Ill. Dep't of Corr.*, 803 F.3d 893 (7th Cir. 2015)

The 7th Circuit addressed whether the Family and Medical Leave Act's (FMLA) statute of limitations can time bar an employee's suit against an employer "in the context of an absenteeism policy based on a system of progressive discipline." *Id.* at 895. The court noted that the 8th Circuit determined that an "FMLA violation occurs when an employer improperly denies a request for leave[,] not when the employee is later fired for excessive absenteeism," while the 6th Circuit determined that "a plaintiff who was fired for excessive absenteeism may challenge her termination under the FMLA even though the limitations period for the

two absences she claimed were FMLA protected had long since expired." *Id*. at 896 n.1 (internal quotation marks omitted). The 7th Circuit agreed with the 8th Circuit's conclusion and found that "[w]hen an FMLA plaintiff alleges that his employer violated the Act by denying qualifying leave, the last event constituting the claim ordinarily will be the employer's rejection of the employee's request for leave," regardless of whether that "denial of leave came in the form of a retrospective hearing rather than a rejection of a prospective request for leave." *Id*. at 897. Thus, the 7th Circuit concluded that alleged FMLA violations in the context of excessive absenteeism begin to run when an employer classifies an employee's absence as unauthorized, not when that employee is "fired years later as a consequence of her overall attendance record." *Id*. at 894.

Remedies – Dodd-Frank Act: *Berman v. Neo@Oglivy LLC*, 801 F.3d 145 (2d Cir. 2015)

The 2nd Circuit addressed the question of whether retaliation remedies available to whistleblowers in the Dodd-Frank Act (Act) are available when the wrongdoing was not reported to the Securities and Exchange Commission (SEC). *Id*. at 147. The court noted that the 5th Circuit, together with many district court decisions, has ruled that whistleblower protection is granted only to those employees which notify the SEC. *Id.* at 151. The 2nd Circuit, considering the ambiguity of the statutory language and the legislative intent, determined that the purpose of the applicable provision was to "protect employees for making reports" regardless of whether these reports were made internally or to the Commission. *Id*. at 153–54. Accordingly, the 2nd Circuit disagreed with the 5th Circuit and held that whistleblower notification need not be made to the SEC in order to benefit from the retaliation remedies provided by the Act. *Id.* at 155.

TAX

Foreign Tax – Pre-Tax Profit: *Bank of N.Y. Mellon Corp. v. Comm'r*, 801 F.3d 104 (2d Cir. 2015)

The 2nd Circuit addressed whether, for purposes of the economic substance doctrine, foreign taxes should be treated as costs when calculating pre-tax profit. *Id.* at 116. The court noted that the Federal Circuit determined that foreign taxes are economic costs, while the 5th and 8th Circuits found "foreign taxes are not economic costs and should not be deducted from pre-tax profit." *Id.* The 2nd Circuit agreed with the Federal Circuit in finding that here the purpose of calculating pre-tax profit is to discern, "as a matter of law, whether a transaction meaningfully alters

a taxpayer's economic position other than with respect to tax consequences." *Id.* at 118. The court disagreed with the 5th and 8th Circuits, as the court would not calculate "profitability based on the gross dividend, before foreign taxes were paid." *Id.* at 117. Thus, the 2nd Circuit concluded that foreign taxes should be considered as economic costs and thus be deducted when calculating pre-tax profit. *Id.* at 124.

CRIMINAL

CONSTITUTIONAL LAW

Challenges to Jury Venire – Fair Cross-Section: *Garcia-Dorantes v. Warren*, 801 F.3d 584 (6th Cir. 2015)

The 6th Circuit addressed whether the representation of African Americans in jury selection is fair and reasonable in relation to the number of such persons in the community, or whether there is a lack of representation in venires which constitutes a prime facie case of a Sixth Amendment fair-cross section violation. *Id.* at 600. "To determine whether representation of a distinctive group is not fair and reasonable, courts typically use either the absolute disparity or comparative disparity test to measure the distinctive group's underrepresentation." *Id.* Absolute disparity is the difference between the percentage of the group in the general population and the percentage in the qualified wheel. *Id.* at 600–01. Comparative disparity compares the likelihood members in the group will get called for jury service to what their actual presence in the community suggests the likelihood should be. *Id.* at 601. The Court observed an absolute disparity of African Americans in the jury venire from which the jury was drawn of 3.45% and corresponding comparative disparity of 42%. *Id.* The court noted that the 1st and 2nd Circuit did not analyze comparative disparity at all, while the 3rd, 7th and 10th Circuits all rejected absolute and comparative disparities with similar, low statistics. *Id.* at 602–03. The 6th Circuit took a contrary position on the issue by finding that an absolute disparity of 3.45% and comparative disparity of 42% was sufficient to prove that the representation of African Americans in venires which juries are selected is not fair and reasonable in relation to the number of such persons in the community. *Id.* at 603–04.

Retroactive Collateral Review – Armed Career Criminal Act: *In re Franks*, 2016 U.S. App. LEXIS 201 (11th Cir. Jan. 6, 2016)

The 11th Circuit addressed whether the defendant meets the second exception to the general bar to successive 28 U.S.C. § 2255 motions. *Id.* at *2. Defendant's successive 28 U.S.C. § 2255 motion was based on a rule from *Johnson v. United* States, 135 S. Ct. 2551 (2015) that stated the residual clause of the Armed Career Criminal Act is constitutionally vague. *Id.* The 11th Circuit found that the Supreme Court has not made the rule announced in *Johnson* applicable retroactively to cases seeking collateral review. *Id*. The court noted that the 1st, 2nd, 6th, 7th, 8th and 9th Circuits granted applications to file successive 28 U.S.C. § 2255 motions based on *Johnson* while the 5th and 10th Circuits did not. *Id.* at *23 n.3. The 11th Circuit noted that the *Johnson* rule does not fit within the category of new substantive rules that apply retroactively on collateral appeal because it neither prohibits Congress from punishing a criminal that has a prior conviction for a specified offense nor does it prohibit Congress from increasing the criminal's sentence because of his prior conviction. *Id.* at *9. Thus, the 11th Circuit agreed with the 5th and 10th Circuits that the Supreme Court did not establish a new rule in *Johnson* which could be retroactively applied to cases on collateral review. *Id.*

Sentencing Guidelines – Procedural Due Process: *In re Watkins*, 810 F.3d 375 (6th Cir. 2015)

The 6th Circuit addressed whether the decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), applies retroactively to cases on collateral review. *Id.* at 377. In *Johnson*, the Supreme Court created a new rule of constitutional law that was previously unavailable to inmates. *Id*. The Supreme Court held that "the imposition of an increased sentence under the Armed Career Criminal Act's (ACCA) residual clause violates due process" because it "denies fair notice to defendants and invites arbitrary enforcement by judges." *Id.* The court noted that historically, "new substantive rules generally apply retroactively," but "new procedural rules generally do not apply retroactively." *Id.* at 381. Despite the consensus that *Johnson* announced a new rule, the circuit courts were split "regarding the gatekeeping requirement under [28 U.S.C.] § 2255(h)(2) retroactivity on collateral review." *Id.* at 380. The 5th Circuit concluded that *Johnson* did not apply retroactively because it did not announce a substantive rule of constitutional law. *Id.* at 379. The 8th Circuit disagreed, however, holding that *Johnson* did announce a new substantive rule of constitutional law and should therefore apply retroactively. *Id.* at 380. The 10th and

11th Circuits also heard cases over this issue, but explicitly chose not to decide over such a "difficult legal analysis". *Id.* at 380. The court agreed with the 8th Circuit reasoning that "[b]ecause *Johnson* announced a substantive rule that prohibits the imposition of ACCA's 15-year mandatory minimum sentencing provision on defendants whose status as armed career criminals depends on application of the unconstitutionally vague residual clause . . . the Supreme Court has made Johnson's rule categorically retroactive to cases on collateral review." *Id*. at 383. Thus, the 6th Circuit held that *Johnson* did announce a new substantive rule of constitutional law that applies retroactively. *Id.*

Immigrants' Rights – The Right To Bail: *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015)

The 2nd Circuit addressed how to determine reasonableness under 8 U.S.C. § 1226(c) of the Immigration and Nationality Act (INA) which mandates detention, while an immigrant's removal proceedings are pending, of non-citizens who have committed certain criminal offenses. *Id.* at 604. The court noted that the 3rd and 6th Circuits' approach calls for a "fact-dependent inquiry requiring an assessment of all of the circumstances of any given case," to determine whether detention without an individualized hearing is unreasonable. *Id.* at 614. In contrast, the approach adopted by the 9th Circuit, is to apply a bright-line rule to cases of mandatory detention where the government's "statutory mandatory detention authority under Section 1226(c) . . . .[is] limited to a six-month period, subject to a finding of flight risk or dangerousness." *Id*. The 2nd Circuit agreed with the 9th Circuit in applying the bright-line approach after considering the relevant Supreme Court precedent, the pervasive confusion over what constitutes a "reasonable" length of time that an immigrant can be detained without a bail hearing, the current immigration backlog, and the disastrous impact of mandatory detention on the lives of immigrants who are neither a flight risk nor dangerous. *Id*. 614–15. The 2nd Circuit disagreed with the 3rd and 6th Circuits because while a case-by-case approach might be workable in circuits with comparatively small immigration dockets, the 2nd and 9th Circuits have been disproportionately burdened by a surge in immigration appeals and a corresponding surge in the sizes of their immigration dockets. *Id*. at 615–16. With such large dockets, predictability and certainty are considerations of enhanced importance and the court believes that the interests of the detainees and the district courts, as well as the government, are best served by this approach. *Id*. Thus, the 2nd Circuit concluded that the detainee must be admitted to bail unless the government establishes by

clear and convincing evidence that the immigrant poses a risk of flight or a risk of danger to the community. *Id*. at 616.

Defendant's Rights – Mental Health: *McWilliams v. Comm'r, Ala. Dep't of Corr.*, 2015 U.S. App. LEXIS 21805 (11th Cir. Dec. 16, 2015)

The 11th Circuit addressed whether providing a neutral psychiatrist to a criminal defendant satisfies the requirement set out in *Ake v. Oklahoma*, 470 U.S. 68 (1985), that a defendant must have access to a competent mental health professional who will evaluate and examine the defendant and assist in preparation of the defense if the defendant's sanity is a significant factor in trial. *Id*. at *16–18. The court noted that the 9th and 10th Circuits determined that a non-neutral mental health professional must be provided in order to satisfy a defendant's due process rights to a non-neutral psychiatric assistance by prohibiting that mental health professional from evaluating or assisting the adverse party, while the 5th and 6th Circuits determined that non-neutral mental health professionals may be used but are not required to be used. *Id*. at *17–18. The court disagreed with the 9th and 10th Circuits requirement because the Supreme Court, having never decided this issue, has never mandated the use of a non-neutral mental health professional, in order to satisfy a defendant's due process rights. *Id*. Thus, since the court will not be "contrary to or involve an unreasonable application of clearly established Federal law," the 11th Circuit concluded that the psychiatrist could be neutral. *Id.*

Sentencing – Retroactivity of Supreme Court Decisions: *Woods v. United States*, 805 F.3d 1152 (8th Cir. 2015)

The 8th Circuit addressed whether the Supreme Court's determination that the Armed Career Criminal Act's residual clause was unconstitutionally vague permits the court to adjust sentencing retroactively by means of a successive petition pursuant to 28 U.S.C. § 2255. *Id.* at 1153. The court noted that the 7th and 10th Circuits have determined that Supreme Court rulings may be applied retroactively to such a petition, while the 11th Circuit holds that the Supreme Court rulings are retroactive only upon collateral review. *Id.* at 1154. The 8th Circuit agreed with the 7th and 10th Circuits in finding that a decision by the Supreme Court may be applied in such circumstances as it may be used to show a prima facie case required by the Defendant's petition. *Id.* The court disagreed with the 11th Circuit believing that the determination should be applied in cases beyond collateral review. *Id.* Thus, the 8th Circuit concluded that the defendant may apply a Supreme Court decision retroactively demonstrating a prima facie showing which is required for a successive petition pursuant to § 2255. *Id.*

Statutory Interpretation – Federal-Program Embezzlement: *United States v. Chafin*, 808 F.3d 1263 (10th Cir. 2015)

The 11th Circuit addressed whether 18 U.S.C. § 666(c)'s exception for bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business, applies to § 666(b)'s federal-funds threshold for embezzlement. *Id.* at 1270. The court noted that the 7th and 5th Circuits determined that § 666(c)'s exceptions do not apply to a §666 bribery offense, while the 6th Circuit found that § 666(b) does apply to the entire statute. *Id.* at 1271 n.5. The 11th Circuit agreed with the 6th Circuit in finding that the phrase "this section" of § 666(c) is unambiguous and applies to the whole statute. *Id.* at 1271. The court disagreed with the 7th and 5th Circuits after finding that the words in the statute are unambiguous, and therefore the court must presume that Congress meant what it said. *Id.* Thus, the 11th Circuit concluded that § 666(c)'s exceptions apply to all of § 666, including § 666(b)'s federal-funds threshold for embezzlement. *Id.*

Criminal Law – Federal Rules of Criminal Procedure: *United States v. Cordova*, 806 F.3d 1085 (D.C. Cir. 2015)

The D.C. Circuit addressed the proper meaning of 18 U.S.C. § 3005 in relation to the appointment of two defense attorneys. *Id.* at 1098. The court noted that the 1st, 2nd, 3rd, 9th, and 11th Circuits have determined that within the meaning of § 3005, a case is no longer a capital case once the government decides not to seek the death penalty, and thus the district court does not need to continue the appointment of a second attorney. *Id.* at 1102. Conversely, the 4th Circuit found § 3005 unambiguously mandates the retention of the second defense attorney in this situation. *Id.* The D.C. Circuit agreed with the 1st, 2nd, 3rd, 9th, and 11th Circuits in finding that Congress' language suggests that "the purpose of the statute would be best met by applying the mandate for two attorneys only as long as the death penalty is actually being pursued." *Id.* at 1099. The court disagreed with the 4th Circuit's conclusion that § 3005 is unambiguous in mandating a second defense attorney after the government removes the possibility of the death penalty. *Id.* at 1102. Thus, the D.C. Circuit concluded that once the death penalty is no longer being sought, the trial court retains the discretion to keep or dismiss the second defense attorney. *Id.* at 1101.

Federal Sentencing Guidelines – Elicitation of Sentencing Objections: *United States v. Hunter*, 809 F.3d 677 (D.C. Cir. 2016)

The D.C. Circuit addressed whether the sentencing judge has "an affirmative burden . . . to elicit objections" after pronouncing the defendant's sentence. *Id.* at 682. The court noted that the 6th and 11th Circuits "impose an affirmative burden on the sentencing judge to elicit objections[;]" while the 3rd, 9th, and 4th Circuits refused to require this burden. *Id.* at 682. The court noted the10th Circuit's reasoning that "once the court makes clear by timing (here, post-imposition) or by express reference . . . that the defendant's opportunity to object is nigh, that is all that is required." *Id.* at 682. The court agreed with the 10th Circuit reasoning that "[a]lthough not required for a district court to provide an opportunity to object . . . after sentencing the judge should ask if there are any objections to the sentence imposed not already on the record." *Id.* at 683. Thus, the D.C. Circuit held that the judge should but is not required to ask if there are any objections to sentencing. *Id.*

Sentencing Guidelines – Consideration of the Nature and Circumstances of the Offense: *United States v. Morgan*, 2015 U.S. App. LEXIS 19402 (10th Cir. Nov. 6, 2015)

The 10th Circuit briefly addressed whether consideration of the collateral consequences of a prosecution and conviction as punishment was also clear and obvious error. *Id*. at *64. The court noted that while the 6th, 7th, and 11th Circuits have found consideration of consequences favoring middle- or upper-class defendants to be error, the 2nd Circuit has not. *Id*. The court followed the 6th, 7th and 11th Circuits reasoning that the answer is made clear under the explicit language of 28 U.S.C. § 994(d) as well as the policy statements of the sentencing guidelines. *Id*. Thus, the 10th Circuit held that consideration of the collateral consequences of a prosecution and conviction as punishment is clear error.

Tax Law – Tax Administration and Criminal Offenses: *United States v. Sorensen*, 801 F.3d 1217 (10th Cir. 2015)

The 10th Circuit addressed whether charging tax obstruction under 26 U.S.C. § 7212(a) requires the defendant to be aware "of a pending IRS investigation or audit." *Id.* at 1231. The court noted that the 6th Circuit previously determined that the defendant should be aware of a pending IRS investigation when being charged under § 7212(a), while the 1st Circuit held that a conviction did not require proof of an ongoing audit. *Id*. at 1232. The court agreed with the 1st Circuit, stating that the defendant is not required to be aware of an ongoing proceeding, or whether or not a

proceeding had been initiated, in order to be charged under § 7212(a). *Id.* Thus, the 10th Circuit concluded that the defendant could be charged under 7212(a). *Id*.

Statutory Interpretation – The Computer Fraud and Abuse Act:
United States v. Valle, 807 F.3d 508 (2d Cir. 2015)

The 2nd Circuit addressed when an employee "exceed[s] authorized access" to a computer under 18 U.S.C. § 1030(a) of the Computer Fraud and Abuse Act (CFAA). *Id.* at 511. The 2nd Circuit noted that the 4th and 9th Circuits have determined an employee does not "exceed authorized access" when they access information they are not prevented from obtaining, irrespective of whether this access contravened an employer's purpose for allowing the employee access to information. *Id*. at 524. Contrarily, the 1st, 5th, 7th and 11th Circuits have determined that an individual exceeds authorized access when they access information beyond whatever purpose their employer provides them. *Id.* The 2nd Circuit agreed with the 4th and 9th Circuits that both statutory construction as well as Congressional intent favored interpreting "exceeds authorized access" in a limited manner. *Id.* at 527. Further, the court was concerned that the approach taken by the, the 1st, 5th, 7th and 11th Circuits could have the effect of criminalizing employees who simply searched for basic information beyond that of the scope of his employment, such as basic information that is accessed by visiting social media websites. *Id*. Specifically, the court feared that adopting this position would "criminalize the conduct of millions of ordinary computer users." *Id.* Thus, the 2nd Circuit held that absent fraud; employees do not violate the CFAA by accessing a computer program without a specific employment purpose. *Id.* at 528.

STATUTORY INTERPRETATION

Statutory Interpretation – Migratory Bird Treaty Act of 1918:
United States v. CITGO Petroleum Corp., 801 F.3d 477 (5th Cir. 2015)

The 5th Circuit addressed whether an oil company is criminally liable for the incidental death of migratory birds that landed on uncovered separation tanks. *Id*. at 480–81. Pursuant to the Migratory Bird Treaty Act of 1918, 16 U.S.C. §703, no person or entity may "take" or be found to have "aid[ed] and abett[ed] the taking" of migratory birds. *Id*. at 488. CITGO was subsequently indicted for "taking" or "aiding and abetting the taking" of migratory birds when the EPA determined that migratory birds had died in uncovered CITGO storage tanks. *Id*. at 481. The issue become whether CITGO illegally "took" the migratory birds as promulgated by

the applicable statute. *Id*. at 488. The 5th Circuit recognized that its sister courts are split on this issue. *Id*. at 488–89. The 8th and 9th Circuits have concluded inapposite of the 2nd and 10th Circuits by articulating that "a 'taking' is limited to deliberate acts done directly and intentionally to migratory birds[.]" *Id*. The 5th Circuit joined the 8th and 9th Circuits on this split. *Id*. at 493. The court's rationale was that the common reading of the word "take" was a well-understood term in 1918 to interfere a direct or purposeful killing. *Id*. at 490. Moreover, the 5th Circuit justified this conclusion by referencing the Endangered Species Act in which Congress evidenced its intention to expand the definition of "take" by also including "accidental" or "indirect harm to animals." *Id*. at 490–91.