Current Circuit Splits

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

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

CIVIL MATTERS

CRIMINAL MATTERS

CIVIL MATTERS

CONSTITUTIONAL/FEDERAL LAW

Foreign Antisuit Injunctions – Level of International Comity Deference: *Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355 (8th Cir. 2007)

The 8th Circuit adopted the "conservative approach" for determining the "level of deference afforded to international comity in determining whether a foreign antisuit injunction should issue." *Id.* at 359. The court joined the 1st, 2nd, 3rd, 6th, and D.C. Circuits in holding that "a foreign antisuit injunction will issue only if the movant demonstrates that (1) an action in a foreign jurisdiction would prevent United States jurisdiction or threaten a vital United States policy, and (2) the domestic interests outweigh concerns of international comity." *Id.* The court rejected the "liberal approach" of the 5th and 9th Circuits which "places only modest emphasis on international comity." *Id.* at 360. The court recognized that "world economic interdependence has highlighted the importance of comity, as international commerce depends to a large extent on 'the ability of merchants to predict the likely consequences of their conduct in overseas markets.'" *Id.* at 360–61. Furthermore, the court reasoned that "the Congress and the President possess greater experience with, knowledge of, and expertise in international trade and economics than does the Judiciary." *Id.* at 361. Thus "the two other branches, not the Judiciary, bear the constitutional duties related to foreign affairs." *Id.*

CIVIL PROCEDURE

Jury Selection – Delegation of Voir Dire to a Magistrate Judge: *United States v. Gonzalez*, 483 F.3d 390 (5th Cir. 2007)

The 5th Circuit determined "the conditions under which jury selection may be permissibly delegated to a magistrate judge." *Id.* at 391. The court noted that the 11th Circuit "appears to be alone in . . .

[concluding] that the defendant's personal consent is required for the delegation of jury selection to be constitutionally valid." *Id.* at 393. The 5th Circuit, agreeing with the 1st, 7th, 8th, and 9th circuits, reasoned that a "defendant does not, by waiving his right to have an Article III judge conduct voir dire, waive his right to judicial review of those proceedings. *Id.* at 394. The court stated that the "nature of the right given up is therefore limited, particularly as compared to the other rights that we have held may be waived via counsel." *Id*. In affirming the district court's judgment, the 5th Circuit held that "the right to have an Article III judge conduct voir dire is one that may be waived through the consent of counsel." *Id.*

Prudential Standing – *Conte Bros.* Test: *Phoenix of Broward, Inc. v. McDonald's Corp.*, 489 F.3d 1156 (11th Cir. 2007)

The 11th Circuit joined the 3rd and 5th Circuits in adopting the *Conte Bros.* test for determining whether a party has prudential standing to bring a false advertising claim under section 43(a) of the Lanham Act. *Id.* at 1163. The 11th Circuit noted that the *Conte Bros.* test required the court to "consider and weigh the following factors: (1) The nature of the plaintiff's alleged injury . . . ; (2) The directness or indirectness of the asserted injury; (3) The proximity or remoteness of the party to the alleged injurious conduct; (4) The speculativeness of the damages claim; and (5) The risk of duplicative damages or complexity in apportioning damages." *Id.* at 1163–64. The court concluded that this test "provides appropriate flexibility in application to address factually disparate scenarios that may arise in the future, while at the same time supplying a principled means for addressing standing under . . . section 43(a)." *Id.* at 1164. This ruling conflicts with rulings in the 7th, 9th, and 10th Circuits, which have adopted a more categorical approach, holding that the "plaintiff must be in 'actual' or 'direct' competition with the defendant and assert a 'competitive injury to establish prudential standing under section 43(a).'" *Id.* The 1st and 2nd Circuits utilize a separate, third approach, which asks "whether the plaintiff has a 'reasonable interest' to be protected against the type of harm that the Lanham Act is intended to prevent." *Id.* at 1165.

Appellate Jurisdiction – Nonparty Rights to Appeal: *Seymour v. Hug*, 485 F.3d 926 (7th Cir. 2007)

The 7th Circuit disagreed with the 1st, 3rd, 10th and Federal Circuits on the issue of whether a nonparty can appeal the rulings of a district court. *Id.* at 929. The court noted the general rule that a nonparty

cannot appeal the ruling of a district court unless the nonparty is challenging a district court's decision imposing sanctions on the attorney. *Id.* The 7th Circuit's holding limited appeals to monetary sanctions and prevented appeals involving critical comments to fall within the exception. *Id.* The court noted that its ruling created a split with other circuit courts of appeals, but reasoned that adopting a different position would result in a "breathtaking expansion in appellate jurisdiction." *Id.*

Relief from Judgment – Judicial Discretion Rule: *Ford Motor Co. v. Mustangs Unlimited, Inc.*, 487 F.3d 465 (6th Cir. 2007)

The 6th Circuit followed its own precedent by employing a judicial discretion rule to determine whether a prior order of dismissal should be set aside pursuant to Federal Rule of Civil Procedure 60(b)(6), when the non-moving party breached a term of the consent judgment. *Id.* at 470. The 6th Circuit precedent held that "a district court has a duty to vacate a prior order of dismissal when required in the interests of justice, not whenever a settlement agreement has been breached." *Id.* at 470. The court reaffirmed the "general rule that when considering a Rule 60(b)(6) motion, the trial judge should use his discretion to determine if the granting of such motion would further justice." *Id.* This ruling is in dispute with the 1st and 9th Circuits, which have held that "the material breach of a settlement agreement which has been incorporated into the judgment of a court entitles the nonbreaching party to relief from judgment under Rule 60(b)(6)." *Id.* at 469.

Attorney's Fees – Scope of Fed. R. App. P. 7 Regarding Costs of Appeal: *Azizian v. Federated Dep't Stores, Inc.*, 499 F.3d 950 (9th Cir. 2007)

The 9th circuit analyzed "whether attorney's fees are 'costs on appeal' securable under [Federal Rule of Appellate Procedure] 7." *Id.* at 954. The court noted that the issue was one of first impression, and that "[s]ix other circuits [were] split on the question." *Id.* at 955.

After assessing the reasoning of the various circuits, the 9th Circuit concluded that it sided with the "majority rule" adopted by the 2nd, 6th, and 11th Circuits. *Id.* The court thus held "that the term 'costs on appeal' in Rule 7 includes all expenses defined as 'costs' by an applicable fee-shifting statute, including attorney's fees." *Id.* at 958. The court articulated four reasons for its agreement with the rule. First, the court stated that "Rule 7 does not define 'costs on appeal.'" *Id.* Second, the court explained that "Rule 39 [regarding recoverability of costs] does not contain any 'expression[ ] to the contrary.'" *Id.* Third, although the court

noted some criticism of the rule, it ultimately agreed that the Supreme Court's interpretation of "costs" in *Marek v. Chesny* "counsels that [courts] must take feeshifting statutes at their word." *Id.* at 959. Fourth, the court reasoned that "allowing district courts to include appellate attorney's fees in estimating and ordering security for statutorily authorized costs under Rule 7 comports with their role in taxing the full range of costs of appeal." *Id.*

IMMIGRATION

Board of Immigration Appeals Authority – Motion to Reopen: *Chhetry v. United States DOJ*, 490 F.3d 196 (2d Cir. 2007)

The 2nd Circuit found that the Board of Immigration Appeals ("BIA") exceeded its authority when it denied the plaintiff's motion to reopen the denial of asylum status based on inferences it drew from news articles "without giving him the opportunity to rebut the significance of the noticed facts as applied to his particular situation." *Id.* at 200. The court followed the 9th and 10th Circuits by concluding that the "availability of a motion to reopen is an inadequate substitute for a full opportunity to rebut administratively noticed facts." *Id.* at 201. The 2nd Circuit reasoned that "the discretionary nature of motions to reopen does not guarantee a petitioner an effective ability to respond to previously-noticed facts, and petitioners are not guaranteed a stay of deportation while awaiting a decision on reopening." *Id.* This ruling is in dispute with the findings of the 5th, 7th, and D.C. Circuits, which have found that the "availability of a motion to reopen serves as a sufficient mechanism to rebut officially noticed facts." *Id.*

"Refugee" Asylum – IIRIRA: Lin v. U.S. Dep't of Justice, 494 F.3d 296 (2d Cir. 2007)

The 2nd Circuit held that section 601(a) of the Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") "does not extend automatic refugee status to spouses or unmarried partners of individuals section 601(a) expressly protects." *Id.* at 300. This decision created a circuit split with the 5th, 7th, and 9th circuits, which have deferred to the Board of Immigration Appeals ("BIA") decision from *Matter of C-Y-Z-*. *Id.* at 299. The BIA held "that an individual whose spouse has been forced to abort a pregnancy, undergone involuntary sterilization, or been

persecuted under a coercive population control program could automatically qualify for asylum as a 'refugee' . . . ." *Id.* The court further noted that the 3rd Circuit "had questioned the BIA's reading of the plain language of the amendment . . . [however] a divided panel of the 3rd Circuit recently validated the BIA's interpretation of section 601(a) over a vigorous dissent." *Id.* The court concluded that "the BIA erred in its interpretation of 8 U.S.C. § 1101(a)(42) by failing to acknowledge language in section 601(a), viewed in the context of the statutory scheme governing entitlement to asylum, that is unambiguous and that does not extend automatic refugee status to spouses or unmarried partners that section 601(a) expressly protects." *Id.* at 300.

Removal Proceedings – Grounds for Removability: *Dulal-Whiteway v. Dep't of Homeland Sec.*, 501 F.3d 116 (2nd Cir. 2007)

The 2nd Circuit addressed the question of "whether the information in a restitution order may establish that an alien's conviction was for a removable offense." *Id.* at 130. The 2nd Circuit held that "the BIA [Board of Immigration Appeals], in determining whether an alien is removable based on a conviction for an offense set forth in the INA [Immigration and Nationality Act], may rely only upon information appearing in the record of conviction that would be permissible under the *Taylor-Shepard* approach in the sentencing context." *Id.* at 131. The 2nd Circuit's decision contradicted the 1st Circuit's decision in *Conteh v. Gonzalez*, in which the 1st Circuit rejected the categorical approach, arguing that it "impermissibly elevates the government's burden in civil removal proceedings," and "conclud[ing] that the alien's restitution order . . . permitted [the court] to conclude that the alien's conviction was for removable conduct." *Id.*

However, both the 9th and 11th Circuits have agreed with the 2nd Circuit's holding on this issue. *Id.* at 133. The 2nd Circuit noted that the 9th Circuit held "removability could be established only by facts of which the alien was convicted," and the 11th Circuit found that "the restitution amount . . . could not, standing alone, establish removability by clear, unequivocal and convincing evidence." *Id.*

Immigration and Nationality Act – Jurisdictional Bar to Judicial Review: *Ali v. Gonzales*, 502 F.3d 659 (7th Cir. 2007)

The 7th Circuit considered whether it had jurisdiction to review an immigration judge's denial of a continuance in a removal proceeding under 8 U.S.C. § 1252(a)(2)(B)(ii) of the Immigration and Nationality

Act ("INA"). *Id.* at 660. The court began by noting that section 1252(a)(2)(B)(ii) precludes judicial review of any decision or action for which the authority "is specified under this subchapter to be in the discretion of the Attorney General." *Id.* The 7th Circuit disagreed with the 1st, 2nd, 3rd, 5th, 6th, and 11th Circuits, and also with the Attorney General's contention that because immigration judges were granted authority to issue continuances by the regulations rather than the statute, the "jurisdiction-stripping provision" did not apply. *Id.* at 660–61. While recognizing that its interpretation was the minority position among circuit courts considering the issue, the 7th Circuit emphasized that the immigration judge's authority to rule on a continuance was statutory; the regulations merely implemented the authority already conferred upon the judge. *Id.* at 663. The court explained that immigration judges derived authority to conduct removal proceedings from 8 U.S.C. § 1229(a), which was part of the subchapter specified in the relevant jurisdiction-stripping provision. *Id.* With such authority, the immigration judge's denial of a continuance motion was an unreviewable discretionary decision or action. *Id.* at 660–61. In explaining its agreement with the 8th and 10th Circuits, the 7th Circuit noted that it was bound by its recent decision in *Leguizamo-Medina v. Gonzales*. *Id.* at 663–64. Following its holding in *Leguizamo-Medina*, which dealt with the subsection of the INA immediately preceding the provision at issue in the instant case, the 7th Circuit concluded that since the continuance motion was a "procedural step along the way to an unreviewable final decision," the denial of the continuance was therefore also unreviewable under section 1252(a)(2)(B)(ii) of the INA. *Id.* at 664.

Immigration Board – Corroboration Rule: *Oyekunle v. Gonzales*, 498 F.3d 715 (7th Cir. 2007)

The 7th Circuit noted the split among the circuit courts regarding the validity of the Board of Immigration Appeals' ("BIA") "corroboration rule," which "empowers the immigration judge to require that credible testimony of the asylum seeker be corroborated in circumstances in which one would expect corroborating evidence to be available and presented in the immigration hearing." *Id.* at 717. The court expressed skepticism about the rule, recognizing that the 9th Circuit had found the rule invalid due to "the oddity of requiring corroboration of testimony that the immigration judge has already decided to credit." *Id.* The court noted that although the 2nd, 3rd, and 6th Circuits had all applied the rule, only the 2nd Circuit actually considered its validity. *Id.* The court recognized that "[f]or aliens who applied for asylum after May

11, 2005 . . . the rule has been superseded by a statute" that "in effect codifies the rule," however, in this case "the petitioner applied for asylum earlier than that, so the statute doesn't apply to her." *Id.* at 717–18. The court ultimately found the rule inapplicable and also noted that contrary to the BIA's determination, the corroborative evidence in the case supported the [petitioner] having a "well-founded fear of persecution if she is returned to Nigeria." *Id.* at 718.

STATUTORY INTERPRETATION

Mail Fraud Statutes – Salary Theory: *United States v. Ratcliff*, 488 F.3d 639 (5th Cir. 2007)

The 5th Circuit adhered strictly to the plain language of the statute, 18 U.S.C. § 1341, in refusing to adopt the "salary theory" employed by the 1st, 2nd and 8th Circuits. *Id.* at 646. The court noted that under the mail fraud statute, "the indictment must allege that the defendant devised or intended to devise a scheme to defraud including a scheme for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." *Id.* at 643–44. The 5th Circuit interpreted the statutory language as unambiguous and refused to adopt the alternative "salary method" offered by the government. *Id.* at 646. The court held that although its sister circuits embraced the "salary theory" for charges of mail fraud in election cases, "none of these cases contain[ed] any reasoning relevant to the issues presented in this appeal . . . ." *Id.* at 647. Therefore, the court refused to expand the meaning of the mail fraud statute to encompass the "salary theory" offered by the government "because it invites . . . a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress." *Id.* at 648.

DNA Statutes – Totality of the Circumstances Test: *Banks v. United States*, 490 F.3d 1178 (10th Cir. 2007)

The 10th Circuit recognized divergent approaches among the circuit courts when analyzing DNA-indexing statutes to determine "whether the DNA Analysis Backlog Elimination Act of 2000, as amended, passe[d] constitutional muster under the Fourth Amendment." *Id.* at 1183. The court joined the 3rd, 4th, 5th, 8th, 9th, 11th, and D.C. Circuits in applying a "reasonableness test informed by the totality of the circumstances," and rejected the "special-needs analysis" of the 2nd and

7th Circuits. *Id.* at 1182–83. The court examined the divide in the 10th Circuit's own precedent, noting that "[i]n three successive opinions, this [c]ourt applied a totality-of-the-circumstances test to substantially similar DNA-indexing statutes," but later broke from precedent in *United States v. Kimler*, and "upheld a federal DNA statute under a special-needs test." *Id.* at 1183–84. The court criticized the break from precedent, recognizing that "*Kimler* neither explained why building a DNA database is a special need, nor applied a balancing test to determine whether this special need outweighed the defendant's right to privacy." *Id.* at 1184. The court explained that although it chose to apply the "totality-of-the-circumstances test" in the instant case, the decision did "not eliminate the possibility that the Act satisfies the special-needs test" as well. *Id.*

RICO – Application to Violent but Noneconomic Criminal Activity: *United States v. Nascimento*, 491 F.3d 25 (1st Cir. 2007)

The 1st Circuit addressed the application of the "Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962, to a street gang engaged in violent, but noneconomic, criminal activity." *Id.* at 29–30. The court noted that the issue involved weighty constitutional implications that led the 6th Circuit to hold that "the RICO statute reaches an enterprise engaged in noneconomic violent crime only if the enterprise's activities have a substantial effect on interstate commerce." *Id.* at 38.

The 1st Circuit adopted a contradictory view by holding that "the normal requirements of the RICO statute apply to defendants involved with enterprises that are engaged only in noneconomic criminal activity." *Id.* at 30. The court indicated that the RICO statute applied to any "enterprise engaged in, or the activities of which affect, interstate or foreign commerce." *Id.* at 37. The court explained that "[t]here is nothing in either the statutory language or the legislative history that supports the . . . contention that these words mean different things as applied to different types of enterprises." *Id.* at 37. Furthermore, the 1st Circuit rejected the 6th Circuit's holding by noting "[t]he absence of anything in the reasoning of that court that explains how it is possible, consistent with sound canons of statutory construction, to read the word "affect" as possessing two different meanings depending upon additional facts not mentioned in the statute itself, makes the decision suspect." *Id.* at 38.

Armed Career Criminals Act – Prison Escape as Violent Felony: *United States v. Collier*, 493 F.3d 731 (6th Cir. 2007)

The 6th Circuit considered whether a prison escape constituted a "violent felony" under the Armed Career Criminals Act ("ACCA"). *Id.* at 734. The court determined that a prison escape was not a "violent felony" under the ACCA, where "a state has defined escape as complete when the defendant leaves custody without hav[ing] been discharged." *Id.* at 736. The court explained that it would be "inappropriate to speculate about the circumstances of the defendant's ultimate apprehension because that conduct [in such a circumstance] is simply not part of the offense." *Id.* The 6th Circuit concluded that "failure to report escape in a jurisdiction . . . that defines escape as complete upon leaving custody without having been discharged is not categorically a violent felony." *Id.* at 737. The court agreed with the 7th, 9th, 10th, and D.C. Circuits in formulating its decision. *Id.* at 755. However, the 6th Circuit recognized that the 1st, 3rd, and 8th Circuits previously held that any escape from custody could be considered categorically violent. *Id.*

ERISA – Remand Orders as Appealable Final Decisions: *Giraldo v. Bldg. Serv. 32B-J Pension Fund*, 502 F.3d 200 (2d Cir. 2007)

The 2nd Circuit determined whether a remand order to a plan administrator of the Employee Retirement Income Security Act ("ERISA") constituted an appealable "final decision" under 29 U.S.C. § 1291. *Id.* at 202. The court noted that the 5th, 6th, and 11th Circuits barred all such appeals, while the 7th and 9th Circuits allowed these appeals in certain circumstances. *Id.* The 2nd Circuit concluded that the district court's remand only sought further development of the factual record without any judgment affirming, modifying, or reversing the defendant's decision. *Id*. at 202–03. Failing to meet the circumstances outlined by the 7th and 9th Circuits, the 2nd Circuit held that the remand was not an appealable "final judgment" under section 1291 of ERISA. *Id.* at 203.

ERISA – Necessity of Establishing Reliance or Prejudice: *Washington v. Murphy Oil USA, Inc.*, 497 F.3d 453 (5th Cir. 2007)

The 5th Circuit addressed whether an ERISA claimant needed to establish reliance and/or prejudice based on the conflicting terms of a Summary Plan Description ("SPD"). *Id.* at 457–58. The court recognized

that a five-way circuit split surrounded the issue. *Id.* Specifically, the court noted that, "[t]he 3rd and 6th Circuits do not require a showing of reliance; the 2nd Circuit also does not require a showing of reliance, but does require a showing of a likelihood of prejudice, which an employer may then rebut through evidence that the deficient SPD was in effect a harmless error." *Id.* The court continued by acknowledging that the "7th and 11th Circuits require a showing of reliance while the 1st, 4th, and 10th Circuits require a showing of reliance or prejudice, though it appears that the terms 'reliance' and 'prejudice' are sometimes treated synonymously." *Id.* The 5th Circuit also noted that "the 8th Circuit requires a showing of reliance or prejudice, but only if the SPD is 'faulty.'" *Id.*

After assessing the different approaches by other circuits, the 5th Circuit endorsed the view of the 3rd Circuit, basing its holding on contract law to find "that an ERISA claimant need not show reliance or prejudice when the terms of a [Summary Plan Description] conflict with the plan itself." *Id.* Moreover, the court reasoned that its holding was "most consistent with ERISA, which is designed to protect employees; and most consistent with" the court's opinion in *Hansen v. Continental Ins. Co.*, "which refused to place the burden of conflicting SPDs on plan beneficiaries." *Id.* at 459.

ERISA – Collateral Order Doctrine: *Graham v. Hartford Life & Accident Ins. Co.*, 501 F.3d 1153 (10th Cir. 2007)

The 10th Circuit noted that the circuit courts varied on how they approached the issue of "finality in cases involving ERISA remand orders." *Id.* at 1159. The court indicated that "[t]he majority of circuits have relied on one of the analogues invoked in *Rekstad* or the collateral order doctrine in deciding whether a decision to remand a benefits decision to a plan administrator is final." *Id.* The court acknowledged that the 1st, 6th, 9th, 10th (itself), and 11th Circuits held that "an order remanding to an ERISA plan administrator for further proceedings is interlocutory in nature and therefore not immediately appealable, particularly when the district court retained jurisdiction or otherwise deferred considering the merits of the administrator's decision being reviewed." *Id. at 1160.* The 10th Circuit explained that the 6th Circuit found such a decision not final and not appealable, because "assessment of damages or awarding of other relief remain[ed] to be resolved." *Id.* at 20. However, the court also noted that the 7th Circuit held the same type of decision as final and appealable. *Id.*

The 6th Circuit indicated that its approach to the issue would vary on "a case-by-case basis applying well-settled principles governing 'final decisions.'" *Id.* at 1157. Citing *Rekstag*, the court compared the remand in that case to a summary judgment on an ERISA claim with unresolved damages, or a remand to an agency, both of which were not appealable. *Id.* However, the court also carved out an exception for urgent and important issues, holding that the "practical finality rule may be invoked when the lack of immediate review of an order for an administrative remand would violate basic judicial principles." *Id.* The court further explained that it looked at substance rather than form when making its case-by-case determination whether an order to remand was final. *Id.* at 1161.

IDEA – Congressional Intent: *Blanchard v. Morton Sch. Dist.*, 504 F.3d 771 (9th Cir. 2007)

The 9th Circuit considered whether Congress intended rights under the Individuals with Disabilities Education Act ("IDEA") to be enforceable under 42 U.S.C § 1983. *Id.* at 773–74. The court noted that the 1st, 3rd, 4th, and 10th Circuits have held that Congress did not intend IDEA rights to be enforced under the statute, while the 2nd and 7th Circuits found that Congress did so intend. *Id.* at 773–74. The court also recognized that the 8th Circuit has issued rulings both ways. *Id.* at 774. The court agreed with the 3rd Circuit's ruling in *A.W. v. Jersey City Pub. Sch.*, where that court indicated that "[t]he IDEA includes a judicial remedy for violations of any right 'relating to the identification, evaluation, or educational placement of [a] child, or the provision of a free appropriate public education to such child,'" and that "[g]iven this comprehensive scheme, Congress did not intend section 1983 to be available to remedy violations of the IDEA . . . ." *Id.* The 9th Circuit concluded that "the comprehensive enforcement scheme of the IDEA evidences Congress' intent to preclude a section 1983 claim for the violation of rights under the IDEA." *Id.* at 774–75.

Federal Tort Claims Act – Interpretation of "Other Law Enforcement Officer" Exception: *ABC v. DEF*, 500 F.3d 103 (2d Cir. 2007)

The 2nd Circuit followed "a sound minority of the courts of appeals and conclude[d] that the phrase 'other law enforcement officer' in [28 U.S.C.S.] § 2680(c) references only law enforcement officers whose function or authority are related to customs or excise functions" when it interpreted one of the exceptions to the Federal Tort Claims Act which

"bars jurisdiction for claims involving the detention of goods 'by any officer of customs or excise or any other law enforcement officer.'" *Id.* at 105, 107. The court noted that the Federal, 5th, 8th, 9th, 10th, and 11th Circuits have adopted a broad reading of the exception while the D.C., 4th, 6th, and 7th Circuits employed a narrow reading. *Id.* The 2nd Circuit ruled that because the prisoner's claim that "a prison officer negligently detained and lost his property during his transfer from one cell to another" was not barred by section 2680(c), the district court's dismissal of the prisoner's claim was vacated and the case was remanded for further proceedings. *Id.* at 105.

Bankruptcy Law – Nondischarge of Individual Debts: *Denton v. Hyman*, 502 F.3d 61 (2d Cir. 2007)

The 2nd Circuit addressed "whether a 'defalcation' under [11 U.S.C.S.] § 523(a)(4) includes all misappropriations or failures to account or only those that evince some wrong conduct." *Id.* at 66. The court recognized that the 4th, 8th, and 9th Circuits took the most lenient approach to hold "that an innocent mistake can constitute a defalcation." *Id.* at 67. However, the court noted that a "majority of Circuits addressing this issue require[d] some level of wrongful conduct in order to find a defalcation under section 523(a)(4). The 5th, 6th, and 7th Circuits require a level of fault greater than mere negligence." *Id. at 68.* In addition, the 2nd Circuit commented that the 10th circuit's standard remained ambiguous, "but at least require[d] 'some portion of misconduct.'" *Id.* at 68. The 2nd Circuit adopted the 1st Circuit's stringent standard, "holding that defalcation under section 523(a)(4) requires a showing of conscious misbehavior or extreme recklessness—a showing akin to the level of recklessness required for scienter in the securities law context." *Id.* The 2nd Circuit listed three justifications for this "extreme recklessness" standard: it "ensures that the term 'defalcation' complements but does not dilute the other terms of the provision . . . all of which require a showing of actual wrongful intent"; it "insures that the harsh sanction of non-dischargeability is reserved for those who exhibit 'some portion of misconduct'"; and it "has the virtue of ease of application since the courts and litigants have reference to a robust body of securities law." *Id.* at 68–69.

CRIMINAL MATTERS

CONSTITUTIONAL/FEDERAL LAW

Fourth Amendment – Investigatory Stops upon Reason of Completed Misdemeanor: *United States v. Moran*, 503 F.3d 1135 (10th Cir. 2007)

The 10th Circuit addressed the issue of whether the Supreme Court holding in *United States v. Hensley*, "that the Fourth Amendment permits police officers to conduct an investigatory stop if they have a 'reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony,'" extends to misdemeanors. *Id.* at 10–11. The court noted that a split existed between the 6th Circuit, which held that "[p]olice may . . . make a stop when they have reasonable suspicion of a completed felony, though not of a mere completed misdemeanor[,]" and the 9th Circuit, which ruled that "in reviewing the reasonableness of a stop to investigate a completed misdemeanor, a court must consider the nature of the misdemeanor offense in question, with particular attention to the potential for ongoing or repeated danger . . . and any risk of escalation." *Id.* at 1140–41. The court applied the Supreme Court's approach in *Hensley* and "determine[d] the constitutionality of an investigatory stop by balancing 'the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion.'" *Id.* at 1141. After its analysis, the 10th Circuit concluded that "the officers' investigatory stop . . . was reasonable in light of the particular facts and circumstances of this case." *Id.*

Habeas – Favorable-Termination Requirement for 42 U.S.C. § 1983 Claimants: *Powers v. Hamilton County Pub. Defender Comm'n*, 501 F.3d 592 (6th Cir. 2007)

The 6th Circuit adhered strictly to Supreme Court Justice Souter's analysis in *Heck v. Humphrey* and *Spencer v. Kemna* to adopt his view that the favorable-termination requirement "does not preclude [42 U.S.C.S.] § 1983 lawsuits by persons who could not have their convictions or sentences impugned through habeas review." *Id*. at 600,

602. The court noted a "distinct split of authority among the Federal Circuit Courts on this issue," explaining that the 1st, 3rd, 5th, and 8th Circuits rejected Justice Souter's analysis to instead hold that "section 1983 claimants must comply with *Heck*'s favorable-termination requirement even if habeas relief was unavailable to them." *Id.* at 602. Thus, the 6th Circuit agreed with the "logic of the United States Courts of Appeals for the 2nd, 9th, and 11th Circuits which have held that *Heck*'s favorable-termination requirement cannot be imposed against section 1983 plaintiffs who lack a habeas option for the vindication of their federal rights." *Id*. at 603.

Fourth Amendment – DNA Profiling of Felons: *United States v. Weikert*, 504 F.3d 1 (1st Cir. 2007)

The 1st Circuit employed a totality of the circumstances approach to hold that cataloguing the DNA from a felon on supervised release did not offend the Fourth Amendment. *Id.* at 15. The court noted that use of the totality of the circumstances test to judge criminal DNA cataloguing laws was the majority position among the circuits, with only the 2nd, 7th, and 10th Circuits applying the special needs test. *Id.* at 18–19. The court explained that most of the circuit decisions predated the Supreme Court decision in *Samson v. California*, where the totality of the circumstances test was applied to a search of a parolee absent suspicion. *Id.* at 8–9. The 1st Circuit noted that the circuit courts had never distinguished between supervised release, probation, and parole in the context of Fourth Amendment analysis before. *Id.* at 11. The court then rejected a distinction drawn by a 2007 decision of the 2nd Circuit that applied the special needs test after finding *Samson* only applied to parolees, not probationers. *Id.*

Federal Criminal Forfeiture Statute – Preemption: *United States v. Fleet*, 498 F.3d 1225 (11th Cir. 2007)

The 11th Circuit construed the substitute property provision of the federal criminal forfeiture statute, 21 U.S.C. § 853(p), as preempting the homestead exception under Florida's Constitution and tenancy by the entireties law. *Id.* at 1232. The court noted that the federal criminal forfeiture statute authorized the government to seize property "involved" or "traceable" to a crime specified within the statute. *Id.* at 1226. The court also indicated that, under section 853(p), the government could seize substitute property in the event that traceable property was unavailable. *Id.* However, the court recognized that the provision contradicted Florida state law protecting marital assets from forfeiture.

Id. at 1227. Ultimately, the 11th Circuit concluded that the explicit language contained within the statute provided no exception for property protected from forfeiture under state law, and that the Federal law preempted the state law. *Id.* The court's decision created a split with a 7th Circuit case that deferred to state law. *Id.* at 1231.

Immunity – Police Officer's Qualified Immunity: *Callahan v. Millard County*, 494 F.3d 891 (10th Cir. 2007)

The 10th Circuit addressed the issue of whether individual police officers were entitled to "qualified immunity derived from the "consent-once-removed" doctrine." *Id.* at 894. The court held that where an individual's constitutional rights were clearly established and violated, individual police officers were not entitled to qualified immunity. *Id*. at 899. The court recognized that "the "consent-once-removed doctrine" applied when an undercover officer entered a house at the express invitation of someone with authority to consent, established probable cause to arrest or search, and then immediately summoned other officers for assistance. *Id.* at 896. However, the court disagreed with holdings from the 6th and 7th Circuits that extended the "consent-once-removed" doctrine to confidential informants. *Id.* The court determined that there was a significant difference "between an officer and an informant summoning additional officers" to a home to conduct a search. *Id.* The 10th Circuit noted that "the invitation of an informant into a house who then in turn invites the police . . . would require an expansion of the consent exception." *Id.* at 897. The court concluded that where police officers entered into a "home based on the invitation of an informant and without a warrant, direct consent, or other exigent circumstances," the Fourth Amendment rights of the homeowner had been constitutionally violated. *Id.* at 898.

SENTENCING

Child Pornography – Sentence Enhancements: *United States v. Geiner*, 498 F.3d 1104 (10th Cir. 2007)

The 10th Circuit determined whether sentences for attempted interstate transportation of child pornography and possession of child pornography were properly enhanced under U.S.S.G. § 2G2.2(b)(3)(B), which enhanced an offense when it involved "distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain."

Id. at 1106. Specifically, the 10th Circuit determined that a broad reading of U.S.S.G. § 2G2.2(b)(3)(B) was not proper and that by sharing files on a file-sharing network, a defendant did not necessarily expect to receive a "thing of value." *Id.* at 1111. This determination was contrary to the 8th Circuit's finding that, when a defendant downloads and shares child pornography over a file-sharing network, he was presumed to do so with an expectation of receiving a "thing of value." *Id.*

STATUTORY INTERPRETATION

Appointment of Defense Counsel – Presumed Prejudice in Capital Offense Cases: *United States v. Fields*, 483 F.3d 313 (5th Cir. 2007)

The 5th Circuit recognized a circuit split between the 3rd and 4th Circuits on whether "failure to appoint second counsel under [18 U.S.C. § 3005] gives rise to an irrebuttable presumption of prejudice." *Id.* at 348. The court noted that section 3005 provided "that those charged with federal capital offenses are entitled to two lawyers, one of whom 'shall be learned in the law applicable to capital cases.'" *Id.* at 347. The court recognized that in the instant case, the defendant cited several 4th Circuit cases advocating a "presumed-prejudice approach" to support his claim that the district court erred because it "fail[ed] to consult the FPD [Federal Public Defender] before appointing capital counsel." *Id.* at 348. The court indicated, however, that the cases cited were distinguishable in that they "all involve[d] district courts' failures to appoint any second counsel." *Id.* The 5th Circuit also acknowledged the view of the 3rd Circuit, which "explicitly rejected the [4th] Circuit's presumed-prejudice approach to a court's failure to appoint second counsel." *Id.* Ultimately, the court "decline[d] to extend the [4th] Circuit's approach," and held that, "fail[ure] to consult the FPD before appointing capital counsel" did not result in a structural error or presumed prejudice. *Id.*

Aiding and Abetting – Knowledge of Prior Conviction: *United States v. Gardner*, 488 F.3d 700 (6th Cir. 2007)

The 6th Circuit concurred with 3rd Circuit precedent, holding that an aiding and abetting conviction under the felon in-possession statute [18 U.S.C. § 922(g)] could only stand if the government presented proof that the defendant knew or had "reasonable cause to know that the principal is a felon . . . ." *Id.* at 714. Rejecting the 9th Circuit's

requirement that "the government need not show that the defendant knew the principal was a felon," as well as the 7th Circuit's requirement that the defendant only "share the principal's knowledge that the principal possessed a gun," the court agreed with the 3rd Circuit that "to allow aider-and-abettor liability without requiring proof of knowledge of the status of the principal . . . would effectively circumvent the knowledge element . . . and would thus abrogate congressional intent." *Id.* at 714–15. Specifically, the 6th Circuit found that allowing a conviction for aiding and abetting to stand without knowledge of the principal's felony status would effectively negate the knowledge element written into section 922(d) (sale to a felon). *Id.* at 715.