Current Circuit Splits

The following pages contain brief summaries, drafted by the members of the *Seton Hall Circuit Review*, of circuit splits identified by federal court of appeals opinions between October 2009 and March 2010. This collection is organized by civil and criminal matters, then by subject matter.

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

CIVIL MATTERS

CIVIL MATTERS

ADMINISTRATIVE LAW

False Claims Act ("FCA") – Public Disclosure Jurisdictional Bar: *U.S. ex rel. Ondis v. Woonsocket, 587 F.3d 49 (1st Cir. 2009)*

The 1st Circuit addressed the meaning of the phrase "based upon" as used in the public disclosure jurisdictional bar to putative qui tam actions brought under the FCA. *Id.* at 53, 57. The court noted that under the FCA, one of the prongs for determining if the qui tam action is barred relies on whether the relator's suit is "based upon" publicly disclosed allegations or transactions. *Id.* at 53. The court noted that the 2nd, 3rd, 7th, 8th, 9th, 10th, 11th and D.C. Circuits determined that "as long as the relator's allegations are substantially similar to information disclosed publicly, the relator's claim is 'based upon' the public disclosure even if he actually obtained his information from a different source," while the 4th Circuit alone requires "proof that the relator's allegations are actually derived from the publicly disclosed information." *Id.* at 57. The 1st Circuit agreed with the 2nd, 3rd, 7th, 8th, 9th, 10th, 11th and D.C. Circuits in finding that a broader reading of the phrase "based upon" comports with the overall structure and purpose of the FCA to preclude "qui tam actions that merely parrot previously disclosed allegations or transactions." *Id.* at 58. The court disagreed with the 4th Circuit's position that "a relator's allegations actually must be derived from a public disclosure in order to trigger the jurisdictional bar," because under such an interpretation, the "original source" exception would be read out of the statute. *Id.* Thus the 1st Circuit concluded that the "based upon"

requirement is satisfied "when the relator's allegations are substantially similar to allegations or transactions already in the public domain at the time he brings his qui tam action." *Id.*

BANKRUPTCY LAW

***Automatic Stay Violations – Attorneys Fees**: Sternberg v. Johnston, 582 F.3d 1114 (9th Cir. 2009)*

The 9th Circuit addressed whether damages for an attorney's violation of his affirmative duty to educate a state court on the extent of a bankruptcy stay can include attorney's fees incurred in prosecuting the action against the violating party. *Id*. at 1116. The court recognized that the 5th Circuit—the only court of appeals to have previously addressed the issue—concluded that "it is proper to award attorney's fees that were incurred prosecuting [the claim]." *Id.* at 1124. However, the 9th Circuit found this language unpersuasive, and instead held that "only those attorney fees related to enforcing the automatic stay and remedying the stay violation, not the fees incurred in prosecuting the bankruptcy adversary proceeding in which he pursued his claim for those damages," are recoverable. *Id.* at 1116.

***Standard of Review – Equitable Mootness:** Search Mkt. Direct, Inc. v. Jubber (In re Paige), 584 F.3d 1327 (10th Cir. 2009)*

The 10th Circuit addressed "whether a district court's ultimate determination of equitable mootness should be reviewed de novo or for abuse of discretion." *Id.* at 1334–35. The court noted that the 5th, 6th, and 11th Circuits have reviewed the determination of equitable mootness de novo, while the 3rd Circuit created a split by opting to review these determinations for abuse of discretion. *Id.* at 1335. The 10th Circuit expressed the view that the split was "likely [due to] the unique role of the district courts in the bankruptcy context." *Id.* The position of the majority of the circuits is that the district court acts as an appellate court in a bankruptcy case and therefore the appellate court must review the decision de novo based on legal determinations. *Id.* Alternatively, the 3rd Circuit previously held that a determination of equitable mootness is discretionary and must be granted some deference. *Id.* The 10th Circuit noted that it has already adopted the abuse-of-discretion standard "in the similar context of prudential mootness." *Id.* Therefore, the 10th Circuit agreed with the 3rd Circuit and "adopt[ed] the abuse-of-discretion

standard of review for determinations of equitable mootness in bankruptcy cases." *Id.*

CIVIL PROCEDURE

Competency to Stand Trial – Burden of Proof: *United States v. Whittington, 586 F.3d 613 (7th Cir. 2009)*

The 7th Circuit addressed "which party has the burden of proof at a competency hearing" under 18 U.S.C. § 4241(d). *Id.* at 617. The court noted that the 4th and 10th Circuits placed the burden of proof on the defendant to prove incompetence, while the 3rd, 5th, 7th and 9th Circuits placed the burden on the government to prove competence. The 11th Circuit placed the burden with the party moving to determine competency, and the 2nd Circuit declined to address the issue because "[t]he allocation of the burden of proof to the defendant will affect competency determinations only in a narrow class of cases where the evidence is in equipoise." *Id.* at 618. The 7th Circuit agreed with the 4th and 10th Circuits in finding that the burden should be placed on the defendant. *Id.* The court disagreed with the 3rd, 5th, 7th and 9th Circuits and found the decisions of those courts "inconsistent with Supreme Court precedent that holds the accused in a federal prosecution must prove incompetence by a preponderance of the evidence." *Id.* Thus the 7th Circuit concluded that the defendant has the burden of proof at a competency hearing. *Id.*

Jurisdiction – Forum Selection Clause: *Wong v. Partygaming Ltd., 589 F.3d 821 (6th Cir. 2009)*

The 6th Circuit addressed whether state or federal law governs the inquiry into the enforceability of a forum selection clause when a federal court exercises diversity jurisdiction. *Id.* at 826. The court noted that a majority of circuits have determined that "the enforceability of a forum selection clause implicates federal procedure and should therefore be governed by federal law," while the 7th and 10th Circuits found that the law that governs the contract as a whole also governs the enforceability of the forum selection clause. *Id.* at 827. The 6th Circuit agreed with the majority of circuits in finding "forum selection clauses significantly implicate federal procedure issues. *Id.* Thus the 6th Circuit concluded that federal law governs the enforceability of a forum selection clause when a federal court exercises diversity jurisdiction. *Id.* at 828.

Remedies – Attorneys' Fees: *Fox v. Vice, 594 F.3d 423 (5th Cir. 2010)*

The 5th Circuit addressed whether a defendant has to prevail over an entire suit in order to recover attorneys' fees for frivolous 42 U.S.C. § 1983 claims. *Id.* at 428. The court noted that the majority of circuits hold that a defendant does not have to prevail over an entire suit to recover attorneys' fees. *Id*. The 5th Circuit agreed with the 9th and 11th Circuits that "it would undermine the intent of Congress to allow plaintiffs to prosecute frivolous claims without consequences merely because those claims were joined with additional non-frivolous claims." *Id.* (internal quotation marks omitted). The 5th Circuit stated that "[s]uch a rule would also make a defendant's entitlement to attorneys' fees 'depend not upon the district court's review of the merits of a plaintiff's § 1983 claims, but upon how a plaintiff chose to draft his complaint." *Id.* at 428–29. Thus the 5th Circuit concluded that the district court did not abuse its discretion when awarding defendant attorney's fees even though defendant did not prevail on the entire suit. *Id.* at 429.

Removal –Timely Filing: *Barbour v. Int'l Union, 594 F.3d 315 (4th Cir. 2010)*

The 4th Circuit addressed how to calculate timely filing for removal when multiple defendants were served at different times and one or more of the defendants were served outside the original 30-day period required by 28 U.S.C. 1446(b). *Id.* at 319. The court noted the 5th Circuit's "first-served defendant rule," under which the "[30-day] period begins to run as soon as the first defendant is served." *Id.* The court also noted the "last-served defendant rule" favored by the 6th, 8th, and 11th Circuits, which "permits each defendant, upon formal service of process, thirty days to file a notice of removal." *Id.* at 319–20. The court also discussed the "middle ground rule," a position that a 4th Circuit panel had expressed. *Id.* at 320. The "middle ground rule" would have allowed later-served defendants who filed within 30 days of being served to join a valid removal petition, but would have prevented those defendants from filing for removal if the earlier-served defendants had not filed within the statutory period or had filed defective petitions. *Id.* Because the "middle ground rule" was not essential to the 4th Circuit's previous decision, the court reasoned that it was not bound to follow the middle-ground rule. *Id.* at 321–22. The 4th Circuit disagreed with the middle ground and first-served defendant rules because "[u]nder either . . . rule, [the later-served defendant]'s right of removal would have been waived by the [first-served defendant]'s failure to file a notice of removal within 30 days of being served even though it was not yet within the court's jurisdiction."

Id. at 324. "Such prejudice . . . would violate the spirit, if not the letter, of the 'bedrock principle' that 'a defendant is not obliged to engage in litigation unless notified of the action, and brought under a court's authority, by formal process.'" *Id.* Thus, the 4th Circuit concluded "in cases involving multiple defendants, each defendant, once served with formal process, has 30 days to file a notice of removal pursuant to § 28 U.S.C. 1446(b) in which earlier-served defendants may join regardless of whether they have previously filed a notice of removal." *Id.* at 326.

Social Security Act – Attorney Fees*: Walker v. Astrue, 593 F.3d 274 (3d Cir. 2010)*

The 3rd Circuit addressed "what filing deadline under the Federal Rules of Civil Procedure governs a petition for attorney fees under Section 406(b) of the Social Security Act when a case is remanded under sentence four of Section 405(g) for a determination of benefits[.]" *Id.* at 276. The court noted that the 5th and 11th Circuits have held that Rule 54(d)(2)'s 14-day filing deadline applies, while the 10th Circuit has held that the "reasonable time" standard under Rule 60(b) applies. *Id.* The 3rd Circuit agreed with the 5th and 11th Circuits in finding that Rule 54(d)(2) is the appropriate standard. *Id.* The court disagreed with the 10th Circuit's approach because the use of the "reasonable time" standard "finds little support in the law," as the 10th Circuit relied on the 7th Circuit's reading of Rule 54 prior to its 1993 amendment, "which contained no time limit for filing and which courts interpreted to contain 'an implicit requirement of reasonableness.'" *Id.* at 279. Thus, the 3rd Circuit concluded that "Rule 54(d)(2) is the appropriate avenue through which counsel can seek attorney fees following a § 406(b) administrative remand." *Id.* at 280. The 3rd Circuit further held that "the application of the filing deadline is tolled until the notice of award is issued by the Commissioner and counsel is notified of that award." *Id.*

CONSTITUTIONAL LAW

Exclusionary Rule — Retroactivity of Constitutional Decision: *United States v. Davis, 598 F.3d 1259 (11th Cir. 2010)*

The 11th Circuit reviewed an exclusionary rule case in light of the Supreme Court decision in *Arizona v. Gant*, 552 U.S. 1230 (2008), which was rendered during the pendency of the appeal. *Id.* at 1261. That decision broadened the scope of the exclusionary rule by limiting a search of a vehicle incident to an arrest to situations where "the arrestee

is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Id.* at 1262. The circuits are split regarding the "retroactivity of a constitutional decision." *Id*. The 5th and 10th Circuits do not apply the exclusionary rule retroactively, in opposition to the 9th Circuit. *Id.* at 1264. The 11th Circuit sided with the 5th and 10th Circuits, holding that although the defendant was subject to an illegal search in violation of the Fourth Amendment, it would not "tie the retroactivity of new Fourth Amendment rules to the suppression of evidence." *Id.* at 1265. The 11th Circuit explained that "[b]ecause the exclusionary rule is justified solely by its potential to deter police misconduct, suppressing evidence obtained from an unlawful search is inappropriate when the offending officer reasonably relie[s] on well-settled precedent." *Id.* at 1266. The 11th Circuit concluded that "the good-faith exception [which] allows the use of evidence obtained in reasonable reliance on well-settled precedent" was applicable in refusing to retroactively apply the new Fourth Amendment rules. *Id.* at 1268.

McCarran-Ferguson Act ("MFA")* – *Pre-emption of State Law: *Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyds, London, 587 F.3d 714 (5th Cir. 2009)*

The 5th Circuit addressed the issue of whether implemented treaty provisions are reverse-preempted by state law under the MFA. *Id.* at 731. The court noted that the 2nd Circuit determined that when a treaty is not self-executing and thus relies on an act of Congress for implementation, the implementing legislation is reverse-preempted by state law under the MFA. *Id*. The 5th Circuit agreed that when the provisions of a treaty are not self-executing, enforcement of the provisions in a United States court depends on implementation by Congress. *Id.* However, the 5th Circuit disagreed with the holding of the 2nd Circuit and found that the "Act of Congress" referred to in the MFA cannot be seen as distinguishing between treaties that require implementation by Congress and those that do not. *Id.* Thus, the 5th Circuit held that implemented treaty provisions, self-executing or not, are not reverse–preempted by state law pursuant to the MFA. *Id.*

EMPLOYMENT LAW

Long Term Disability Plans – Material Duties: *Darvell v. Life Ins. Co. of N. Am., 597 F.3d 929 (8th Cir. 2010)*

The 8th Circuit addressed whether the "phrase 'material duties of his . . . regular occupation' [under a disability plan] can be interpreted as referring to the duties that are commonly performed by those who hold the same occupation as defined by the DOT (a 'generic' approach), or the duties that the specific claimant actually performed for his employer (a 'claimant-specific' approach)." *Id*. at 935. The court noted that the 6th Circuit follows the "generic approach," while the 3rd and 10th Circuits follow the "claimant-specific approach." *Id.* at 936. The 8th Circuit reasoned that "'[o]ccupation' is a more general term that seemingly refers to categories of work than narrower employment terms like 'position,' 'job,' or 'work,' which are more related to a particular employee's individual duties." *Id*. The 8th Circuit further noted that "where plan fiduciaries have offered a 'reasonable interpretation' of disputed provisions, courts may not replace [it] with an interpretation of their own . . . ." *Id*. at 935. Thus, the 8th Circuit concluded that the insurance company's "interpretation of 'material duties of his . . . regular occupation' is not contrary to clear language of the [p]lan" and therefore, the disability plan can be interpreted under the "generic approach." *Id*. at 936.

Family Medical Leave Act ("FMLA") – Evidence Necessary to Establish Incapacity: *Schaar v. Lehigh Valley Health Servs., 598 F.3d 156 (3d Cir. 2010)*

The 3rd Circuit addressed "whether a combination of expert and lay testimony can establish that an employee was incapacitated for more than three days as required by the FMLA's implementing regulations" in order to establish the statute's requisite serious medical condition. *Id.* at 157. The court noted that the 5th and 9th Circuits found lay testimony alone sufficient to establish incapacitation under the FMLA, while the 8th Circuit held that lay testimony could only be used "to supplement incomplete medical evidence." *Id.* at 160. The court looked to the Department of Labor regulations, which do not require a health care professional to make the determination of incapacity, and stated that lay testimony should therefore not be categorically excluded when making an incapacity determination. *Id.* at 161. However, the court disagreed with the 5th and 9th Circuits, finding that some medical testimony is

necessary to establish causation between the incapacitation and the serious health condition, so that employers are not faced with a heavy burden to "inquire into an employee's eligibility for FMLA leave based solely on the employee's self–diagnosed illness." *Id*. Thus, the 3rd Circuit held that "an employee may satisfy her burden of proving three days of incapacitation through a combination of expert medical and lay testimony." *Id.*

Family Medical Leave Act ("FMLA") – Front Pay: *Traxler v. Multnomah County, 596 F.3d 1007 (9th Cir. 2010)*

The 9th Circuit addressed whether "the court, rather than the jury, determines the amount of the front pay award" under the FMLA. *Id.* at 1009. The court noted that the 4th, 5th, and 10th Circuits have agreed that "the approach in these cases follows the general recognition that front pay is best understood as a substitute for the equitable remedy of reinstatement, and thus, is appropriately determined by the court." *Id.* at 1011. The court also noted that the 6th Circuit "[d]iffers [by] holding that the district court determines the propriety of awarding front pay, but that the jury decides the actual amount of the award." *Id*. The 9th Circuit agreed with the 4th, 5th, and 10th Circuits in finding that an award of front pay is "an alternative to reinstatement [and] is derived solely from the statutory provision permitting the court to award 'such equitable relief as may be appropriate.'" *Id*. at 1011–12. The court disagreed with the 6th Circuit as the statute does not support splitting "the availability of front pay . . . [as] a judicial determination and the amount a jury determination." *Id*. at 1012. Thus, the 9th Circuit concluded "[t]hat under the FMLA, front pay is an equitable remedy that must be determined by the court, both as to the availability of the remedy and the amount of any award." *Id*. at 1011.

Rehabilitation Act – Independent Contractor: *Fleming v. Yuma Reg'l Med. Ctr., 587 F.3d 938 (9th Cir. 2009)*

The 9th Circuit addressed whether § 504(d) of the Rehabilitation Act, "which refers to 'the standards applied under title I of the Americans with Disabilities Act [ADA]. . . as such sections relate to employment,' incorporates Title I literally or selectively." *Id.* at 939. The 9th Circuit needed to resolve this question in order to determine the primary issue of whether § 504 extends to a "claim of discrimination brought by an independent contractor." *Id.* at 939. The court noted that "if Title I is incorporated literally, then the Rehabilitation Act is limited by the ADA and only covers employer-employee relationships in the

workplace." *Id.* However, as the court pointed out, if Title I is incorporated selectively, "the Rehabilitation Act covers all individuals 'subject to discrimination under any program or activity receiving Federal financial assistance,' who may bring an employment discrimination claim based on the standards found in the ADA." *Id.* The court noted that the 6th and 8th Circuits determined that Title I of the ADA is incorporated literally, while the 10th Circuit found Title I to be incorporated selectively. *Id.* The 9th Circuit agreed with the 10th Circuit in finding that while § 504 of the Rehabilitation Act "incorporates the 'standards' of Title I of the ADA for proving when discrimination in the workplace is actionable," it does not incorporate Title I in totality. *Id.* The court disagreed with the 8th Circuit's position that the "similarity" between Title I and the Rehabilitation Act leads to the conclusion that both statutes apply to "employer-employee" relationships, and therefore do not extend coverage to independent contractors. *Id.* at 946. Although reluctant to state that 6th Circuit precedent bore directly on the issue, the 9th Circuit disagreed with the 6th Circuit's conclusion that the ADA and Rehabilitation Act "borrowed" the definition of "employer" from Title VII of the ADA. *Id.* Thus the 9th Circuit concluded that § 504 "incorporates the 'standards' of Title I of the ADA for proving when discrimination in the workplace is actionable, but not Title I *in toto*, and therefore the Rehabilitation Act covers discrimination claims by an independent contractor." *Id.* at 939.

IMMIGRATION

Good Faith Marriage Waiver – Jurisdiction: *Contreras-Salinas v. Holder, 585 F.3d 710 (2d Cir. 2009)*

The 2nd Circuit addressed whether the court had jurisdiction to review the discretionary decision of the Attorney General to grant or deny a waiver under 8 U.S.C. §1186a(c)(4), which requires an alien to file a "good faith marriage waiver" to remain in the country post divorce from a United States citizen. *Id.* at 713. The court noted that the 9th Circuit determined that "despite the clear language committing credibility determinations to the '*sole discretion* of the Attorney General,' . . . courts nevertheless retain jurisdiction to review such determinations." *Id.* at n.4. Further, the 9th Circuit "relied on the legislative history . . . [and] concluded that the statutory history demonstrates beyond any question that Congress adopted this language for the specific purpose of putting a stop to immigration officials' practice of employing overly-strict evidentiary rules when determining

the credibility of battered women, and *not* in order to limit judicial review of credibility decisions." *Id.* (emphasis in original). Here, the 2nd Circuit disagreed with the 9th Circuit, finding that by the statutory language "Congress . . . demonstrates an unambiguous intent to limit judicial review." *Id*. Thus, the 2nd Circuit concluded that it lacked jurisdiction to review petitioner's challenges to the credibility and weight of the findings by the Immigration Judge and Board of Immigration Appeals and held that such discretion is left solely to the Attorney General. *Id.*

Repeal of Immigration and Nationality Act ("INA") – Reliance*: Canto v. Holder, 593 F.3d 638 (7th Cir. 2010).*

The 7th Circuit considered "whether th[e] petitioners who opted to go to trial 'relied' on the continued existence of equitable relief under section 212(c) in foregoing [their] legal right" to an appeal. *Id.* at 643. The court noted that the 4th and 11th Circuits require actual reliance, requiring a petitioner to "show that he actually subjectively relied on the prior law in the criminal proceedings resulting in his conviction." *Id*. On the other hand, the court pointed out that the 3rd, 8th, and 10th Circuits have utilized an objective reliance standard, by which a petitioner merely needs to "establish that relevant circumstances gave rise to interests upon which it would have been objectively reasonable for a petitioner to rely on the prior law in deciding to give up a legal right." *Id*. Additionally, the court noted that the 1st and 9th Circuits made no distinction between these two forms of reliance and "have categorically held that petitioners who chose to go to trial could not possibly have relied on the continued existence of section 212(c) relief." *Id.* The court stated that it has previously agreed with the 1st and 9th Circuits "holding that relief under former section 212(c) only remains open to: (1) petitioners who pled guilty prior to section 212(c)'s repeal; or (2) 'aliens who conceded deportability before AEDPA's enactment, with the expectation that they could seek waivers under § 212(c).'" *Id*. at 643–44. However, the court noted that the instant case presented "a slightly more nuanced argument . . . that [petitioner] forwent his legal right to appeal his conviction in reliance on his continued ability to seek section 212(c) relief." *Id*. at 644. The 7th Circuit pointed out that, with the exception of the 4th Circuit, "the circuits are generally in agreement that the Supreme Court prefers a categorical approach over an individualized analysis when deciding whether an alien relied on the continued existence of section 212(c) in forgoing a legal right." *Id*. As such, the court stated that it also has "followed the categorical approach, finding that the category of aliens

who went to trial did not forgo any possible benefit in reliance on section 212(c)," a category which also "necessarily includes those aliens that went to trial, but chose not to appeal." *Id*. Thus, the 7th Circuit held that it is "more likely than not that the existence of section 212(c) [would] not affect [the] decision about whether to appeal" a conviction. *Id*. at 645.

LABOR LAW

Defense Base Act ("DBA") – Court of Initial Review: *Serv. Emples. Int'l, Inc. v. Dir., 595 F.3d 447 (2d Cir. 2010)*

The 2nd Circuit addressed "whether the initial review of decisions of [a DBA] Benefits Review Board . . . lies in the courts of appeals or in the district courts." *Id.* at 452. In enacting the DBA in 1941, Congress "extended the already existing provisions of the Longshore and Harbor Workers' Compensation Act (LHWCA), enacted in 1927, to provide workers' compensation coverage for those engaged in maritime employment." *Id.* At the time the DBA was enacted, "the LHWCA provided for initial review of administrative compensation orders in the federal district court for the judicial district in which the injury occurred." *Id.* (internal quotation marks omitted). Congress later amended the LHWCA, "providing for initial review of compensation claims in a newly created administrative board (the Benefits Review Board) and for judicial review in the courts of appeals," but Congress "made no change in DBA § 3(b), which continued to provide that judicial proceedings be conducted in accordance with the LHWCA and in the district court." *Id.* The 2nd Circuit noted that Congress intended that "the DBA track the provisions of the LHWCA" and that the statutes should establish a "unified scheme." *Id.* at 454. The court further noted that the legislative purpose of the 1972 amendments to the LHWCA was to "expedit[e] the processing of compensation claims and permit[] appeals of agency decisions directly to the courts of appeals without the extra step of district court proceedings." *Id.* The 2nd Circuit recognized that the 4th, 5th, 6th, and 11th Circuits have all held that DBA § 3(b) "unambiguously provides that a party adversely affected by the administrative resolution of a DBA claim must file a petition for review in the United States [D]istrict [C]ourt." *Id.* 453 (internal quotation marks omitted). Nevertheless, the 2nd Circuit disagreed with those circuits and joined the 7th and 9th Circuits in holding that § 3b of the DBA "vest[s] jurisdiction in the courts of appeals." *Id.*

PROPERTY LAW

Fair Housing Act ("FHA") – Discrimination: *Bloch v. Frischholz, 587 F.3d 771 (7th Cir. 2009)*

The 7th Circuit addressed whether a violation of § 3617 of the FHA "can exist without a violation of §3604 or any other FHA provision." *Id.* at 781. The court noted that the 2nd Circuit and the Southern District of Texas determined that § 3617 and § 3601 are co-extensive; therefore, a violation of one is a violation of the other. *Id.* However, the District of Nebraska and the Northern District of Illinois held differently. *Id.* The 7th Circuit disagreed with the 2nd Circuit, noting that although it had held in some instances that the statutes were co-extensive, the present case suggested a different construction. *Id.* The court decided that defendants may have "interfered" with plaintiffs' § 3604 rights, even though plaintiffs had not proved a § 3604 violation, thereby suggesting a § 3617 violation without a §3604 violation. *Id.* The court noted that holding otherwise "would make § 3617 entirely duplicative of the other FHA provisions." *Id.* Thus the 7th Circuit concluded that "a § 3617 claim might stand on its own." *Id.* at 782.

STATUTORY INTERPRETATION

Telecommunications Act of 1996 – Adequate Writing: *Helcher v. Dearborn County, 595 F.3d 710 (7th Cir. 2010)*

The 7th Circuit addressed "[w]hat is necessary for an adequate writing under the Telecommunications Act." *Id.* at 717. The court noted that the 1st, 6th, and 9th Circuits determined that the "in writing requirement is met so long as the written decision contains a sufficient explanation of the reasons for the permit denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons." *Id.* at 718. The 8th Circuit, however, follows an approach "that strike[s] a balance between a dubious, literal reading of the Act and a pragmatic, policy-based approach." *Id*. The 7th Circuit agreed with the 1st, 6th and 9th Circuits in finding the "primary purpose of the "in writing" requirement for the Telecommunications Act is to allow for meaningful judicial review of the decisions of local governments. *Id.* at 719. Thus, the 7th Circuit concluded the "in writing [requirement] is adequate if it provides an explanation that allows [a court], in combination with the written record, to determine if the decision is supported by substantial evidence." *Id.*

Title IX – Notice Requirement: *Mansourian v. Regents of the Univ. of Cal., 594 F.3d 1095 (9th Cir. 2010)*

The 9th Circuit addressed whether "pre-litigation notice and opportunity to cure is necessary in cases alleging unequal provision of athletic opportunities in violation of Title IX." *Id.* at 1105. The court noted that the 5th Circuit determined that "the requirement in the sexual harassment cases—that the academic institution have actual knowledge of the sexual harassment—is not applicable for purposes of determining whether an academic institution intentionally discriminated on the basis of sex by denying females equal athletic opportunity," while the 8th Circuit found the notice requirement applies without any analysis. *Id.* at 1106. The 9th Circuit agreed with the 5th Circuit in finding that "[i]t would also be inconsistent with funding recipients affirmative obligations to provide nondiscriminatory athletic participation opportunities and continually to assess and certify compliance with Title IX." *Id.* The court disagreed with the 8th Circuit, finding that its approach is inconsistent with application of the notice requirement. *Id.* Thus, the 9th Circuit concluded that the "notice requirement is inapplicable to cases alleging that a funding recipient has failed effectively to accommodate women's interest in athletics."

CRIMINAL MATTERS

SENTENCING

Aggravating Crime – Hypothetical Felony Approach: *United States v. Hector Santana-Illan, 2009 U.S. App. LEXIS 28536 (10th Cir. Dec. 29, 2009)*

The 10th Circuit addressed whether the hypothetical felony approach permits a court to examine the crime for which the defendant *could* have been prosecuted or only the crime that was *actually* prosecuted when determining if an aggravating crime occurred. *Id.* at *7–8. The court noted that the 1st, 2nd, 3rd, and 6th Circuits determined that the hypothetical felony approach only permits courts to examine the crime *actually* prosecuted, while the 5th and 7th Circuits found that courts could base a decision on the crime that *could* have been prosecuted. *Id.* at *8. The 10th Circuit agreed with the 1st, 2nd, 3rd, and 6th Circuits in finding that the inclusion of the word "hypothetical" in the hypothetical felony approach does not permit courts to make ex-post

determinations about what crimes an individual might have been charged with. *Id.* at *12–13. The court disagreed with the 5th and 7th Circuits primarily because the Supreme Court had already rejected the approach that courts may look back through a defendant's record to determine what crime they *could* have been prosecuted for. *Id.* at *16. Thus the 10th Circuit concluded that "the hypothetical federal felony approach permits us to examine only the state crime that was actually prosecuted." *Id.* at *11.

***Armed Career Criminal Act ("ACCA") – Violent Felony: United States v. Lee**, 586 F.3d 859 (11th Cir. 2009)*

The 11th Circuit addressed whether a "non-violent walkaway escape is a violent felony for purposes of the [ACCA]" after the Supreme Court's decision in *Chambers v. United States*, __ U.S. __ , 129 S. Ct. 687 (2009). *Id.* at 866. The 11th Circuit noted that prior to *Chambers*, all the circuits except the 9th Circuit "held that all escapes were crimes of violence and/or violent felonies." *Id.* at 867. After *Chambers*, the 11th Circuit found that "several of [its] sister circuits ha[d] overruled their prior precedents and concluded that walkaway escapes [we]re no longer properly classifiable as violent felonies under the ACCA or crimes of violence under the Sentencing Guidelines," specifically the 3rd, 6th, and 7th Circuits. *Id.* at 869. The 11th Circuit agreed with these circuits in finding a non-violent walkaway escape from unsecured custody is not sufficiently similar in kind or in degree of risk posed to the ACCA's enumerated crimes to bring it within § 924(e)(2)(B)(ii)'s residual provision. *Id.* at 874.

***Career Offender Designation – Reduction for Overrepresentation:** United States v. Munn, 595 F.3d 183 (4th Cir. 2010)*

The 4th Circuit addressed "[w]hether § 3582(c)(2) authorizes a district court to grant a motion for a reduced sentence when the sentencing court designated the defendant as a career offender but then found that the career offender designation overrepresents his criminal history." *Id.* at 187–88. The court noted that the 2nd and 11th Circuits had determined that "§ 3582(c)(2) and the accompanying Policy Statement require only that a defendant's sentence be 'based on' a subsequently amended guideline range," while the 8th Circuit found that the "designation of a defendant as a career offender precludes a sentence reduction under § 3582(c)(2)." *Id.* at 189–91. The 4th Circuit agreed with the 2nd and 11th Circuits in finding that "a defendant's career offender designation does not bar a § 3582(c)(2) sentence reduction based on

Amendment 706 if (1) the sentencing court granted an Overrepresentation Departure from the career offender guideline range, and (2) the court relied on the Crack Guidelines in calculating the extent of the departure." *Id.* at 192. The court disagreed with the 8th Circuit, stating, "the Sentencing Guidelines do not compel the conclusion that a sentencing court must determine a defendant's applicable guideline range *before* granting an Overrepresentation Departure." *Id.* (emphasis in original). Thus, the 4th Circuit concluded that "§ 3582(c)(2) authorizes a district court to grant a motion for a reduced sentence when the sentencing court designated the defendant as a career offender but then found that the career offender designation overrepresents his criminal history." *Id.* at 188.

Career Offender Designation – Robbery as Crime of Violence: *United States v. Gregory, 591 F.3d 964 (7th Cir. 2010)*

The 7th Circuit addressed whether a defendant's robbery conviction counted as a crime of violence, thus classifying the defendant as a career offender under the Sentencing Guidelines. *Id.* at 966. The court noted that "the [4th] Circuit has sided with [the defendant], while the 3rd, 9th, and 11th Circuits have taken the government's position," and that the "2nd Circuit has come close to the government's position as well." *Id.* at 967. The court determined that "[t]he difference of opinion centers on the question whether, in addition to distinguishing between adult and juvenile *convictions*, the Guidelines also call for distinguishing between adult and juvenile *sentences*, depending on whether the sentence is imposed pursuant to the adult or juvenile criminal code." *Id.* (emphasis in original). The 7th Circuit found that "[t]he 4th Circuit concluded that the Sentencing Commission did adopt the latter refinement. The word 'imprisonment,' it said, applies only to adult convictions, whereas the word 'confinement' applies to both juvenile and adult dispositions." *Id.* The 7th Circuit further noted that "[t]he remaining courts have not been persuaded by this line of argument." *Id.* The 7th Circuit was not persuaded by the 4th Circuit's approach, which found "it difficult to believe that the Commission would have made such an important point about juveniles convicted as adults using such subtle linguistic signals. *Id.* If the Commission had wanted to draw such a sharp distinction between juveniles with adult convictions sentenced as adults and those sentenced as juveniles, it would have done so more clearly." *Id.* Thus, the 7th Circuit concluded that "the critical question is whether the juvenile was convicted as an adult, not how he was sentenced." *Id.*

Authority of the Federal Bureau of Prison – Early Release: *Handley v. Chapman, 587 F.3d 273 (5th Cir. 2009)*

The 5th Circuit addressed whether the Federal Bureau of Prison ("BOP") used reasonable exercise of its statutory authority in "implementing regulation that categorically excludes early-release eligibility for those inmates whose 'current offense is a felony . . . [t]hat involved the carrying, possession, or use of a firearm.'" *Id*. at 276. The court noted that the 3rd and 8th Circuits found the exclusion of inmates who carried a firearm from early-release eligibility was a valid exercise of BOP authority, while the 9th, 10th and 11th Circuits did not. *Id*. at 278. The 5th Circuit reasoned that under 18 U.S.C. 3621(e), "the [BOP] has the discretion to determine eligibility for early release consideration." *Id*. at 279. Additionally, the court reasoned that in the interest of public safety, "[t]he [BOP] recognizes that there is a significant potential for violence from criminals who carry, possess or use firearms while engaged in felonious activity . . . [t]hus . . . these inmates should not be released months in advance of completing their sentences." *Id*. at 280. Thus, the 5th Circuit concluded that due to the "public safety rationale," the BOP used reasonable exercise of its statutory authority in excluding inmates who carried a firearm from early-release eligibility. *Id*.

STATUTORY INTERPRETATION

Sexual Offenders Registration and Notification Act ("SORNA") – Offense Registration: *United States v. Cain, 583 F.3d 408 (6th Cir. 2009)*

The 6th Circuit addressed whether defendants convicted prior to the enactment of SORNA were required to comply with the terms of SORNA before the Attorney General issued an implementing regulation mandating retroactive adherence. *Id.* at 410. The court noted that of the five circuits to have addressed the issue, the 4th, 7th, and 10th Circuits have held that SORNA did not apply to certain offenders until the Attorney General specified its retroactive application. *Id.* at 415. The 6th Circuit, however, did not address the perspectives adopted by the other circuits, and instead, evaluated the issue utilizing the following factors: plain meaning of subsection 16913(d); the title of subsection 16913(d); the subsection's relation to subsection 16901; textual ambiguity; and legislative history. *Id.* at 414–417. In doing so, the 6th Circuit agreed with the 4th, 7th, and 10th Circuits, concluding that "SORNA explicitly required the Attorney General to specify the applicability of the Act to

persons convicted prior to the effective date of SORNA." *Id.* at 410. Accordingly, persons convicted prior to SORNA's enactment were not required to comply with the terms of the Act prior to the Attorney General's specific mandate. *Id.*