CIVIL

ANTITRUST

***Parker* Immunity – Private Parties:** *Auraria Student Housing at the Regency, LLC v. Campus Village Apartments, LLC*, 703 F.3d 1147 (10th Cir. 2013)

The 10th Circuit addressed "whether the denial of *Parker* immunity is immediately appealable by private parties." *Id.* at 1150. "In *Parker*, the Supreme Court held that the Sherman Act did not reach anticompetitive activities conducted by a state or its officers or agents." *Id.* at 1149. The court noted that the 5th Circuit, "which otherwise extends interlocutory review to denials of *Parker* immunity, does not do so in cases involving private parties[,]" while the 11th Circuit "has allowed interlocutory review in cases in which a private party asserts *Parker* immunity." *Id.* at 1151. The 10th Circuit agreed with the 5th Circuit and noted that "the Supreme Court's repeated admonitions that the collateral order doctrine applies only to a narrow class of cases. . . [and] the justifications for affording immediate review of the denial of *Parker* immunity to governmental entities are inapplicable to private parties." *Id.* The 5th Circuit found the 11th Circuit's reasoning "wholly devoid of any persuasive justification for its holding." *Id.* Thus, the 10th Circuit concluded that "[e]xtending the collateral order doctrine to private parties contesting an order denying *Parker* immunity does not serve a substantial public interest and would constitute precisely the type of expansion the doctrine discourages." *Id.* at 1152.

BANKRUPTCY

Article III Adjudication – Fraudulent Transfers and Public Rights: *Executive Benefits Insurance Agency v. Arkison*, 702 F.3d 553 (9th Cir. 2012)

The 9th Circuit addressed "whether bankruptcy courts have the general authority to enter final judgments on fraudulent conveyance claims asserted against noncreditors to the bankruptcy estate." *Id*. at 565. The 9th Circuit acknowledged that the 5th and 10th circuits held a fraudulent conveyance to be a matter of public right, and thus, reviewable by non-Article III judges; while the 11th Circuit found a fraudulent conveyance to be a private right, and thus, it entitled litigants to a trial by jury, unless waived. *Id.* at 562. Relying on its interpretation of Supreme Court precedent, the 9th Circuit agreed with the 11th Circuit, and held that bankruptcy litigants have a Seventh Amendment right to a jury trial. *Id*. at 563.

CIVIL PROCEDURE

Application for a New Trial – Improper Closing Arguments: *Caudle v. District of Columbia*, 707 F.3d 354 (D.C. Cir. 2013)[1]

The D.C. Circuit addressed whether a "golden rule" argument made with respect to liability during closing arguments was improper, thus warranting a new trial. *Id.* at *10. The court noted that "[a] golden rule argument—which asks jurors to place themselves in the position of a party—is universally condemned because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on evidence." *Id.* at *9 (internal citation omitted) (internal quotation marks omitted). The court observed, however, that "whether such argument is improper if made with respect to liability" is unsettled. *Id.* at *10. The court noted that the 2nd, 5th, 10th, and 11th Circuits hold "such a golden rule argument permissible[,]" while the 3rd, 4th, and 7th Circuits "rejected the liability–damages distinction." *Id.* at *10–11. The D.C. Circuit agreed with the 3rd, 4th, and 7th Circuits in finding that "[c]ourts forbid golden rule arguments to prevent the jury from deciding a case based on inappropriate considerations such as emotion." *Id.* at *11–12. The court disagreed with the 2nd, 5th, 10th, and 11th Circuits because "[i]t is no more appropriate for a jury to decide a defendant's liability *vel non* based on an improper consideration than to use the same consideration to determine damages." *Id.* at *12. Thus the D.C. Circuit concluded "that a golden rule argument is improper and may thus serve as the basis for a new trial." *Id.* at *11.

Attorney-Client Privilege – Employee Retirement Income Security Act (ERISA): *Stephan v. Unum Life Insurance Co. of America*, 697 F.3d 917 (9th Cir. 2012)

The 9th Circuit addressed whether the ERISA "fiduciary exception," which prohibits employers "acting in the capacity of ERISA fiduciary . . . from asserting the attorney-client privilege against plan beneficiaries on matters of plan administration," applies to insurance companies. *Id.* at 931. The court observed that the 3rd Circuit, the only other circuit to address the issue, "held that the fiduciary exception was inapplicable to insurance companies." *Id*. at 931 n.6. The 9th Circuit rejected the 3rd Circuit's approach because it found that "[t]he justifications for excepting ERISA for fiduciaries from attorney-client privilege apply equally to insurance companies." *Id*. at 931. The court further reasoned that "[t]he duty of an ERISA fiduciary to disclose all information regarding plan administration applies equally to insurance companies as to trustees." *Id*. Moreover, the 9th Circuit stressed that "[n]either the statute nor the regulations provide any reason why the disclosure of information is any less important where an insurer, rather than a trustee or other ERISA fiduciary, is the decisionmaker." *Id*. at 932. Finding that there was "no principled basis for excluding insurers from the fiduciary exception,"

[1] Specific reporter pages were not assigned at time of publication; pin cites reflect Lexis page numbers. The Lexis cite is: *Caudle v. District of Columbia*, No. 11-7107, 2013 U.S. App. LEXIS 3213 (D.C. Cir. Feb. 15, 2013).

the 9th Circuit held that the fiduciary exception applies to wholly-insured ERISA plans. *Id*.

Timeliness of Appeal – Attorneys' Fees: *Central Pension Fund of the International Union of Operating Engineers and Participating Employers v. Ray Haluch Gravel Co.*, 695 F.3d 1 (1st Cir. 2012)

The 1st Circuit addressed whether the holding in *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988)—where the Supreme Court determined that a claim for attorney's fees does not affect the finality of a judgment for the purposes of determining whether an appeal was timely under 28 U.S.C. § 1291—created a bright-line rule applicable to all claims for attorneys' fees. *Id*. at 5. The court observed that the 2nd, 9th, 7th, and 5th circuits "have held that *Budinich* applies to all claims for attorneys' fees." *Id.* at 6. Conversely, the 4th, 11th, and 8th circuits "have held, on various rationales, that contractual claims for attorneys' fees may fall beyond the *Budinich* line." *Id.* The court also explained that the 3rd Circuit "has put a foot in each camp," holding that "certain contract-based attorneys' fees are outside the scope of *Budinich*," but that there was no difference between statute-based and contract-based attorney fees for the purposes of finality under § 1291. *Id.* The 1st Circuit declined to adopt a "mechanical reading" of *Budinich*, stressing that the Supreme Court's holding did not preclude the possibility that attorneys' fees "sometimes be considered as part of the merits." *Id.* The court noted that a "judgment as to liability" does not finalize an action to enforce a CBA provision that "provided for payment of attorneys' fees as an element of damages in the event of breach." *Id.* As a result, the court determined that the contractual claims at issue fell "beyond the line drawn by the *Budinich* Court." *Id.* at 7.

CONSTITUTIONAL LAW

Second Amendment – Constitutionality of Federal Regulations Limiting the Right to Bear Arms: *National Rifle Association of America, Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185 (5th Cir. 2012)

The 5th Circuit considered what test to use when determining whether a firearms regulation violates the Second Amendment. *Id.* at 194. The court first recognized that the Supreme Court in *District of Columbia v. Heller* "made clear that the Second Amendment codified a pre-existing individual right to keep and bear arms" and that "the right to keep and bear arms [is] among those fundamental rights necessary to our system of ordered liberty, and is incorporated against the States via the Fourteenth Amendment." *Id.* at 192–93. The court noted that the 4th, 6th, and 10th Circuits have adopted a two-step inquiry, whereby courts first "determine whether the challenged law impinges upon a right protected by the Second Amendment" and then "determine whether to apply intermediate or strict scrutiny to the law" to test whether "the law survives the proper level of scrutiny." *Id.* at 194. Although the 7th Circuit rejected the two-step framework, the 5th Circuit adopted a version of the two-step approach, requiring at least "intermediate" scrutiny. *Id.* at 197–98. The 5th Circuit reasoned that rational basis

review is inappropriate for this two-step analysis because the Second Amendment confers a "specific enumerated right" and *Heller* proscribed a low bar. *Id.* at 195–96.

Eighth Amendment – Prisoner and Correctional Officer Relationships: *Wood v. Beauclair*, 692 F.3d 1041 (9th Cir. 2012)

The 9th Circuit addressed "[w]hether a prisoner can consent to a relationship with a correctional officer." *Id.* at 1046. The court noted that the 10th Circuit determined "that prisoners are incapable of consenting to sexual relationships with a prison official[,]" while the 6th and 8th circuits found that "consensual sexual relations between a prisoner and a prison guard [could exist, and therefore] did not give rise to an Eighth Amendment violation." *Id.* at 1046–48. The 9th Circuit agreed with the 10th Circuit in finding that "[t]he power dynamics between prisoners and guards make it difficult to discern consent from coercion." *Id.* at 1047. The 9th Circuit, however, "[was] concerned about the implications of removing consent as a defense for Eighth Amendment claims." *Id.* at 1048. Thus, the 9th Circuit concluded that "when a prisoner alleges sexual abuse by a prison guard . . . the prisoner is entitled to a presumption that the conduct was not consensual. The state then may rebut this presumption by showing that the conduct involved no coercive factors." *Id.* at 1049. Finally, "[u]nless the state carries its burden, the prisoner is deemed to have established the fact of non-consent." *Id.*

Equal Protection – Affirmative Action: *Coalition to Defend Affirmative Action, Integration and Immigrant Rights & Fight for Equality By Any Means Necessary v. Regents of The University of Michigan*, 701 F.3d 466 (6th Cir. 2012)

The 6th Circuit addressed whether a state constitutional amendment prohibiting affirmative action in public education, employment, and contracting violated the Equal Protection Clause of the Constitution. *Id.* at 473. The court disagreed with the 9th Circuit's assertion that voluntary bussing programs are distinguishable from race-conscious admissions policies, stating that such a conclusion is incompatible with the Supreme Court's decision in *Grutter v. Bollinger*. *Id.* at 486 n.8. The 6th Circuit instead reasoned that such a distinction is incompatible with *Grutter* because, in *Grutter*, the Supreme Court found that "narrowly-tailored race-conscious admissions programs are not inherently invidious . . . and do not work wholly to benefit of members of one group." *Id.* The majority of the 6th Circuit, therefore, declined to follow the 9th Circuit's reasoning, and held that a state constitutional amendment prohibiting affirmative action in public education, employment, and contracting violated the Equal Protection Clause of the Constitution. *Id.* at 485.

Equal Protection – Level of Scrutiny for Sexual Orientation-Based Discrimination: *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012).

The 2nd Circuit addressed whether an equal protection challenge to Section 3 of the Defense of Marriage Act ("DOMA") required heightened scrutiny. *Id.* at 181. The

dissenting opinion noted that eleven other circuits have not applied a heightened level of scrutiny to "new categories of discrimination." *Id.* at 209 (Straub, J., dissenting). Because the 2nd Circuit did not believe any precedent was directly on point, it analyzed whether the new classification qualified as a quasi-suspect class. *Id.* at 181 (majority opinion). The court reasoned that: "A) homosexuals as a group have historically endured persecution and discrimination; B) homosexuality has no relation to aptitude or ability to contribute to society; C) homosexuals are a discernible group with non-obvious distinguishing characteristics, especially in the subset of those who enter same-sex marriages; and D) the class remains a politically weakened minority." *Id.* at 181–82. The court held that the four factors support the conclusion that "homosexuals compose a class that is subject to heightened scrutiny." *Id.* at 185. The court further concluded that "the class is quasi-suspect (rather than suspect) based on the weight of the factors" and by analogy to other suspect and quasi-suspect classes. *Id.* at 185. The 2nd Circuit is the only circuit court to apply intermediate scrutiny to such a class. *Id*. at 209. For those reasons, the court found that Section 3 of DOMA violated equal protection under intermediate scrutiny and is unconstitutional. *Id.* at 188.

Retaliation Claim—Actual Affiliation Requirements: *Dye v. Office of the Racing Commission*, 702 F.3d 286 (6th Cir. 2012)

The 6th Circuit addressed "whether individuals claiming to have been retaliated against because of their political affiliation must show that they were actually affiliated with the political party or candidate at issue." *Id.* at 292. The court noted that 1st and 10th Circuits agree that perceived, rather than actual, affiliation is sufficient evidence for First Amendment political-affliction retaliation claims. *Id.* at 299. The court believed that the 3rd Circuit erroneously interpreted the Supreme Court precedent to require actual affiliation. *Id.* at 299–00. The 6th Circuit agreed with the 10th Circuit that the central inquiry is the motivation of the employer, "only relevant consideration is the impetus for the elected official's employment decision vis-a-vis the plaintiff . . . ." *Id.* at 299. In light of the Supreme Court precedent, the 6th Circuit agreed with the 1st and 10th Circuits that a retaliation claim could be based on perceived political affiliation. *Id.* at 300.

FEDERAL INCOME TAXATION

Tax Payment – Penalties: *Gustashaw v. Commissioner*, 696 F.3d 1124 (11th Cir. 2012)

The 11th Circuit addressed whether the IRS should grant a taxpayer an exception from the gross valuation misstatement penalty when the valuation basis claimed is so egregious that the entire tax benefit is disallowed. *Id.* at 1136. The court pointed out that the majority of the circuit courts, including the 1st, 2nd, 3rd, 4th, and 6th circuits, concluded that the IRS should assess a gross valuation misstatement penalty against the tax payer whose entire tax benefit was disallowed.

Id. The court rejected the interpretation of the 5th and 9th Circuits, which held that the valuation misstatement penalty against the taxpayer is not required. *Id.* The 11th Circuit noted that the 5th and 9th Circuits question the soundness of their interpretation. *Id.* The 11th Circuit acknowledged that the gross valuation misstatement penalty is but one means of penalizing the taxpayer. *Id.* at 1137–38. Thus, the 11th Circuit concluded that the IRS could still assess a gross valuation penalty against a taxpayer even when the entire tax benefit is disallowed. *Id.* at 1136.

IMMIGRATION

Child Custody – Immigration Status: *Lozano v. Alvarez*, 697 F.3d 41 (2d Cir. 2012)

The 2nd Circuit addressed whether the defense that a child who was wrongfully taken from her home country has "now settled" in the United States is subject to equitable tolling under the Hague Convention on the Civil Aspects of International Child Abduction. *Id.* at 45. The 2nd Circuit noted that the 5th, 9th, and 11th Circuits "have permitted the one-year period in Article 12 to be equitably tolled." *Id.* at 55. The 2nd Circuit, however, found that the "abducting parent's conduct may be taken into account when deciding whether a child is settled in his or her new environment," and thus, the one-year period set forth in the Hague Convention is not subject to equitable tolling. *Id.* at 51. The court observed that "a child may develop an interest in remaining in a country in which she has lived for a substantial amount of time regardless of her parents' efforts to conceal or locate her." *Id.* at 54. Disagreeing with the 5th, 9th and 11th Circuits, the 2nd Circuit held that "if more than one year has passed, a demonstration that the child is now settled in its new environment may be a *sufficient* ground for refusing to order repatriation." *Id.* 52–53.

Deportation and Removal – Reentry of an Alien: *United States v. Lopez-Solis*, No. 12-13005, 2013 U.S. App. LEXIS 1312 (11th Cir. Jan. 18, 2013)

The 11th Circuit addressed "whether the failure to advise an alien of the right to judicial review of a deportation or removal order [pursuant to 8 U.S.C. § 1326] improperly deprives the alien of the opportunity for judicial review, such that the order can be collaterally attacked in a criminal proceeding." *Id.* at *8. The 8th Circuit determined that the government has an affirmative duty to advise an alien of his right to judicial review if the deportation is later used to prove a criminal offense. *Id.* at *9. The 9th Circuit held that an alien may collaterally attack a removal order in a § 1326 proceeding if his right to appeal the removal order has not been waived. *Id.* The 2nd and 6th Circuits, in contrast, have held that immigration officials need not advise an alien of his judicial right to appeal before relying on the deportation order in a criminal proceeding, and the receipt of a final deportation order or a general explanation of a right to appeal an order is adequate. *Id.* at *9–10. The 11th Circuit agreed with the 2nd

Circuit's reasoning and held that "in an ordinary case, the receipt of a final order of removal puts an alien on notice to look for remedies of that order." *Id.* at *12.

Eligibility for Asylum – Social Visibility Test: *Rojas-Perez v. Holder*, 699 F.3d 74 (1st Cir. 2012)

The 1st Circuit addressed whether the "social visibility test," as applied by the Board of Immigrations Appeals (BIA), is a valid method for determining whether an asylum seeker is a member of a "particular social group." *Id.* at 79–80. The court noted that the 3rd and 7th circuits determined that the BIA's "application of the social visibility requirement was both unreasonable and inconsistent[,]" while the 2nd, 5th, 6th, 8th, 9th, 10th, and 11th circuits found the test "reasonable and therefore entitled to . . . deference." *Id.* at 79, 83. The 1st Circuit agreed with the 2nd, 5th, 6th, 8th, 9th, 10th, and 11th Circuits in finding that "it [was] bound by its own precedent regarding the reasonableness of the BIA's social visibility requirement[,]" and there had been no "fresh development" for the 1st Circuit to consider. *Id.* at 80–81. The court disagreed with the 3rd and 7th Circuits because "[a] panel decision may only be overturned where it is either undermined by subsequently announced controlling authority or . . . where authority that postdates the original decision . . . offers a sound reason for believing that the former panel . . . would change its collective mind." *Id.* at 81. Thus, the 1st Circuit concluded that it was valid for the BIA to rely on "social visibility as one of the requisite factors that would define a particular and legally cognizable social group under BIA precedent." *Id.* at 78, 81.

LABOR AND EMPLOYMENT

Employment Retirement Income Security Act (ERISA) – Long Term Disability ("LTD") Benefits Plan: *Colby v. United Security Insurance Co.*, 705 F.3d 58 (1st Cir. 2013)

The 1st Circuit addressed "whether, in an addiction context, a risk of relapse can be so significant as to constitute a current disability" for purposes of an ERISA LTD benefits plan. *Id.* at 59. The court noted that the 4th Circuit determined that an insurer did not abuse its discretion in denying LTD benefits to an addict at risk of relapse. *Id.* at 65. The 1st Circuit disagreed with the 4th Circuit's holding, reasoning that the ambiguities in insurance contracts must be construed against the insurer, and that the plain language of the plan did not explicitly exclude risk of relapse as a condition that could lead to sickness or disability. *Id.* at 65–66. The 1st Circuit explained that the facts of the case, namely the plain language of the specific plan and the insurer's stark refusal to consider the possibility that the risk of relapse could swell to the level of disability, required a different conclusion than the facts of the 4th Circuit case. *Id.* at 67. Thus, the 1st Circuit stated that "the desire to achieve uniformity must give way to the need to ensure that plan administrators handle claims reasonably," and concluded that the risk of

relapse can swell to the level of current disability for purposes of an LTD benefits plan. *Id.*

STATUTORY INTERPRETATION

Child Status Protection Act – Conversion & Retention of Aged-Out Derivative Beneficiaries: *De Osoio v. Mayorkas*, 695 F.3d 1003 (9th Cir. 2012)

The 9th Circuit addressed whether the Child Status Protection Act (CSPA) grants automatic conversion and priority date retention to aged-out derivative beneficiaries. *Id.* at 1006. The 5th and 2nd Circuits came to the exact opposite conclusion to this issue. *Id.* at 1010. The 9th Circuit agreed with the 5th Circuit's statutory analysis that because subsection (h)(2) explicitly encompasses both F2A visas and all derivative visas, "the statute, as a whole, clearly expresses Congress' intention about the universe of petitions covered by (h)(3)." *Id.* at 1010. In contrast, the 2nd Circuit did not find the subsections interrelated, and concluded that the appellant's petition could not be automatically converted. *Id.* at 1011. The 9th Circuit agreed with the 5th Circuit and held that "the plain language of the CSPA unambiguously grants automatic conversion and priority date retention to aged-out derivative beneficiaries." *Id.* at 1006.

Federal Arbitration Act – Definition of "Arbitration": *Bakoss v. Certain Underwriters at Lloyds of London Issuing Certificate No. 0510135*, 707 F.3d 140 (2d Cir. 2013)

The 2nd Circuit addressed whether state law or federal common law provides the definition of "arbitration" under the Federal Arbitration Act (FAA). *Id.* at 143. The court stressed the controlling presumption that Congress intends for federal law to govern a statutory term unless otherwise indicated. *Id.* The court noted that the 1st, 6th, and 10th Circuits have applied federal law and, in doing so, relied on "congressional intent to create a uniform national arbitration policy." *Id.* at 143–44. The 5th and 9th circuits, in contrast, have applied state law with little analysis and few articulated reasons. *Id.* at 144. The 2nd Circuit joined the more "compelling analysis" of the 1st, 6th, and 10th circuits and held that federal common law provides the definition of "arbitration" under the FAA because Congress did not indicate that it intended otherwise. *Id.*

CRIMINAL

CONSTITUTIONAL LAW

Immigration – Due Process and the Right to Counsel under 8 U.S.C.S. § 1362: *Montez-Lopez v. Holder*, 694 F.3d 1085 (9th Cir. 2012)

The 9th Circuit addressed "whether [a] petitioner is required to demonstrate that he was prejudiced by the lack of representation at his merits hearing" in an 8 U.S.C. § 1362 claim. *Id*. at 1090. The 2nd, 3rd, 7th, and D.C. Circuits do not require that petitioner to make a separate showing of prejudice where the court has denied petitioner the right to counsel. *Id*. The 4th, 5th, and 10th Circuits do require a showing of prejudice. *Id*. The 9th Circuit held that an alien's right to counsel is based on the "Fifth Amendment's general right to a full and fair hearing, [and] on the specific law and regulations that give aliens a right to be represented by the attorney of their choice." *Id*. at 1092. Secondly, the court held that denial of counsel affects the entirety of a proceeding in that "the absence of counsel can change an alien's strategic decisions, prevent him or her from making potentially-meritorious legal arguments, and limit the evidence the alien is able to include in the record." *Id*. The 9th Circuit sided with the 2nd, 3rd, 7th, and D.C. Circuits in concluding that the right to counsel is "so basic" and "too fundamental" that petitioner is not required prove he was prejudiced. *Id*. at 1090–92.

Legislative Power – Sex Offender Registration and Notification Act (SORNA): *United States v. Elk Shoulder*, 696 F.3d 922 (9th Cir. 2012)

The 9th Circuit addressed whether it is within Congress' constitutional power to punish individuals who have been convicted of federal sex crimes but failed to register under SORNA. *Id.* at 928. The 9th Circuit noted that the 10th Circuit found that SORNA's registration requirement and the statute that penalizes an individual for failure to register are constitutional under the Necessary and Proper Clause. *Id.* at 931. The 5th Circuit, on the other hand, found that Congress does not have the authority to apply SORNA's registration requirements retroactively to federal convicts who had been previously and unconditionally released from federal custody prior to the enaction of SORNA. *Id*. The 9th Circuit joined the 10th Circuit in finding that SORNA's registration requirement and the statute penalizing failure to register were within Congress' authority under the Necessary and Proper Clause. *Id.* at 931. Thus, the 9th Circuit concluded that SORNA's registration requirement and accompanying punitive statute did not violate the Ex Post Facto Clause or Due Process, and that it was within Congress' enumerated powers to enact SORNA. *Id.*

CRIMINAL PROCEDURE

Deprivation of Counsel – Automatic Reversal: *United States v. Ross*, 703 F.3d 856 (6th Cir. 2012).

The 6th Circuit addressed whether "automatic reversal is required when there has been deprivation of counsel at a competency hearing." *Id.* at 874. The court first noted that the 3rd Circuit had held that "retrospective analysis of a defendant's competency is not an appropriate remedy for a deprivation of counsel violation." *Id.* The court noted that the 10th Circuit and the D.C. Circuit, in similar cases, had remanded in order to make a "retroactive competency determination." *Id.* The 6th Circuit, agreeing with the 3rd

Circuit, determined that there was "no reason to create an exception" to the "established rule that complete deprivation of counsel during a critical stage warrants automatic reversal without consideration of prejudice." *Id.* Ultimately, the 6th Circuit remanded on different grounds in order to determine whether the defendant had been "unconstitutionally deprived of representation." *Id.*

Habeas Corpus – The Mailbox Rule: *Ray v. Clements*, 700 F.3d 993 (7th Cir. 2012)

The 7th Circuit addressed whether the *Houston* (or "prisoner") mailbox rule is applicable irrespective of the forum state's highest court's position on the issue. *Id*. at 995. The 7th Circuit noted that the 5th, 6th, 9th, and 10th Circuits hold that the *Houston* mailbox rule, established by the Supreme Court in *Houston v. Lack*, is determinative in whether a post-conviction motion is properly filed "unless the state clearly rejects it." *Id*. at 1002, 1004. The court also observed, however, that the 2nd Circuit holds that the New York Supreme Court's rejection of the "Houston" mailbox rule has no bearing on a federal court's application of the rule in tolling a federal statute of limitations. *Id*. at 1004. The 7th Circuit concluded "that the mailbox rule applies to a state pro se prisoner's post-conviction filings unless the state where the prisoner was convicted has clearly rejected the rule." *Id.*

GROUPING GUIDELINES

Application of the Cross-Reference: *United States v. Horton*, 693 F.3d 463 (4th Cir. 2012).

The 4th Circuit addressed whether "only the offense of a conviction need be a groupable offense or whether *both* the offense of conviction *and* the relevant conduct offense (the cross-referenced offense) must be groupable offenses in order to apply Subsection (a)(2)" of USSG § 3D1.2 ("the Grouping Guideline") when applied to cross-references for murder or other violent offenses. *Id.* at 478. The court noted that all but one of the circuits to address this issue has held that both the offense of conviction and the cross-referenced offense must be grouped. *Id*. The 4th Circuit agreed with the 5th, 6th, 7th, and 11th Circuits and held that Subsection (a)(2) only applies when both offenses are groupable. *Id.* at 479.

REMEDIES

Impermissible Double Recovery – Offsetting Forfeiture and Restitution Recovery by the Government: *United States v. Davis*, 706 F.3d 1081 (9th Cir. 2013).

The 9th Circuit addressed "whether an offset is warranted for defendants to avoid double recovery when government entities will receive both forfeiture and restitution." *Id*. at 1083. The court noted that the 5th, 7th, and 8th circuits have focused their analysis on "whether the two government recipients were 'distinct entities' in order to determine

whether a double recovery would occur." *Id*. The 9th Circuit declined to follow the 5th, 7th, and 8th Circuits' approach, holding that "[e]ven if the same government entity will receive both forfeiture and restitution, there simply is no double recovery." *Id*. The 9th Circuit reasoned that the two payments represent different types of funds, punitive and compensatory, and that "[the payments] are different in nature, kind, and purpose." *Id*. at 1084. Thus, the 9th Circuit held that it is irrelevant if two government entities are distinct for the purpose of offsetting forfeiture or restitution amounts. *Id*.

SENTENCING

Restitution – Mortgage Fraud: *United States v. Robers*, 698 F.3d 937 (7th Cir. 2012)

The 7th Circuit addressed whether, under the Mandatory Victims Restitution Act of 1986 (MVRA), the "offset value" of property stolen in a mortgage fraud scheme should be "determined based on . . . cash proceeds recouped following the sale of the collateral real estate" involved in the scheme. *Id*. at 939. The court noted that the 2nd, 5th, and 9th Circuits determined that the offset value "should be based on the fair market value of the real estate collateral *at the time the victims obtain title* to the houses." *Id*. (emphasis added). The 3rd, 8th, and 10th Circuits, however, hold that a proper offset value should be based on what the victim actually recoups after selling the collateral real estate. *Id*. at 945–46. The 7th Circuit agreed with the 3rd, 8th, and 10th Circuits, interpreting the language of the MVRA to mean that "the property" is "the property originally taken from the victim." *Id.* at 942. Further, the court disagreed with the 2nd, 5th and 9th Circuits that "obtaining title to real estate is the same as receiving cash." *Id*. at 951. The court held that "[t]he victim-lender was defrauded out of cash and wants cash back; the victim does not want the houses and they do not, in any way, benefit from possessing title to the houses until they are converted into cash upon resale." *Id.* at 942, 951. The court, therefore, found that the proper offset value of the returned property under the MVRA is determined at the time the collateral is converted into cash through a future sale, and not at the time of obtainment of title. *Id*. at 955.

Sentence Enhancement – Obstruction of Justice: *United States v. Manning*, 704 F.3d 584 (9th Cir. 2012)

The 9th Circuit addressed whether, for purposes of applying U.S. Sentencing Guidelines Manual § 3C1.1, a defendant who subsequently confesses to a pretrial services officer, after having previously made false statements with respect to an "instant offense of conviction," materially obstructed "the investigation, prosecution, or sentencing" of that instant conviction. *Id.* at 586. The court noted that the 8th Circuit determined that, where a district court is accurately informed of the nature of defendant's crime "*at the time of its sentencing determination*, . . . the [false] comment to the probation officer was not materially false as required for a sentencing enhancement under Guidelines § 3C1.1." *Id.* (internal quotation marks omitted). According to the 9th

Circuit, "it suffices that [the Defendant] fooled a Pretrial Services officer, or tried to. He need not actually have obstructed the investigation; it suffices that he attempted to do so." *Id.* Further, the court explained that "[a] false statement that, if believed, would tend to influence or affect the investigation, is material even if the defendant later comes clean." *Id.* The 9th Circuit, therefore, held that a defendant's subsequent confession to a pretrial services officer does not negate a prior materially false statement, which by itself was "obstructive with respect to the investigation, prosecution, or sentencing" of the instant conviction for purposes of § 3C1.1. *Id.* at 585.