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 March 13, 2009 and October 1, 2009. 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

Habeas Jurisdiction – Certificate of Appealability: *Willis v. Jones*, 329 F. App'x 7 (6th Cir. 2009)

Sentencing – Procedure for Undisputed Sentence Adjustment: *United States v. Jones*, 567 F.3d 712 (D.C. Cir. 2009)

Sentencing – Mandatory Victims Restitution Act of 1996 (MVRA): *United States v. Balentine*, 569 F.3d 801 (8th Cir. 2009)

Sentencing Guidelines – Effect of Prefatory Clause: *United States v. Abbott*, 574 F.3d 203 (3d Cir. 2009)

Sentencing Guidelines – Effect of Prefatory Clause: *United States v. Segarra*, 528 F.3d 1269 (11th Cir. 2009)

Sentencing Guidelines – Post-Booker Mandatory Minimum Sentence: *United States v. Doublin*, 572 F.3d 235 (5th Cir. 2009)

Sentencing Discretion – Mandatory Minimum Sentence: *United States v. Grant*, 567 F.3d 776 (6th Cir. 2009)

Supervised Release – Restitution Payments: *United States v. Baldwin*, 563 F.3d 490 (D.C. Cir. 2009)

CIVIL MATTERS

BANKRUPTCY

Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) – Allowance of Deduction for Vehicles Unencumbered by Debt or Lease: *In re Tate*, 571 F.3d 423 (5th Cir. 2009)

The 5th Circuit joined the 6th, 7th, and 10th Circuits in applying a "plain language" approach to the transportation ownership deduction of the "means test," provided for in the BAPCPA. *Id.* at 428. "The means test takes the debtor's current monthly income and reduces it by allowed deductions set forth in 11 U.S.C. § 707(b)(2)(A)(ii)-(iv)." *Id.* at 425. The transportation ownership deduction "allows the debtor to deduct . . . the debtor's applicable monthly expense amounts." *Id.* "Under the plain language approach, the vehicle ownership deduction that applies to a debtor is the one that corresponds to his geographic region and number of cars, regardless of whether that deduction is an actual expense." *Id.* at 426 (internal quotations omitted). This approach differs from the Internal Revenue Manual approach, adopted by the 8th and 9th Circuits, which disallows the vehicle ownership deduction where the debtor had not made monthly debt payments. *Id.* In choosing to follow the plain language approach to the "means test," the 5th Circuit tracked the 7th Circuit's reasoning. *Id.* at 427. The court "found the plain language approach more strongly supported by the language and logic of the statute." *Id.* Moreover, "policy considerations supported [the 7th Circuit's] interpretation because costs are associated with vehicle ownership even when no lease or loan payments are due." *Id.* at 428.

Bankruptcy Abuse and Consumer Protection Act of 2005 (BAPCPA) – Projected Disposable Income: *In re Nowlin,* 576 F.3d 258 (5th Cir. 2009)

The 5th Circuit addressed the issue of how to interpret the new definition of "disposable income" in § 1325(b)(2) in the BAPCPA and its effect on the meaning of "projected disposable income" in § 1325(b)(1)(B). *Id.* at 261. The court noted that the 8th and 10th Circuits used a flexible approach when interpreting "projected disposable income" in § 1325(b)(1), while the 9th Circuit adopted a "mechanical interpretation." *Id.* at 263–65. The 5th Circuit agreed with the 8th and 10th Circuits in finding that a flexible interpretation "accounts for the

relevant statutory language, including the phrases 'to be received in the applicable commitment period,' 'as of the effective date of the plan,' and 'will be applied to make payments.'" *Id.* at 266. The court disagreed with the 9th Circuit, finding that its interpretation of § 1325(b)(1) "fails to address this language, and overly emphasizes the modified definition of 'disposable income' without recognizing the independent significance of the word 'projected.'" *Id.* The court further stated that "[t]his word allows for calculation of future income and expenses based on present data, including evidence extrinsic to that used in the calculation of 'disposable income' under § 1325(b)(2)." *Id*. Thus, the 5th Circuit concluded that "a debtor's 'disposable income' calculated under § 1325(b)(2) and multiplied by the applicable commitment period is presumptively the debtor's 'projected disposable income' under § 1325(b)(1)(B), but that any party may rebut this presumption by presenting evidence of present or reasonably certain future events that substantially change the debtor's financial situation." *Id.*

Chapter Thirteen Bankruptcy – Taxes Payable During Pending Case: *Joye v. Franchise Tax Bd.*, 578 F.3d 1070 (9th Cir. 2009)

The 9th Circuit addressed when taxes become payable to a governmental unit while the case is pending, pursuant to 11 U.S.C. § 1305(a)(1). *Id.* at 1074. The 5th Circuit determined that taxes payable are taxes that must be paid immediately, while the Bankruptcy Appellate Panel (BAP) for the 10th Circuit found that the term payable is best construed as some time before the last permissible day to pay taxes. *Id.* at 1075. The 9th Circuit agreed with the 10th Circuit BAP in finding that Congress intended to cover a debtor's tax liability at a time prior to the point when that liability becomes legally actionable. *Id*. The 9th Circuit disagreed with the 5th Circuit that the word payable in customary usage means more than just capable of being paid, but also justly due and legally enforceable. *Id.* at 1075. Thus, the 9th Circuit concluded "only taxes incurred post-petition may be treated as post-petition claims under section 1305(a)." *Id.* at 1076.

Chapter Thirteen Bankruptcy – Monthly Expense Accounts: *In re Washburn*, 579 F.3d 934 (8th Cir. 2009)

The 8th Circuit addressed "whether 'applicable monthly expense amounts' [under 11 U.S.C. § 707(b)(2)(A)(ii)(I)] means an expense that the debtor in fact incurs or whether this term means merely the IRS-designated expense amounts listed as Local Standards applicable in a given geographic region for a debtor's number of vehicles." *Id.* at 936. The 5th and 7th Circuits held "that a debtor need not have a vehicle loan

or lease payment to claim a vehicle ownership expense amount . . . ." *Id.* The 9th Circuit held that "a debtor [is not allowed] to deduct an 'ownership cost' (as opposed to an 'operating cost') that the debtor does not have." *Id.* at 942. The court agreed with the 5th and 7th Circuits in holding that the statutory text, legislative intent and history, and policy considerations weighed in favor of the "statutory language" interpretation of the statute. *Id.* at 937–40. The court disagreed with the 9th Circuit in holding that "it is [not] appropriate to give § 707(B)(2)(A)(ii)(I) one meaning when applied in a Chapter Seven proceeding and another when applied in a Chapter Thirteen proceeding without a legislative basis for doing so." *Id.* at 940. Therefore, the 8th Circuit held that "a debtor need not in fact owe a vehicle loan or lease payment to claim a vehicle-ownership expense in accordance with § 707(b)(2)(A)(ii)(I)." *Id.* at 940.

Undue Hardship Determinations – Ripeness: *Educ. Credit Mgmt. Corp. v. Coleman*, 560 F.3d 1000 (9th Cir. 2009)

The 9th Circuit addressed "whether 'undue hardship' determinations—whereby bankruptcy courts decide whether student loans qualify for discharge—are ripe in a Chapter 13 case substantially in advance of plan completion." *Id.* at 1002–03. The 9th Circuit noted that the 4th Circuit determined that the issue of student loan dischargeability is ripe before the completion of plan payments, while the 8th and 5th Circuits found loan dischargeability is not ripe until completion. *Id.* at 1008. The 9th Circuit agreed with the 4th Circuit's approach that permits a debtor to choose the "snapshot date" for determining undue hardship, on the grounds that the text of the pertinent statute does not prohibit such an advance determination." *Id.* at 1010 (internal quotations omitted). The court disagreed with the 8th and 5th Circuits because "the factual question is whether there is undue hardship at the time of discharge, not whether there is undue hardship at the time that a § 523(a)(8) proceeding is commenced." *Id.* Thus the 9th Circuit concluded that "an undue hardship determination can be ripe substantially in advance of plan completion." *Id.* at 1008–09.

BUSINESS LAW

Fiduciary Duty – Investment Company Act of 1940 (ICA): *Gallus v. Ameriprise Fin., Inc.*, 561 F.3d 816 (8th Cir. 2009)

The 8th Circuit addressed "the scope of the fiduciary duty imposed on advisers of mutual funds by § 36(b) of the [ICA]" which states that investment advisers have a fiduciary duty when receiving compensation

for services. *Id.* at 818, 821. The court noted that the 2nd Circuit developed a standard that could be used to determine whether a fee charged by an investor "represents a charge within the range of what would have been negotiated at arm's-length in light of all the surrounding circumstances." *Id.* at 821. In considering this standard, the 2nd Circuit listed factors which take into account, among other things, the quality of the services, profitability of the fund, fees of comparable funds and independence of the board of directors. *Id.* The 3rd and 4th Circuits approved this framework to determine if an adviser has breached his or her fiduciary duty. *Id.* at 822. However, the 7th Circuit rejected this approach and instead placed the duty on the fiduciary, not the court, when determining the reasonableness of the fee, noting that "a fiduciary must make full disclosure and play no tricks but is not subject to a cap on compensation." *Id.* The 8th Circuit agreed with the 2nd Circuit's approach for determining if fees are excessive. *Id.* at 823. However, the court found the 2nd Circuit's standard flawed in its application, since the framework contemplates only one way in which the adviser's fiduciary duty can be breached. *Id.* Furthermore, the 8th Circuit noted that the size of an adviser's fee is a major factor for courts to consider and the court agreed with the 7th Circuit that "advisers [have] a duty to be honest and transparent throughout the negotiation process." *Id.* Thus, the 8th Circuit concluded that the scope of an adviser's fiduciary duty under § 36(b) depends on "both the adviser's conduct during negotiation[s] and the end result" and "[u]nscrupulous behavior with respect to either can constitute a breach of fiduciary duty." *Id.* at 823.

CIVIL PROCEDURE

Appellate Review – Waiver of Argument: *Ford-Evans v. United Space Alliance LLC*, 329 F. App'x 519 (5th Cir. 2009)

The 5th Circuit addressed whether an appellee's failure to raise an issue before the district court estops him from presenting that argument on appeal. *Id*. at 523. The court noted that both the Supreme Court and the 5th Circuit have permitted appellees to raise arguments on appeal not considered by the district court. *Id.* The court also noted, however, that the 3rd Circuit has precluded appellees from raising arguments on appeal not previously raised. The 6th and 7th Circuits have declined to rule on the issue in the specific context of appellee proffers. *Id.* at 525 n.2. Following Supreme Court precedent, the 5th Circuit found that an appellate court may consider appellee arguments not previously raised before the district court. *Id*.

Declaratory Judgment Act (DJA) – *Wilton/Brillhart* Abstention Doctrine: *R.R. St. & Co. v. Vulcan Materials Co.*, 569 F.3d 711 (7th Cir. 2009)

The 7th Circuit addressed whether the *Wilton/Brillhart* abstention doctrine, which grants "district courts . . . considerable leeway in deciding whether to entertain declaratory judgment actions even though subject matter jurisdiction is established," was an appropriate basis for dismissal of the plaintiff's claims seeking "both declaratory and non-declaratory relief." *Id.* at 714–15. The court noted that the 5th Circuit holds the *Wilton/Brillhart* abstention completely inapplicable to all claims if "an action includes a claim for declaratory relief along with any non-frivolous claim for coercive relief." *Id*. at 715. In contrast, the court further noted that the 9th Circuit first inquires as to the independent nature of the non-declaratory claims, allowing independent claims to continue after abstaining from the declaratory claims, but "[w]here the non-declaratory claims are not independent, the district court has discretion under *Wilton/Brillhart* to abstain from hearing the entire action." *Id.* at 716. The court disagreed with the 5th Circuit as "the mere fact that a litigant seeks some non-frivolous, non-declaratory relief" defeating a district court's *Wilton/Brillhart* discretion would be an undue curtailment of the unique discretion granted to a district court. *Id.* Thus, the 7th Circuit agreed with the 9th Circuit in first inquiring into the independent nature of the non-declaratory claims, allowing the continuation of independent non-declaratory claims after exercising *Wilton/Brilhart* discretion over the declaratory claims, and further allowing "the court [to] exercise its discretion under *Wilton/Brillhart* and abstain from hearing the entire action" when the non-declaratory claims are not independent claims. *Id.* at 717.

Equal Access to Justice Act (EAJA) – Attorney's Fees: *Stephens v. Astrue*, 565 F.3d 131 (4th Cir. 2009)

The 4th Circuit addressed whether attorney's fees under the EAJ "are payable directly to the claimants and not their attorneys." *Id.* at 137. The court noted that the 10th, 11th and Federal Circuits determined that fees are payable to the claimant, while the 5th, 6th and 8th Circuits found the fee award was payable to the attorney. *Id.* The 4th Circuit agreed with the 10th and 11th Circuits in finding the "statutory language clearly provides that the prevailing party, who incurred the attorney's fees, and not that party's attorney, is eligible for an award of attorney's fees." *Id.* at 138 (internal citations omitted). The court further stated "settled law that the attorney does not have standing to apply for the EAJA fees; that right belongs to the prevailing party." *Id*. (internal citations omitted).

Thus, the 4th Circuit concluded "attorney's fees under the EAJA are payable to the claimant, not the attorney, and thus are subject to administrative offset." *Id.*

Equal Access to Justice Act (EAJA) – Attorney's Fees: *Bryant v. Commissioner of Social Security*, 578 F.3d 443 (6th Cir. 2009)

The 6th Circuit addressed whether "attorney fees under the EAJA are the property of and are payable directly to [a client's] attorney." *Id.* at 446. The court noted that the 4th, 10th, and 11th Circuits found that the statutory language of the EAJA provides fees to the prevailing party who incurred the fees, and not that party's attorney. *Id.* at 447. The 8th Circuit reached the opposite conclusion, however only because "it was constrained by prior precedent." *Id*. The court disagreed with the 8th Circuit's interpretation as inconsistent with the language in two Supreme Court opinions, the EAJA's plain language, and the holdings of most other circuit courts. *Id.* at 448. Thus the 6th Circuit agreed with the 4th, 10th, and 11th Circuits in finding that under "the plain language of the EAJA . . . the prevailing party, and not her attorney, is the proper recipient of attorney fees under the EAJA." *Id*.

Federal Rule of Civil Procedure 15(c) – Statute of Limitations: *Sanders-Burns v. City of Plano,* 578 F.3d 279 (9th Cir. 2009)

The 9th Circuit held that a plaintiff may amend a complaint to name a defendant in his individual capacity, rather than in his official capacity, after the statute of limitations has run. *Id.* at 284. The court rejected the restrictive approaches of the 6th, 11th, and D.C. Circuits, and instead adopted the flexible approach of the 7th Circuit, stating that "Rule 15(c) serves as a useful guide to help, not hinder, persons who have a legal right to bring their problems before the court." *Id.* at 286. The 9th Circuit noted that the defendant-appellee "received sufficient notice of the lawsuit, was not prejudiced in preparing a defense, and knew or should have known that but for the mistake of identity he would have been named in the original pleading . . . ." *Id.* at 290. The court sought to adhere to a "sensible approach to reading a complaint so that suits may be maintained regardless of technical pleading errors as is required by Rule 15(c)." *Id*. at 289-90.

Federal Rule of Civil Procedure 60(b) – Legal Error Review: *Benson v. St. Joseph Reg'l Health Ctr.*, 575 F.3d 542 (5th Cir. 2009)

The 5th Circuit addressed "whether a legal error can be raised in a Rule 60(b) motion." *Id*. at 547. Noting a preexisting circuit split, the

court cited its rule "that a Rule 60(b) motion may be used to rectify an obvious error of law, apparent on the record." *Id*. (internal citations omitted). The 5th Circuit described its rationale in that by "focus[ing] on obvious legal error, which this court as a matter of course would correct anyway, . . . prevent[s] a Rule 60(b) motion from being used as a substitute for a timely appeal on disputed issues." *Id.* (internal citations omitted). The court concluded that the "alleged legal error is not one appropriately characterized as an obvious error of law," and in order for the court to "reach the merits of [the claim], [they] would be required to determine how the Texas Supreme Court would interpret state law. . . [which] is not the sort of legal error previously entertained pursuant to a Rule 60(b) motion." *Id.* at 548–49.

Jury Instructions – Pretext: *Browning v. U.S.*, 567 F.3d 1038 (2009)

The 9th Circuit addressed "whether a district court's refusal to give a permissive jury instruction regarding pretext in an employment discrimination case is reversible error." *Id*. at 1039. The court noted that the 2nd, 3rd, 5th, 10th and 11th Circuits determined that a permissive pretext jury instruction is not required, while the 1st, 7th and 8th Circuits held the contrary. *Id*. at 1041. The 9th Circuit reasoned that "the court told [the plaintiff] that, although it would not give her requested pretext instruction, she was free to explain to the jurors that they could find the [defendant's] reasons for firing her to be pretextual and infer an unlawful motive." *Id*. at 1042. The 9th Circuit further noted that the district court's jury instructions "set forth the essential elements that [the Plaintiff] had to prove in order to prevail." *Id*. Thus, the 9th Circuit concluded that so long as the instructions as a "whole set forth the essential elements that [one had to] prove, the court did not err in refusing to give [the] proposed pretext instructions." *Id*. at 1040.

Personal Jurisdiction – Minimum Contacts: *Touchcom, Inc. v. Bereskin & Parr*, 574 F.3d 1403 (Fed. Cir. 2009)

The Federal Circuit addressed whether "the act of filing an application for a U.S. patent at the [United States Patent and Trademark Office] is sufficient to subject the filing attorney to personal jurisdiction in a malpractice claim that is based upon that filing and is brought in federal court." *Id.* at 1409. The court noted that, as to the second requirement of Fed. R. Civ. P. 4(k)(2), "the Fifth, Seventh, Ninth, Eleventh, and DC Circuits have adopted an approach that places the burden on the defendant." *Id*. at 1414. "Under that approach, a court is entitled to use Rule 4(k)(2) to determine whether it possesses personal

jurisdiction over the defendant unless the defendant names a state in which the suit can proceed." *Id.* (internal citations omitted). The court acknowledged that the approach of the 1st and 4th Circuits requires that "a plaintiff must certify that defendant is not subject to jurisdiction in any state, at which point the burden shifts to the defendant to refute the plaintiffs certification." *Id.* The Federal Circuit agreed with the 5th, 7th, 9th, 11th, and DC Circuits, finding that "in federal cases, the purposes of Rule 4(k)(2) are best achieved when the defendant is afforded the opportunity to avoid the application of the rule only when it designates a suitable forum . . . ." *Id.* at 1415. The court disagreed with the 1st and 4th Circuits because that approach allows "some defendants to escape jurisdiction due to the excessive burden involved in making such a showing." *Id*. The could also felt that the "approach would not allow plaintiffs to plead jurisdiction in the alternative under Rule 4(k)(1)(A) and Rule 4(k)(2)." *Id.* Thus, the Federal Circuit held that "if the defendant contends that he cannot be sued in the forum state and refuses to identify any other where suit is possible, then the federal court is entitled to use Rule 4(k)(2)." *Id.*

Subject Matter Jurisdiction – Comity: *Coors Brewing Co. v. Mendez-Torres*, 562 F.3d 3 (1st Cir. 2009)

The 1st Circuit addressed "whether the principles of comity described in *U.S. Brewers* are intact after *Hibbs* . . . ." *Id.* at 16. The court noted that the 6th and 7th Circuits "have adopted a narrowed view of comity principles in light of *Hibbs.*" *Id.* The court further noted the 9th Circuit "has also suggested that *Hibbs* limited the reach of comity . . . ." *Id.* However, the 4th Circuit "has relied on *U.S. Brewers*, even after *Hibbs*, to refuse jurisdiction." *Id.* The 1st Circuit did not find the position of the 4th Circuit convincing and agreed with the 6th Circuit in finding that "to permit the broad use of comity in a situation like this one, runs squarely against *Hibbs*'s instruction that comity guts federal jurisdiction only when plaintiffs try to thwart tax collection." *Id.* at 18 (internal quotations omitted). Moreover, "an unduly broad view of comity would render an Act of Congress—the Tax Injunction Act—effectively superfluous, as its contours would never be dispositive so long as extant 'comity principles' uniformly barred challenges to state taxation." *Id.* Thus, the 1st Circuit concluded "that comity does not bar federal courts from hearing suits seeking to invalidate state tax laws that afford preferential tax treatment to third parties where such challenge would not arrest state revenue generation." *Id.*

Waiver of Counsel – Required Disclosure: *Lamay v. Astrue*, 562 F.3d 503 (2d Cir. 2009)

The 2nd Circuit addressed the issue of how much information must be disclosed to a plaintiff in order for a waiver of court-appointed counsel to be valid. *Id.* at 507. Rather than order that a court must issue more disclosure than required by 42 U.S.C. §§ 406(c) and 1383(d)(2) regarding the statutory right to counsel, the 2nd Circuit broke with the 5th, 7th, and 11th Circuits and determined that what is required under the statutes is sufficient. *Id.* at 507–09. These circuits utilize a three-part test that requires the *pro se* claimant be informed of "(1) the manner in which an attorney can aid in the proceedings, (2) the possibility of free counsel or a contingency arrangement, and (3) the limitation on attorney fees to twenty-five percent of past due benefits and required court approval of the fees." *Id.* at 507. The court disagreed with the other circuits because those circuits decided similar cases prior to the addition of greater notice requirements to 42 U.S.C. §§ 406(c) and 1383(d)(2) by Pub. L. No. 101–239. *Id.* at 508. These additional notice requirements included that the claimant be advised in writing of "(1) her 'options for obtaining [an] attorney[] to represent [her]' at her hearing, and (2) 'the availability . . . of . . . organizations which provide legal services free of charge' to 'qualifying claimants.'" *Id.* at 507. The 2nd Circuit noted that the 5th, 7th, and 11th Circuits created their three-part test for mandatory disclosures as a means of ensuring an informed waiver of counsel. *Id.* The 2nd Circuit held that the revised statute provided an adequate basis for a valid, informed waiver of court-appointed counsel. *Id.*

CONSTITUTIONAL LAW

First Amendment – Child Pornography: *United States v. Wilson*, 565 F.3d 1059 (8th Cir. 2009)

The 8th Circuit addressed "whether the First Amendment requires reading a reasonable-mistake-of-age defense" into 18 U.S.C. § 2251 (sexual exploitation of children). *Id.* at 1068. The court noted that the 9th Circuit held that "imposition of major criminal sanctions on these defendants without allowing them to interpose a reasonable-mistake-of-age-defense would choke off protected speech." *Id.* The court also noted, however, that the 5th and 11th Circuits found that the Constitution does not mandate a mistake-of-age-defense under the statute. *Id*. The court agreed with the latter circuits, and found that the statute neither contains a mens rea requirement nor permits an affirmative mistake-of-age-defense. *Id*. at 1069. Accordingly, the 8th Circuit, under the

circumstances of this case, did not contemplate the defendant's appeal on these grounds. *Id.* at 1071.

First Amendment – Freedom of Speech: *Roach v. Stouffer*, 560 F.3d 860 (8th Cir. 2009)

The 8th Circuit addressed "whether the messages contained on specialty [license] plates communicate government or private speech." *Id.* at 864. The court noted that the 4th, 7th, and 9th Circuits determined that the message on the specialty plate did not communicate government speech and, therefore, implicated private-speech rights while the 6th Circuit found that it was government speech. *Id.* at 867. The 8th Circuit agreed with the 4th, 7th, and 9th Circuits in finding that "a reasonable and fully informed observer would consider the speaker to be the organization that sponsors and the vehicle owner who displays the specialty license plate" and not the state government. *Id.* The court disagreed with the 6th Circuit's "proposition that when the government determines an overarching message and retains power to approve every word disseminated at its behest, the message must be attributed to the government for First Amendment purposes." *Id.* at 865. Thus, the 8th Circuit concluded that "messages communicated on specialty plates are private speech, not government speech." *Id.* at 868.

Substantive Due Process – Qualified Immunity: *Green v. Post*, 574 F.3d 1294 (10th Cir. 2009)

The 10th Circuit addressed whether the protections of qualified immunity afforded to officers in high-speed chases attach only when "the law was not clearly established at the time of the incident." *Id.* at 1304. The court declined to adopt the 6th, 7th, 8th, and 9th Circuits' approach applying an "intent-to-harm standard . . . to all § 1983 substantive due process claims . . . regardless of whether the . . . pursing officers [had] time to deliberate." *Id.* at 1308. The court found that "[w]hile it may have been clearly established that an officer can be liable if the plaintiffs show that he intended to harm the plaintiffs in the context of a high-speed pursuit, it was not clearly established what specific standard applied." *Id.* at 1304. The 10th Circuit concluded that the officers were entitled to qualified immunity because the law was not clearly established at the time of the incident "such that a reasonable officer in [appellant's] situation would have known that his conduct was a violation of [appellee's] constitutional rights." *Id.* at 1310.

Tenth Amendment – Standing: *United States v. Hacker*, 565 F.3d 522 (8th Cir. 2009)

The 8th Circuit addressed "whether a private individual has standing to bring a Tenth Amendment claim." *Id.* at 526. The court noted that the 1st, 2nd, 9th and 10th Circuits have concluded that private parties lack standing to raise a Tenth Amendment claim, while the 7th and 11th Circuits have permitted private parties to bring such claims. *Id.* The 8th Circuit agreed with the 1st, 2nd, 9th and 10th Circuits that their "conclusion finds support in the Court's more general standing jurisprudence." *Id.* at 527. Thus, the 8th Circuit joined "the majority of circuits and [held] that a private party does not have standing to assert that the federal government is encroaching on state sovereignty in violation of the Tenth Amendment absent the involvement of a state or its instrumentalities." *Id.* at 526.

CONTRACTS

Choice-of-Law Provision – Effect on Third Parties in Maritime *In Rem* Actions: *Triton Marine Fuels Ltd. v. M/V Pacific Chukotka*, 575 F.3d 409 (4th Cir. 2009)

The 4th Circuit addressed whether a choice-of-law provision is enforceable against a third party if such enforcement would adversely affect the rights of an entity that is not a party to the agreement. *Id.* at 414. The court noted that the 2nd Circuit will not enforce such provisions, while the 5th and 9th Circuits found no fundamental unfairness in enforcement because such provisions are "a consequence obviously contemplated by the contracting parties," and those parties agreed to have their transaction governed by the laws of the jurisdiction of which the vessel sailed into. *Id.* at 415–16. The court also reasoned that where the third party affected is the ship owner itself, it is a party that has a direct contractual relationship with the sub-charterer, the contracting party. *Id.* at 415 n.3. The 4th Circuit agreed with the 5th and 9th Circuits, finding that approach "not only well-reasoned, but . . . consistent with the holdings of the Supreme Court." *Id.* at 415. The court disagreed with the 2nd Circuit based on that court's "refus[al] to apply the law as chosen by the contracting parties after engaging in only a cursory analysis" and failure to apply Supreme Court precedent. *Id.* Thus, the 4th Circuit concluded "that absent compelling reasons of public policy, a choice-of-law provision in a maritime contract should be enforced." *Id.* at 415.

IMMIGRATION

Deportation – Retroactive Impermissibility: *Ferguson v. United States AG*, 563 F.3d 1254 (11th Cir. 2009)

The 11th Circuit addressed whether the repeal of Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") "§ 212(c) relief [has] an impermissible retroactive effect on aliens [] who were convicted of deportable criminal offenses by a jury prior to IIRIRA's effective date." *Id.* at 1258. The court noted that the 1st, 2nd, 4th, 5th, 7th, 9th and 10th Circuits "held that IIRIRA does not have an impermissible retroactive effect on aliens who relied on § 212(c) relief in deciding to go to trial" while the 3rd Circuit "does not require aliens to show reliance or a reliance interest—either objective or subjective—on § 212(c) relief and has concluded that IIRIRA's repeal of § 212(c) is impermissibly retroactive in that it attaches new legal consequences to an alien's criminal conviction." *Id.* at 1266. The court agreed with the majority of circuits in finding that §212(c) relief is not available to aliens who go to trial because they do not satisfy the reliance requirement. *Id.* at 1271. The court disagreed with the 3rd Circuit's "new legal consequence approach." *Id.* at 1270. Thus the 11th Circuit concluded "reliance is a component of the retroactivity analysis as it applies to aliens, deportable for criminal offenses, who wish to show that the repeal of § 212(c) of the IIRIRA has an impermissible retroactive effect." *Id.* at 1271.

Deportation and Removal – Recession of Adjustment of Status: *Stolaj v. Holder*, 577 F.3d 651 (6th Cir. 2009)

The 6th Circuit addressed whether "the five-year statute of limitations on rescission proceedings in [8 U.S.C.] § 1256(a) applies to removal proceedings." *Id*. at 656. The court noted that the 4th, 8th, and 9th Circuits "have rejected the argument that the five-year statute of limitations on rescission proceedings in § 1256(a) applies to removal proceedings," while the 3rd Circuit "hold that § 1256(a)'s statute of limitation applies to removal proceedings." *Id*. The 6th Circuit agreed with the former circuits, noting that § 1256(a)'s statute of limitations is not ambiguous in application to rescission proceedings only, and "[e]ven if the provision is ambiguous when charges supporting removal would also support rescission of status, the Attorney General's opinion that § 1256(a) does not apply to removal is reasonable and is entitled to deference." *Id*. at 657. Thus, the 6th Circuit concluded that § 1256(a)'s five-year statute of limitations "does not time-bar the Government from bringing removal proceedings against the defendant." *Id*.

Deportation and Removal – Motion to Reconsider: *Rosillo-Puga v. Holder*, 580 F.3d 1147 (10th Cir. 2009)

The 10th Circuit addressed the issue of whether, pursuant to the 8 C.F.R. § 1003.23(b)(1), aliens who have been removed from the United States may file a motion to reopen or reconsider their removal proceeding that impose a post-departure bar. *Id.* at 1153. The 10th Circuit declined to join the 4th Circuit's majority opinion that declared post-departure regulations invalid, and instead adopted the rationale of the 4th Circuit's dissenting opinion, holding that the regulations are valid and further found it to be implausible that "Congress would repeal the post-departure bar, without doing or even saying anything about the forty-year history of the Attorney General incorporating such a bar in his regulations." *Id.* at 1157. The 10th Circuit noted that "8 C.F.R. § 1003.23(b)(1) . . . is a valid exercise of the Attorney General's Congressionally-delegated rulemaking authority, and does not contravene 8 U.S.C. § 1229a(c)(6)(A) or (7)(A)." *Id.* at 1156. Finally, the court concluded that 8 C.F.R. § 1003.2(d) and 8 C.F.R. § 1003.23(b)(1) provide that "any departure from the United States . . . occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion." *Id*. at 1159.

Immigration and Nationality Act (INA) – Treatment as Spouse: *Lockhart v. Napolitano*, 573 F.3d 251 (6th Cir. 2009)

The 6th Circuit addressed "whether an alien-spouse whose citizen-spouse filed the necessary 'immediate relative' form under 8 U.S.C. §§ 1154, 1255(c)(4), [a Form I-130 petition] but died within two years of the qualifying marriage, nonetheless remains a 'spouse' under 8 U.S.C. § 1151(b)(2)(A)(i) and is entitled to treatment as a 'spouse' when the [Department of Homeland Security] adjudicates that alien's petition to adjust his/her status to that of a lawful permanent resident." *Id.* at 255. The court noted that the 9th Circuit determined "Congress intended a surviving alien-spouse to remain a 'spouse' under the 'immediate relative' provision despite the death of the citizen-spouse," while the 3rd Circuit found that "a surviving alien-spouse is not an immediate relative under 8 U.S.C. § 1151(b)(2)(A)(i)." *Id.* The 6th Circuit agreed with the 9th Circuit in its reading of the plain language of 8 U.S.C. § 1151(b)(2)(A)(i), where it noted the first and second sentences of the statute should be read independently, so as not to impose any "limitation[s] on the [term 'spouse'] beyond the requirement that both parties are present for the marriage ceremony." *Id.* at 256. Thus, the 6th Circuit concluded that "a surviving alien-spouse, whose citizen spouse filed a Form I-130 petition prior to his or her death, is a 'spouse' under

the 'immediate relative' provision of the [Immigration and Nationality Act]." *Id.* at 263.

Waiver of Deportation – Statutory Counterpart Test: *De la Rosa v. United States*, 579 F.3d 1327 (11th Cir. 2009)

The 11th Circuit addressed whether certain deportees who have not temporarily left the country are eligible for relief under 8 U.S.C. § 1182(c). *Id.* at 1329. The court notes a three-way split, which partly turns on the extension of § 212(c) relief to deportable aliens regardless of whether the alien had left the United States after committing a deportable act (the *Francis* rule). *Id*. at 1330. The Board of Immigration Appeals ("BIA") and the 1st, 3rd, 5th, 6th, 7th, and 8th Circuits have adopted "the *Francis* rule and have applied the categorical approach when dealing with the resulting statutory counterpart test." *Id.* at 1335. The 2nd Circuit has also "adopted the *Francis* rule but employs an offense-based approach when considering the resultant statutory counterpart test." *Id*. Finally, the 9th Circuit "has abandoned the *Francis* rule and its accompanying statutory counterpart test altogether." *Id.* The court agreed with the BIA and the 1st, 3rd, 5th, 6th, 7th, and 8th Circuits that the categorical approach better focuses on the similarity of the corresponding grounds of deportation and exclusion and avoids any examination of a petitioner's underlying offense and whether it could render him excludable under § 1182(a). *Id*. The court disagreed with the 2nd Circuit finding that an offense-based approach "rests on a more expansive view of equal protection than [the court found] palatable." *Id.* at 1337. Therefore, the 11th Circuit joined the majority of its sister circuits, holding that it will apply the *Francis* rule and adopt the categorical approach to the statutory counterpart test. *Id.*

REMEDIES

Damage Calculation – Lost Medical Benefits: *Hance v. Norfolk South Railway Co.*, 571 F.3d 511 (6th Cir. 2009)

The 6th Circuit addressed the proper method of calculating lost medical benefits by a successful Title VII plaintiff. *Id.* at 522. The court noted that the 4th Circuit has determined damages based on the policy's value, while the 7th and 9th Circuits have relied on the cost of substitute insurance coverage or actual costs of securing medical care. *Id.* The 6th Circuit agreed with 7th and 9th Circuits reasoning that more recent cases have followed that approach. *Id.* Thus, the court concluded that damages should be awarded "based on actual expenses incurred by a plaintiff in securing insurance or medical care." *Id.*

STATUTORY INTERPRETATION

American with Disabilities Act (ADA) – Private Right of Action: *Lonberg v. City of Riverside*, 571 F.3d 846 (9th Cir. 2009)

The 9th Circuit addressed whether 28 C.F.R. § 35.150(d), an accompanying regulation of the ADA which "requires public entities to develop a 'transition plan' for achieving the ADA's accessibility requirements," creates a private cause of action. *Id.* at 848. The court noted that while the 10th Circuit found the regulation creates a private right of action, the 1st and 6th Circuits disagree. *Id.* at 849. Agreeing with the 1st and 6th Circuits, the 9th Circuit found that § 202 of the ADA "says nothing about a public entity's obligation to draft a detailed plan and schedule for achieving . . . meaningful access," and does not "create a private right to such a plan." *Id.* at 851. The 9th Circuit noted that "nothing in the language of § 202 indicates that a disabled person's *remedy* for the denial of meaningful access lies in . . . private enforcement." *Id.* The court reasoned that "a public entity may be fully compliant with § 202 without ever having drafted a transition plan, in which case, a lawsuit forcing the public entity to draft such a plan would afford the plaintiff no meaningful remedy," and that "[c]onversely, a public entity may have a transition plan that complies, . . . but may still be in violation of § 202 by, for example, failing to alter its sidewalks in a way that provides meaningful access." *Id.* at 851–52. The 9th Circuit disagreed with the 10th Circuit's application of prior Supreme Court precedent to the analysis of ADA regulations, stating that it requires a "more particularized review of the challenged regulation . . . in addition to a determination of whether the regulation effectuates the statutory right and corresponding remedy." *Id.* at 852. Thus, the 9th Circuit concluded that 28 C.F.R. § 35.150(d) is not enforceable through a private right of action. *Id.*

Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) – Tolling: *Kholi v. Wall*, 582 F.3d 147 (1st Cir. 2009)

The 1st Circuit addressed whether "a state-court post-conviction motion to reduce an imposed sentence" falls within the scope of the limitations tolling provision of the AEDPA. *Id.* at 149. The court noted that the 3rd, 4th, and 11th Circuits determined that such a motion, like a plea for discretionary leniency, does not give rise to tolling, while the 10th Circuit found that it did. *Id.* The 1st Circuit agreed with the 10th Circuit in finding a state-court post-conviction motion, even one akin to a plea for discretionary leniency, is obviously a motion that seeks review

of the convict's sentence, which is exactly what the plain language of the AEDPA contemplates as a tolling mechanism. *Id.* at 152. The court disagreed with the 4th Circuit's textual analysis because the 4th Circuit's reading of the statute would read words out of the statute, allowing it to incorrectly conclude that state post-conviction motions did not implicate tolling. *Id.* at 153. The court also disagreed with the 3rd and 11th Circuits as to whether Congress intended such motions to toll limitations. Both circuits noted that Congress intended to encourage the exhaustion of state remedies and safeguarding the finality of state-court judgments, holding that post-conviction motions did not induce tolling controverts those intentions. *Id.* at 154. Thus the 1st Circuit concluded that "a state post-conviction motion to reduce an imposed sentence that seeks purely discretionary leniency and does not challenge the validity of the conviction or sentence acts as a tolling mechanism within the purview of" the AEDPA. *Id.* at 156.

Fair Labor Standards Act (FLSA) – Retaliation Provision:
Kasten v. Saint-Gobain Performance Plastics Corp., 570 F.3d 834 (7th Cir. 2009)

The 7th Circuit addressed "whether unwritten, purely verbal complaints are protected activity" under the retaliation provision of the FLSA. *Id.* at 838. The court first noted that the FLSA's retaliation provision prohibits discharging an employee because "such employee has *filed* any complaint." *Id.* The court noted that the 4th and 2nd Circuits have found that verbal complaints were not protected activity, while the 6th, 8th and 11th Circuits have found that they are. *Id.* at 839. The court agreed with the 4th Circuit in finding that unwritten, purely verbal complaints are not protected activity, because "[t]he use of the verb 'to file' connotes the use of a writing." *Id.* The court also agreed with the 4th Circuit's interpretation of the testimony clause of the FLSA's retaliation provision, prohibiting retaliation for testimony "given or about to be given but *not for an employee's voicing of a position* on working conditions in opposition to an employer." *Id.* (emphasis in original). The court disagreed with the 6th, 8th, and 11th Circuits, [finding that they interpreted] the FLSA's retaliation provision too broadly, contrary to congressional intent. *Id.* at 840. Thus, the 7th Circuit concluded that the FLSA's use of the phrase "file any complaint" requires an employee to submit a written complaint, and therefore unwritten verbal complaints are not protected activity. *Id.*

False Claims Act (FCA) – Materiality: *United States ex rel Longhi v. Lithium Power Techs., Inc.*, 575 F.3d 458 (5th Cir. 2009)

The 5th Circuit addressed what constitutes "the proper standard for assessing the materiality of a false statement under the [False Claims Act's] civil-liability provisions." *Id*. at 468. The 5th Circuit stated that previously, "five judges of this Court suggested that outcome materiality is the correct standard, explaining that a statement is material only if it actually affects the government's decision to pay." *Id*. at 469. However, the 5th Circuit agreed with the government that the "outcome and claim materiality definitions unnecessarily narrow the 'natural tendency to influence or capable of influencing' test, which is unambiguous and easily applied." *Id.* The court instead adopted the 4th and 6th Circuits' "'natural tendency test' for materiality, which focuses on the potential effect of the false statement when it is made rather than on the false statement's actual effect after it is discovered . . . because it is more consistent with the plain meaning of the FCA." *Id*. at 470 (internal citation omitted). The 5th Circuit noted that "the [8]th Circuit has adopted the more restrictive 'outcome materiality test,'" but chose to adopt the broader view, concluding that "[a]ll that is required under the test for materiality, therefore, is that the false or fraudulent statements have the potential to influence the government's decisions." *Id*. (internal citation omitted).

False Claims Act (FCA) – Qui Tam Action: *Glaser v. Wound Care Consultants, Inc.*, 570 F.3d 907 (7th Cir. 2009)

The 7th Circuit revisited the proper interpretation of the phrase "based upon" under the FCA, which provides a jurisdictional bar to a qui tam action when a FCA relator's allegations are based upon information about an alleged fraud that is already publicly disclosed. *Id.* at 909. The 7th Circuit had previously defined "based upon" to mean allegations dependent "essentially upon publicly disclosed information and . . . actually derived from such information." *Id.* The court noted that the 4th Circuit follows its original approach, but that the 2nd, 3rd, 5th, 6th, 8th, 9th, 10th, and D.C. Circuits have adopted the approach that "a lawsuit is based upon publicly disclosed allegations when the relator's allegations and the publicly disclosed allegations are substantially similar." *Id.* at 915. In overturning its own precedent, the court reasoned that its "interpretation of 'based upon' as meaning 'actually derived from' renders the original-source exception superfluous and ignores the exception's role in balancing the FCA's competing policy goals." *Id.* at 920. The court further reasoned that the majority interpretation "treats

the question of whether a lawsuit is 'based upon' a public disclosure as a 'threshold analysis . . . intended to be a quick trigger for the more exacting original source analysis.'" *Id.* Thus, the 7th Circuit concluded that under the FCA, a relator's complaint is "based upon" publicly disclosed allegations or transactions "when the allegations in the relator's complaint are substantially similar to publicly disclosed allegations." *Id.*

Permissible Time Period for Competency Evaluations – Speedy Trial Act: *United States v. Tinklenberg*, 579 F.3d 589 (6th Cir. 2009)

The 6th Circuit addressed "[w]hether the ten day limit in [18 U.S.C.] § 3161(h)(1)(F) [the Speedy Trial Act] applies to the time in which a defendant is transported to a place of examination pursuant to a court's competency evaluation order." *Id.* at 596. The court noted that the 1st and 5th Circuits have held that "an unreasonable delay in the transportation of the defendant for a competency determination is not excludable," while the 2nd Circuit found that "*any* delay associated with a competency determination from the date of the order directing the evaluation until the completion of the competency hearing, including delay from transporting a defendant for the evaluation, is excludable." *Id.* (emphasis in original). The 6th Circuit agreed with the 1st and 5th Circuits in finding that "all delays caused by proceedings to determine a defendant's competency are excluded, except for the time during which the defendant is supposed to be in transit, which is presumptively unreasonable if longer than ten days." *Id.* The court disagreed with the 2nd Circuit's reasoning as it "would create an internal conflict in the statute, since § 3161(h)(1)(F) expressly limits the reasonableness of the transportation period to ten days." *Id*. Thus, the 6th Circuit concluded that "a delay in transporting a defendant to a mental competency examination beyond the ten day limit imposed by § 3161(h)(1)(F) is presumptively unreasonable, and in the absence of rebutting evidence to explain the additional delay, this extra time is not excludable." *Id.*

Religious Use and Institutionalized Persons Act of 2000 (RLUIPA) – Consent to Suit for Appropriate Relief: *Van Wyhe v. Reisch*, 581 F.3d 639 (8th Cir. 2009)

The 8th Circuit addressed whether a provision of the RLUIPA, 42 U.S.C. § 2000cc-2(a), stating that "conditions the state's acceptance of federal funds, in part, on its consent to suit for 'appropriate relief,'" unambiguously extends to monetary claims. *Id.* at 653. The court first pointed out that the statutory phrase creates a private cause of action, and

is broad enough to include both injunctive relief and compensatory damages. *Id.* The court noted that the 4th Circuit has held, in the Eleventh Amendment sovereign immunity waiver context, that "appropriate relief" language falls short of waiving the state's immunity from suits for damages. *Id.* The court added that the 6th Circuit found that "RLUIPA does not contain a clear indication that Congress unambiguously conditioned receipt of federal . . . funds on a state's consent to suit for money damages," and that the 5th and 6th Circuits have expressed similar opinions on the question. *Id.* In contrast, the court noted that that the 11th Circuit had concluded that "appropriate relief" in RLUIPA encompasses monetary as well as injunctive relief. *Id*. Agreeing with the 4th, 5th, 6th, and 7th Circuits, the 8th Circuit held that RLUIPA's "appropriate relief" phrase "does not unambiguously encompass monetary damages so as to effect a waiver of sovereign immunity from suit for monetary claims . . . by acceptance of the federal money." *Id.* at 654. Disagreeing with the 11th Circuit's interpretation of the phrase, the court pointed out that the Supreme Court has rejected any idea that Eleventh Amendment state sovereign immunity could be waived absent an "unequivocal expression of elimination of sovereign immunity . . . in statutory text." *Id.* at 653. Therefore, the 8th Circuit concluded that 'appropriate relief' as phrased in RLUIPA does not extend to monetary claims. *Id.* at 654.

TAX LAW

Tax Shelters – Economic Substance Doctrine: *Klamath Strategic Inv. Fund v. United States*, 568 F.3d 537 (5th Cir. 2009)

The 5th Circuit addressed which standard should apply in deciding whether to disregard a financial or business transaction for tax shelter purposes as lacking economic reality. *Id*. at 544. The court noted that the 3rd, 10th and 11th Circuits determined that a mere lack of economic substance is sufficient to invalidate a transaction as lacking economic reality, while the 4th Circuit required both lacking economic substance and evidence that the taxpayer's sole transactional motive was tax avoidance. *Id*. The 5th Circuit agreed with the 3rd, 10th and 11th Circuits, noting that "if a transaction lacks economic substance compelled by business or regulatory realities, the transaction must be disregarded even if the taxpayers profess a genuine business purpose without tax-avoidance motivations." *Id*. Thus, the 5th Circuit concluded that the loan transactions in this case lacked economic substance and therefore disregarded for tax purposes. *Id*.

CRIMINAL MATTERS

CRIMINAL PROCEDURE

Habeas Jurisdiction – Certificate of Appealability: *Willis v. Jones*, 329 F. App'x 7 (6th Cir. 2009)

The 6th Circuit addressed whether an improperly granted certificate of appealability precludes an appellate court from exercising appellate jurisdiction over a habeas-based motion. *Id*. at 12 n.6. The court noted that the 2nd, 7th, and 10th Circuits found that even an improperly granted certificate of appealability vests jurisdiction with an appellate court, while the 3rd, 5th, 8th Circuits found that a defective certificate of appealability precludes an appellate court from exercising such jurisdiction. *Id*. The 6th Circuit agreed with the former circuits and concluded that "a certificate of appealability, even if improvidently granted, vests jurisdiction in the court of appeals." *Id*. (citations omitted).

Sentencing – Procedure for Undisputed Sentence Adjustment: *United States v. Jones*, 567 F.3d 712 (D.C. Cir. 2009)

The D.C. Circuit remanded to the district court to modify defendant's sentence when neither side disputed that an amendment to the Sentencing Guidelines called for a reduced sentence, but the government had argued that the proper procedure for the D.C. Circuit was to affirm the sentence without prejudice and "leave it to [defendant] to file a petition with the district court." *Id.* at 719. The D.C. Circuit chose not to join the 4th Circuit, which had adopted the approach favored by the government. *Id.* Instead, the D.C. Circuit joined the 1st, 3rd, 6th, 8th, 9th, and 11th Circuits in remanding "to save the defendant the 'additional step' of petitioning the district court for a sentencing modification." *Id.*

Sentencing – Mandatory Victims Restitution Act of 1996 (MVRA): *United States v. Balentine*, 569 F.3d 801 (8th Cir. 2009)

The 8th Circuit addressed as a matter of first impression "[t]he authority of a district court to order restitution beyond the 90-day limit" imposed by the MVRA. *Id*. at 803. The 8th Circuit noted that the 6th, 7th and 11th Circuits all denied restitution orders after 90 days. *Id*. In contrast, "[o]ther circuits have concluded the 90-day limit is subject to

equitable tolling if the delay in entering a restitution order is attributable to the defendant." *Id*. at 804. For example, the 10th Circuit held that while there was "a 90-day limit on making a determination of the victim's losses . . . [that limit] was subject to equitable tolling "[w]here a defendant's own conduct delayed the timely entry of a restitution order . . . ." *Id*. (internal citations omitted). Finally, the 9th and 2nd Circuits "applied harmless error review to violations of the 90-day limit, concluding the error is harmless unless the delay prejudiced the defendant's rights." *Id*. From these various holdings, the 8th Circuit noted that "these courts have concluded the procedural requirements . . . are intended to protect victims, not the victimizers . . . [and] [t]he purpose behind the statutory ninety-day limit on the determination of victims' losses is not to protect defendants from drawn-out sentencing proceedings or to establish finality; rather, it is to protect crime victims from the willful dissipation of defendants' assets." *Id*. (internal quotations omitted). The 8th Circuit thus concluded that "[a]bsent a defendant's clear showing that his substantial rights have been prejudiced by a [MVRA provision] delay, it would in fact, defeat the statutory purpose to allow a defendant to invoke this provision in order to avoid paying restitution to the victims of his crime." *Id*. (internal citation omitted).

Sentencing Guidelines – Effect of Prefatory Clause: *United States v. Abbott*, 574 F.3d 203 (3d Cir. 2009)

The 3rd Circuit addressed whether the penalty prescribed by 18 U.S.C. § 924(c) for felony possession of a firearm permits a concurrent term of imprisonment with any other term of imprisonment imposed for any other crime. *Id.* at 206. The court noted that the majority of circuits determined that "a sentence imposed for a separate offense cannot supplant or abrogate a § 924(c) sentence under the statute's prefatory clause." *Id.* The 2nd Circuit takes a minority approach holding that "where a defendant is exposed to two minimum sentences . . . only the higher minimum should apply." *Id.* at 210. (internal quotations omitted). The 3rd Circuit agreed with the majority of circuits in finding that the plain language of the statute and congressional intent "connotes a comparison between alternative minimum sentences for a violation of § 924(c), not between sentences for separate violations of § 924(c) and another statute." *Id.* at 211. This court found the 2nd Circuit's reasoning flawed as "the language of the statute . . . does not plainly suggest that a sentence under § 924(c) may be abrogated or supplanted by a greater minimum sentence that happens to be imposed for an entirely separate offense." *Id.* Thus, the 3rd Circuit concluded that the statute's prefatory

clause refers to alternative minimum sentences for violations of § 924(c) and a sentence imposed for a separate offense cannot supplant or abrogate a sentence for felony possession of a firearm under § 924 (c). *Id.*

Sentencing Guidelines – Effect of Prefatory Clause: *United States v. Segarra*, 528 F.3d 1269 (11th Cir. 2009)

The 11th Circuit addressed whether the plain language of 18 U.S.C. § 924(c) for felony possession of a firearm either prohibits or requires consecutive sentences where the defendant is convicted of both a firearm offense and another crime. *Id.* at 1270-71. The court noted that the 2nd Circuit held that it was improper to impose consecutive sentences pursuant to § 924(c) where the mandatory minimum for the underlying offense exceeds the applicable minimum under the firearm statute because the "'except' clause should be read literally and the plain language of the statute dictate[s] that the mandatory minimum would not apply to the firearm offense if any other provision of law required a higher mandatory minimum sentence." *Id.* at 1272. However, every other circuit to address the issue allows consecutive sentences for both a firearm offense and another crime. *Id*. The 11th Circuit agreed with the majority of circuits in finding the "except" clause is merely "intended to prevent consecutive mandatory minimum sentences for more than one firearm offense." *Id*. The court disagreed with the 2nd Circuit because that approach ignores the plain language of § 924(c)(1)(D)(ii), which provides that "no term of imprisonment . . . under this subsection shall run concurrently with any other term of imprisonment imposed." *Id.* at 1273. Thus, the 11th Circuit concluded that the plain language of § 924, in its entirety, dictates consecutive sentences for a § 924(c) firearm offenses and another underlying offense simultaneously because the "except" clause is only intended "to prevent consecutive mandatory minimum sentences for more than one firearm offense." *Id.* at 1272.

Sentencing Guidelines – Post-Booker Mandatory Minimum Sentence: *United States v. Doublin*, 572 F.3d 235 (5th Cir. 2009)

The 5th Circuit addressed whether *Booker* alters the mandatory character of U.S.S.G. § 1B1.10. *Id.* at 237. The court noted that the 1st, 2nd, 3rd, 4th, 7th, 8th, 10th and 11th Circuits determined that *Booker* did not affect the guidelines' mandatory character as *Booker* only applied to full sentencings, while the 9th Circuit found that *Booker* did apply to § 1B1.10, thus making the guideline advisory and not mandatory. *Id.* at 237–38. The 5th Circuit agreed with the majority of circuits in finding "there are clear and significant differences between original sentencing

proceedings and sentence modification proceedings," and that "[t]hese differences explain why *Booker* does not affect Guideline § 1B1.10." *Id.* at 238. The court disagreed with the 9th Circuit because the 9th Circuit relied on case law that was "prior to the 2008 amendments to Guideline § 1B1.10." *Id*. Thus the 5th Circuit found that *Booker* does not alter the mandatory character of U.S.S.G. § 1B1.10. *Id.*

Sentencing Discretion – Mandatory Minimum Sentence: *United States v. Grant*, 567 F.3d 776 (6th Cir. 2009)

The 6th Circuit departed from the 11th and 9th Circuits when it held that a district court judge may consider factors other than the defendant's substantial assistance to the government in reducing the sentence of a defendant sentenced to a mandatory minimum when the government has made a motion for a reduced sentence under Federal Rule of Criminal Procedure 35(b). *Id.* at 783. The 9th and 11th Circuits previously held that district courts could consider factors besides substantial governmental assistance when deciding a Rule 35(b) motion for the purposes of reducing the extent of the downward departure but district courts were prohibited from considering "any factor that may militate in favor of the reduction [of defendant's sentence] other than the defendant's substantial assistance." *Id.* at 781–82. The 6th Circuit disagreed, arguing that the plain language of Rule 35(b) "sets up the defendant's substantial assistance as simply a condition precedent to a reduction," but "does not provide any particular limitations on what factors that reduction may or may not reflect." *Id.* at 782. The court held that "[o]nce the grip of the mandatory minimum sentence is broken, the sentencing judge may consider § 3553(a), including subsection (2)(D) on rehabilitation." *Id.* at 778.

Supervised Release – Restitution Payments: *United States v. Baldwin*, 563 F.3d 490 (D.C. Cir. 2009)

The D.C. Circuit addressed whether the U.S. Probation Office has the authority to modify an inmate's monthly restitution payments while she is on supervised release. *Id.* at 491. The 4th Circuit held "that allowing probation officers to modify monthly restitution payments conflicts with 18 U.S.C. §§ 3663-3664 and Article III of the Constitution." *Id.* at 492. In contrast, the 9th Circuit held "that so long as the district court determines the total amount of restitution to be paid, it may properly allow the Probation Office to set the schedule of payments." *Id.* The D.C. Circuit noted the 7th Circuit's reasoning in a case dealing with a district court's discretion to delegate its authority to specify restitution payment schedules, in which the 7th Circuit reasoned

that since "the Probation Office['s] . . . only power derives from the court," such delegation is proper. *Id.* Thus, the D.C. Circuit aligned itself with the 7th and 9th Circuits, and split from the 4th Circuit, in holding that a court may delegate an inmate's monthly restitution payments to the U.S. Probation Office. *Id.*