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 issued between January 1, 2005 and March 31, 2005. This collection is organized first according to Civil/Criminal Matters, then by area of law.

Each summary is intended to give only the briefest overview of a current split, not a comprehensive analysis. Likewise, this compilation is by no means exhaustive, but will hopefully serve the reader well as a reference starting point.

CIVIL MATTERS

BANKRUPTCY

Due Process for Discharge - *In Re* Hanson, 397 F.3d 482 (7th Cir. 2005).

In a creditor's motion for relief from a bankruptcy court order discharging a debtor's student loan, the court noted that an adversary proceeding is required before the debtor can be discharged from student loan obligations. *Id.* at 484. The court held that due process entitled the creditor to heightened notice of the proceeding as provided by Fed. R. Bankr. P. 4009(d), and the creditor "was properly granted relief pursuant to Rule 60(b)(4)." *Id.* at 487. The court joined the 4th and 10th Circuits in concluding that due process requires heightened notice. *Id.* at 486. By contrast, the 9th Circuit holds that heightened notice of the proceeding is not required. *Id*.

Appeals of Section 363 Sales - Weingarten Nostat, Inc. v. Serv. Merch. Co., Inc., 396 F.3d 737 (6th Cir. 2005).

There is a split among the circuits as to whether § 363(m) of the Bankruptcy Code creates a *per se* rule mooting appeals absent a stay of the § 363(m) sale. *Id*. at 741 n.3. The majority of courts of appeal (1st, 2nd, 5th, 7th, 11th, 9th and D.C. Circuits) follow a *per se* rule, holding that appeals of a § 363(b) sale are moot absent a stay of that sale pending appeal. *Id*. The 3d Circuit, however, has held that failure to obtain a stay pending appeal does not dispose of the case so long as a remedy can be fashioned that does not disturb the validity of the § 363(b) sale at issue. *Id*. The 6th Circuit avoided addressing the issue holding that, "even under the more lenient standard of the 3d Circuit, the relief sought by Weingarten would have disturbed the validity of the § 363(b) sale and assignment at issue in this case." *Id*.

Non-discharge of Debts - *In re* Sicroff, No. 03-15610, 2005 WL 665251, (9th Cir. Mar. 23, 2005).

In this case, the 9th Circuit addressed a circuit split regarding elements of a test under the Bankruptcy Code. *Id.* at *5 n.4. While an arbitration judgment was being filed against him for defamation, Seth E. Sicroff filed for bankruptcy. *Id.* at *1. The 9th Circuit had to determine whether the arbitration judgment award was the type of debt that cannot be discharged under the Bankruptcy Code because it is "willful and

malicious." *Id.* at *2 (citing 11 U.S.C. § 523(a)(6) (2000)). As part of the test for malicious behavior, the 9th Circuit decided to take into account whether Sicroff's actions were "without just cause and excuse." *Id.* at *4. The circuit noted in a footnote that by doing this it was holding that the "just cause and excuse" piece of the maliciousness inquiry endured despite the Supreme Court case *Kawaauhau v. Geiger*, 523 U.S. 57 (1998). *Id.* at *5 n.4. The 5th Circuit had determined that *Geiger* disposed of the "just cause and excuse" element, but the 9th Circuit "disagree[d] with that interpretation, which was based on reasoning that conflates the elements of willfulness and malice in contravention of our clear precedents." *Id.*

Priority for Workers' Compensation Insurance Premiums - Howard Delivery Serv. v. Zurich Am. Ins. Co., No. 04-1136, 2005 WL 674869, (4th Cir. Mar. 24, 2005).

In this *per curiam* opinion, the 4th Circuit elaborated upon a circuit split over whether workers' compensation insurance premiums are "contributions to an employee benefit plan" under the Bankruptcy Code and, as such, get priority status under that Code. *Id.* at *1 (quoting 28 U.S.C. § 507(a)(4) (2000)). The 9th Circuit had held that the statute at issue was "unambiguous" and that under its plain meaning, claims about such premiums concerned "contributions" and should get priority. *Id.* at *3 (citations omitted). According to the 9th Circuit line of reasoning, the statute on its face does not specify that "employee benefits plans" include only benefit plans that an employer decides to give voluntarily, as opposed to plans required by law. *Id.* Consequently, this side of the circuit split has held that "claims for unpaid workers' compensation premiums, like those for unpaid health, disability, and life insurance premiums, are entitled to priority status under the Statute." *Id*. Meanwhile, the 6th, 8th and 10th Circuits have held that the statute is ambiguous and have looked to its legislative history. *Id*. at *4. After examining the legislative history, these circuits have refused to award priority to workers' compensation plans. *Id.* The legally-required plans do "not constitute a wage substitute" and are not "employee benefit plans" under the statute. *Id.* Two of the three judges on the 4th Circuit panel here sided with the 9th Circuit, finding that claims regarding workers' compensation insurance coverage get priority as "employee benefit plans." *Id*. at *6. Of the two circuit judges, one found that the statute is unambiguous and "does not require that compensation received by an employee be a 'wage substitute,' nor does it exclude an employee benefit plan that is statutorily mandated." *Id*. at *7. The second judge, however, held that the statute was ambiguous and required a look at the

legislative history before reaching the same result regarding workers' compensation plans. *Id.* at *10-11.

CIVIL PROCEDURE

Pendent Jurisdiction - Fafel v. DiPaola, 399 F.3d 403 (1st Cir. 2005).

The 1st Circuit, in an unpublished decision, undertook a dispute over the propriety of a dismissal of a state claim in a federal action involving pendent jurisdiction. *Id.* at 405-06. Pursuant to Fed. R. of Civ. P. 68, the plaintiff agreed to dismiss his claims upon settlement. *Id.* at 406-07. When the plaintiff attempted to litigate his claims further, the district court dismissed the actions, as per the settlement agreement. *Id.* In denying plaintiff's request to reopen the proceedings, the court determined that "in protecting its Rule 68 judgment, the district court prudently confined its exercise of ancillary jurisdiction to the scope of the offer of judgment." *Id.* at 415. This approach differs with that of the 3d Circuit, which has found "similar language in orders of dismissal insufficient to incorporate terms of settlement agreements." *Id*. at 413 n.11.

Timing for Service of Foreign Process - Nylok Corp. v. Fasterner World Inc., 396 F.3d 805 (7th Cir. 2005).

In this case the 7th Circuit overturned the district court's incorrect application of a 120-day requirement for service of process to a foreign party. *Id*. at 806. In so doing, the *Nylok* court noted a split with the 9th Circuit's position of having no time limit on foreign process, instead noting "that the amount of time allowed for foreign service is not unlimited." *Id*. at 807.

Forum Non Conveniens - Dominguez-Cota v. Cooper Tire & Rubber Co., 396 F.3d 650 (10th Cir. 2005).

This case presented the 10th Circuit with the question of whether a motion for forum non conveniens raised an issue composed purely of non-merits. *Id*. at 652. If so, a reviewing court would have "the discretion to evaluate [the] threshold 'non-merit issue[]' before ruling on subject matter jurisdiction." *Id*. Otherwise, federal courts are obliged, "before proceeding with a case, . . . to examine the basis for their subject matter jurisdiction, doing so on their own motion if necessary." *Id.*

In reviewing the matter, the court noted that the issue had been reviewed by two sister circuits. *Id*. The 2d Circuit found that "because it

was not being called upon to decide a constitutional issue, it was not first required to pass on the question of jurisdiction before ruling on forum non conveniens, a creature of statute." *Id.* The D.C. Circuit agreed, noting that "what is beyond the power of courts lacking jurisdiction is adjudication on the merits, the act of deciding the case," and that a "court that dismisses on . . . non-merits grounds such as forum non conveniens . . . makes no assumption of law declaring power . . . ." *Id.* at 652-53.

The 10th Circuit disagreed with both circuits, finding that "the question of the convenience of the forum is not 'completely separate from the merits of the action.'" *Id.* at 653. The court noted that the inquiry required in a forum non conveniens involves a number of steps, and "[i]n order to apply this analysis, the court must look at the particular facts of the case, and to this extent, it must reach the merits." *Id.* at 653-54. For these reasons, the court ultimately found that it was "unable to characterize forum non conveniens as a 'non-merits' issue akin to personal jurisdiction." *Id.* at 654.

Federal Subject Matter Jurisdiction - Empire Healthchoice Assurance, Inc. v. McVeigh *ex rel.* Estate of McVeigh, No. 03-9098, 2005 WL 605777 (2d Cir. Mar 16, 2005).

The 2d Circuit affirmed that there is a lack of federal subject matter jurisdiction in an action where a private administrator of a federal employee health plan sued the estate of a beneficiary employee. *Id*. at *2. In denying a petition to rehear an earlier panel decision *en banc*, the 2d Circuit noted the contrary position of the 7th Circuit, adopted shortly after the original 2d Circuit ruling that granted such jurisdiction for reasons the 2d Circuit had "addressed and squarely rejected in [its] original opinion." *Id*.

FEDERAL AND CONSTITUTIONAL ISSUES

Section 1983: Constitutional Violations by State Officials - Bogart v. Chapell, 396 F.3d 548 (4th Cir. 2005).

In a civil action for deprivation of property pursuant to 42 U.S.C. § 1983 (2000) the dissent opined that the Supreme Court's holding in *Zinermon v. Burch* 494 U.S. 113 (1990) controlled the case at bar. *Bogart*, 396 F.3d at 563 (Williams, J. dissenting). The dissent noted that there is a split among circuits as to the scope of the Supreme Court's holding in *Zinermon. Id*. at 565 (Williams, J., dissenting). Specifically, the dissent opined that the 4th Circuit has interpreted it broadly, concluding that the *Zinermon* Court had adopted the "governmental model" of determining liability for procedural due process claims under

§ 1983. *Id.* (Williams, J., dissenting). Under this model, "§ 1983 imposes liability for all constitutional violations committed by governmental actors in the scope of their employment…." *Id.* at 564. (Williams, J., dissenting). Alternatively, the 5th and 7th Circuits read *Zinermon* narrowly to retain the "legalist model." *Id.* at 565. (Williams, J., dissenting). Under this model "§ 1983 imposes liability only if state lawmakers endorse a constitutional violation." *Id.* at 564. (Williams, J., dissenting). Ultimately, the court disagreed and held that the *Parratt/Hudson* doctrine controlled the viability of the plaintiff's claim because the action of the state's employee was random and unauthorized and because South Carolina afforded a meaningful post-deprivation remedy. *Id.* at 563.

Constitutional Procedural Due Process: Unemployment - Whalen v. Mass. Trial Court, 397 F.3d 19 (1st Cir. 2005).

In *Whalen*, the 1st Circuit ruled that a trial court clerk whose position was eliminated during budget cuts "had a right to the minimal procedural protections of notice and an opportunity to respond." *Id*. at 26. The 1st Circuit splits with "the D.C. Circuit [that] . . . held that due process did not require pre-termination hearings for more than 400 teachers who lost their jobs in a reduction-in-force . . . even though the teachers were ranked in part by their principals based on performance." *Id*.

Federal Preemption: Airline Deregulation Act - Gary v. Air Groups, Inc., 397 F.3d 183 (3d Cir. 2005).

On the issue of federal preemption of state whistleblower claims by the Airline Deregulation Act ("ADA"), the 3d Circuit reversed the district court's adoption of the more expansive 8th Circuit standard, instead siding with the newly drafted position of the 11th Circuit, ruling that the state law "retaliation claim is not preempted by the ADA." *Id*. at 190.

Off-Reservation Tribal Activity - Praire Band Potawatomi Nation v. Wagnon, No. 03-3322, 2005 WL 681785 (10th Cir. Mar. 25, 2005).

The Praire Band Potawatomi Nation issued motor vehicle registrations and titles for vehicles which admittedly may be driven off the reservation into the State of Kansas. *Id.* at *1. The State refused to recognize those registrations and titles. *Id*. The 10th Circuit disagreed with the 9th Circuit over the appropriate analysis for off-reservation tribal activity. *Id*. at *4 n.6. The 10th Circuit applied the balancing test

from White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 151 (1980). Wagnon, 2005 WL 681785, at *5-6. By contrast, the 9th Circuit holds that when tribal activity takes place off-reservation, no balancing test is necessary and the tribe is subject to non-discriminatory state law. *Id*. at *4 n.6 (citations omitted).

IMMIGRATION

Asylum Protection - Lie v. Ashcroft, 396 F.3d 530 (3d Cir. 2005).

In a case concerning the requirements for asylum protection for foreign citizens, the 3d Circuit concluded that "two isolated criminal acts, perpetrated by unknown assailants, which resulted only in the theft of some personal property and a minor injury, is not sufficiently severe to be considered [the required] persecution." *Id.* at 536. In so doing, the 3d Circuit refused to adopt the 9th Circuit's less stringent "'disfavored group' category" for granting asylum. *Id*. at 538.

Retroactive Application of IIRIRA - Faiz-Mohammad v. Ashcroft, 395 F.3d 799 (7th Cir. 2005).

In *Faiz-Mohammad* the 7th Circuit recognized two splits while deciding whether the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") could be applied retroactively to an otherwise naturalized immigrant. *Id*. at 800. The *Faiz-Mohammad* court first rejected the position of the 6th and 9th Circuits that Congress intended that the IIRIRA not be applied retroactively, instead following the 3d, 4th, 5th, 8th and 11th Circuits in holding "that there is no clear indication of Congress's intent regarding the provision's retroactive effect." *Id*. at 803. Faiz-Mohammad, an illegal immigrant who had been previously removed, reentered the country and married a United States citizen before the passage of IIRIRA. *Id*. at 800. The 7th Circuit declined to agree with the position of the 4th Circuit that there would be "no impermissible retroactive effect because the illegal reentrant could have applied for adjustment of status before IIRIRA's enactment." *Id*. at 807. It instead joined with the 8th Circuit in holding that since the defendant "had reentered the United States and married a United States citizen prior to IIRIRA's effective date, [the statute] . . . could not operate retroactively to deprive him of the right to apply for that discretionary relief." *Id*.

STATUTORY INTERPRETATION

ERISA: Protected Activities - Nicolaou v. Horizon Media, Inc., No. 03-9186, 2005 WL 700951 (2d Cir. Mar. 28, 2005).

Plaintiff Nicolaou was fired from her position with the defendant after bringing various potential violations of ERISA to the attention of the President of Horizon. *Id*. at *1. Reversing the district court's dismissal for not being a protected activity under ERISA, the 2d Circuit held that while the meeting with the President of Horizon was not a formal proceeding it was a protected activity. *Id*. at *1, *4. The 2d Circuit believed that this was in line with the 4th Circuit precedent. *Id*. (citing King v. Marriott Int'l, Inc., 337 F.3d 421, 427 (4th Cir. 2003)). The *Nicolaou* court did, however, disagree with the 4th Circuit in its basis for that decision. *Id*. While the *King* court based its holding on the phrase "testify or about to testify" the *Nicolaou* court derived its interpretation from "the respective meanings of the terms 'inquiry' and 'proceeding,' not the juxtaposition of those terms with any reference to testimony." *Id*. at *4 n.3.

ERISA: Standing Requirements - Milofsky v. Am. Airlines, Inc., No. 03-11087, 2005 WL 605754 (5th Cir. Mar 16, 2005).

In affirming the dismissal of an ERISA action brought by plan participants, the 5th Circuit noted differences with the 6th Circuit on the requirements for bringing an action. *Id*. at *5-6. The 5th Circuit finds no standing in cases having only "particularized harm targeting a specific subset of plan beneficiaries, with claims for damages to benefits members of the subclass only, and not the plan generally." *Id*. at *7. The court noted that quite to the contrary, the 6th Circuit has found "that a subclass of [p]lan participants may sue for a breach of fiduciary duty." *Id*. at *10 (quoting Kuper v. Iovenko, 66 F.3d 1447, 1453 (6th Cir. 1995)).

IDEA: "Prevailing Party" Status and Attorneys' Fees - Smith v. Fitchburg Pub. Schs., 401 F.3d 16 (1st Cir. 2005).

This case presented the 1st Circuit with the issue of the precise definition of "prevailing party," as such status grants the party the right to reasonable attorneys' fees under the Individuals with Disabilities Education Act ("IDEA"). *Id*. at 21-22 (citing 20 U.S.C. § 1415(i)(3)(B) (2000)).

The controlling case in this matter, *Buckhannon v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598 (2001), held that a

party is only conferred "prevailing" status where there is a "material alteration of the legal relationship of the parties," and there is "judicial *imprimatur* on the change." *Smith*, 401 F.3d at 21-22 (citing *Buckhannon*, 532 U.S. at 604-05). The Court went on to note that it had previously "only awarded attorney's fees where the plaintiff ha[d] received a judgment on the merits or obtained a court-ordered consent decree." *Id.* at 22.

The disagreement among the circuit courts stems from the Court's statement on "judgments on the merits" and "consent decrees," and whether the Court intended for only those forms of success to confer "prevailing party" status. *Id.* at 22-23. The majority of the circuit courts, including the 2d, 7th, and 4th, hold that *Buckhannon* does not limit "prevailing party" status to judgments on the merits and consent decrees. *Id.* (citations omitted). The 8th circuit is currently the only circuit court in disagreement, reading *Buckhannon* as a clear statement "'that a party prevails only if it receives either an enforceable judgment on the merits or a consent decree.'" *Id.* at 23 (citations omitted).

The 1st Circuit ultimately found that it did not need to answer the question left by *Buckhannon*, due to the facts of the case before them. *Id.* at 23-24.

RICO: Disgorgement of Profits - United States v. Phillip Morris USA Inc., 396 F.3d 1190 (D.C. Cir. 2005).

In an action to recover health care expenditures paid by the government for tobacco related illnesses, the government, pursuant to the Racketeer Influenced Corrupt Organizations Act (RICO), 18 U.S.C.A. § 1964(a) (West 2005), sought the disgorgement of profits. *Id.* at 1197. The court held "that the language of § 1964(a) and the comprehensive remedial scheme of RICO preclude disgorgement [of profits] as a possible remedy." *Id.* By contrast, the court noted that the 2nd Circuit holds that disgorgement is available under § 1964(a). *Id.* at 1193.

Social Security: Evidence in Appeals - Higginbotham v. Barnhart, No. 04-10197, 2005 WL 730577 (5th Cir. Mar. 31, 2005).

Plaintiff Higginbotham appealed the decision of the Social Security Commissioner denying him supplemental security income. *Id*. at *1. Higginbotham argued that the Commissioner should consider evidence that was first submitted not to the Administrative Law Judge (hereinafter "ALJ") but to the Appeals Council, which denied his petition for review. *Id*. The *Higginbotham* court identified a split among the circuits about whether the district court must consider such evidence as part of the Commissioner's "final decision." *Id*. at *2. The 3d, 6th, 7th and 11th

Circuits have held that denial of review by the Appeals Council excludes any new evidence introduced there and includes only the record before the ALJ. *Id.* at *2 (citations omitted). The 2d, 4th, 8th, 9th and 10th Circuits have ruled that evidence submitted for the first time to the Appeals Council does constitute part of the final decision and therefore should be considered by the district court. Id. (citations omitted). The 5th Circuit joined this group of circuits and held that the district court must consider evidence introduced for the first time at the Appeals Council. *Id*. at *3.

Telecommunications Act: Statutory Interpretation - MetroPCS, Inc. v. City and County of San Francisco, 400 F.3d 715 (9th Cir. 2005).

In this case, the 9th Circuit noted several different splits among the courts of appeals, all in the realm of telecommunications regulation.

The first split involved the "in writing" requirement of the Telecommunications Act ("TCA"), which declares that "[a]ny decision by a State or local government . . . to deny a request to place, construct, or modify personal wireless service facilities shall be in writing." 42 U.S.C.A. § 332(c)(7)(B)(iii) (West 2005). In *MetroPCS*, the plaintiff, a wireless telecommunications service provider, submitted (and was denied) an application to the City to install antennas on an existing light pole on the roof of a parking garage. *MetroPCS*, 400 F.3d 715 at 718-719. The court noted that two district courts in the 2d Circuit and one district court in the 7th Circuit require "local governments [to] explicate the reasons for their decision and link their conclusions to specific evidence in the written record." *Id.* at 721. The *MetroPCS* court noted that the 4th Circuit's position is directly opposite the district courts in the 2d and 7th Circuits in that it applies a "strict textualist approach to hold that merely stamping the word 'DENIED' on a zoning permit application is sufficient to meet the TCA's 'in writing' requirement." *Id*. at 721-722. The *MetroPCS* court then noted that the 1st and 6th Circuits take a middle position, "requiring local governments to 'issue a written denial separate from the written record' which 'contain[s] a sufficient explanation . . . to allow a reviewing court to evaluate the evidence in the record supporting those reasons.'" *Id*. at 722. (quoting S.W. Bell Mobile Sys., Inc. v. Todd, 244 F.3d 51, 60 (1st Cir. 2001). Ultimately, the *MetroPCS* court sided with the 1st and 6th Circuits, adopting the *Todd* standard. *Id.* at 722-23.

Another split the *MetroPCS* court identified involved another TCA provision regarding what constitutes a "general ban" on wireless services. The court noted that the 4th Circuit holds "that only 'blanket

prohibitions' and 'general bans or policies' affecting *all* wireless providers count as effective prohibition of wireless services under the TCA." *Id.* at 730 (quoting AT&T Wireless PCS, Inc. v. City Council, 155 F.3d 423, 428 (4th Cir. 1998)). The 1st Circuit takes a broader approach, which the *MetroPCS* court adopted by finding that the "prohibition analysis is . . . not limited to blanket bans or general policies prohibiting wireless services. *Id.* at 731.

Related to the "general ban" disagreement, the *MetroPCS* court noted that "a locality can run afoul of the TCA's 'effective prohibition' clause if it prevents a wireless provider from closing a 'significant gap' in service coverage" and thereafter the court declares that "there is a clear circuit split as to what constitutes a 'significant gap' in coverage." *Id.* The 2d and 3d Circuits follow the "one provider" rule, which holds that "if any single provider offers coverage in a given area, localities may preclude other providers from entering the area." *Id.* By contrast, the 1st Circuit "rejected the 'one provider' rule and held that a local regulation creates a 'significant gap' in service . . . if the *provider in question* is prevented from filling a significant gap *in its own* service network." *Id*. at 732. The district court in *MetroPCS* followed the 1st Circuit approach, which the 9th Circuit affirmed on this issue without specifically endorsing the 1st Circuit line of reasoning. *Id*. at 732-33.

The *MetroPCS* court identified yet another split regarding the showing a wireless provider must make with respect to the intrusiveness or necessity of its proposed means of closing an identified "significant gap." *Id*. at 734. The 2d and 3d Circuits "require the provider to show that 'the manner in which it proposes to fill the significant gap in service is the *least intrusive on the values that the denial sought to serve*." *Id*. (quoting APT Pittsburgh Ltd. P'ship v. Penn Township, 196 F.3d 469, 480 (3d Cir. 1999)). By contrast, the 1st and 7th Circuits hold that there must be "'no alternative sites which would solve the problem.'" *Id*. (quoting Second Generation Props., L.P. v. Town of Pelham, 313 F.3d 620, 635 (1st Cir. 2002). Ultimately, the *MetroPCS* court adopted the "least intrusive means" standard of the 2d and 3d Circuits. *Id*. at 735.

Title VII Employment Discrimination: Hostile Work Environment - Noviello v. City of Boston, 398 F.3d 76 (1st Cir. 2005).

In this case involving a Title VII employment discrimination suit by a city employee, the 1st Circuit noted that "the weight of authority supports the view that . . . the creation and perpetuation of a hostile work environment can comprise a retaliatory adverse employment action," citing the 2d, 4th, 7th, 9th, 10th, and 11th Circuits as support. *Id.* at 89.

But the court noted that the 5th and 8th Circuits hold "that a hostile work environment cannot constitute a retaliatory adverse employment action; instead, retaliation requires an 'ultimate employment decision . . . such as hiring, granting leave, discharging, promoting and compensating.'" *Id.* (quoting Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997)). Ultimately, the 1st Circuit held "explicitly that a hostile work environment, tolerated by the employer, is cognizable as a retaliatory adverse employment action for purposes of 42 U.S.C. § 2000e-3(a)," thus siding with the majority of the circuits and against the 5th and 8th Circuits. *Id.*

Trademark Infringement: Standard of Review - Adventis v. Consol. Prop. Holdings, Inc., Nos. 04-1405, 04-1411, 2005 WL 481621 (4th Cir. Mar. 2, 2005).

In an unpublished opinion, the 4th Circuit, presented with a trademark infringement dispute, noted a circuit split regarding whether a "likelihood of confusion between the marks" constituted a factual determination or a mixed fact and law determination. *Id*. at *2 n.3. The court noted that the Federal Circuit determines 'likelihood of confusion' as "'a question of law based on finding of relevant underlying facts,'" *id.* (quoting *In re* Majestic Distilling Co., 315 F.3d 1311, 1314 (Fed. Cir. 2004)), and that the 6th Circuit reviews underlying factual findings for clear error, but "likelihood of confusion" de novo. *Id.* The *Adventis* court also cited Justice White's dissent from a denial of certiorari in *McMonagle v. Northeast Women's Center, Inc*., 493 U.S. 901 (1989), *id*., in which the Justice noted the circuit split regarding the proper standard of review for the "likelihood of confusion" question. *McMonagle*, 493 U.S. at 904 (White, J., dissenting from denial of certiorari). Last, the *Adventis* court cited a 10th Circuit decision in which the court declared in a footnote that the parties to that case did not dispute the facts, "[w]ith the sole exception of likelihood of confusion," and then the 10th Circuit declared that it would draw the "underlying facts used to determine likelihood of confusion[] from the record," creating some uncertainty as to whether the 10th Circuit considers the question one of fact or law. Heartsprings, Inc. v. Heartspring, Inc., 143 F.3d 550, 553 n.2 (10th Cir. 1998).

CRIMINAL MATTERS

CRIMINAL PROCEDURE

Elements of a Retaliatory Prosecution Claim - Izen v. Catalina, 398 F.3d 363 (5th Cir. 2005).

Izen alleges that Catalina launched a sting operation in connection with possible money laundering and prosecuted him in retaliation for his history of representing criminal tax defendants. *Id*. at 9. All circuits agree that there are three requirements a plaintiff must prove in order to establish a retaliatory prosecution claim: (1) they were engaged in constitutionally protected activity, (2) the defendants' actions caused them to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) the defendants' adverse actions were substantially motivated against the plaintiffs' exercise of constitutionally protected conduct. *Id*. at 10 (citing Keenan v. Tejeda*,* 290 F.3d 252, 258 (5th Cir. 2002)). The 2d, 3d, 5th, 8th, and 11th Circuits mandate that the plaintiff prove an additional fourth requirement: an absence of probable cause to prosecute. *Id* at 12 n.7. The 6th, 7th, 10th and D.C. Circuits do not require a lack of probable cause to prosecute to succeed in a claim for retaliation. *Id*.

Motion to Dismiss an Indictment - United States v. Flores, No. 04-20109, 2005 WL 603073 (5th Cir. Mar. 16, 2005).

In this case the 5th Circuit was presented with the threshold issue of whether, when considering a motion to dismiss an indictment, a court may "look beyond the face of the indictment and rule on the merits of the charges pretrial." *Id.* at *2.

The majority of circuit courts, the 3d, 8th, 9th, and 11th, find that a court may not look beyond the fact of the indictment as doing so is effectually granting summary judgment to the party bringing the motion. *Id*. at *2 n.7 (citations omitted). The only circuit court to disagree is the 6th Circuit. *Id.*

The 5th Circuit followed the majority of the circuit courts, finding that a reviewing court may rule upon the merits of a case during a pretrial motion. *Id.* at *2.

FRAUD

Government Agencies as Victims - United States v. Milstein, 401 F.3d 53 (2d Cir. 2005).

In this case concerning the distribution of falsely branded prescription drugs with the intent to defraud, the 2d Circuit joined the 10th and 11th Circuits in "holding that a defendant may be convicted on evidence that government agencies were the subject of the intent to defraud." *Id*. at 69. The court noted that the 5th Circuit has expressed "doubt that government agencies could be victims of intent to defraud." *Id*. at 69-70.

IMMIGRATION

Hypothetical Felony - Liao v Rabbett, 398 F.3d 389 (6th Cir. 2005).

The 6th Circuit in *Liao* joined a majority of circuits by adopting "the 'hypothetical felony' approach in immigration cases to determine whether a state drug conviction is a 'drug trafficking crime' and therefore an 'aggravated felony'" that allows removal. *Id.* at 391. In so holding, it brought its position in line with that of the 2d, 3d and 9th Circuits. *Id*. The decision noted the 5th Circuit has "rejected the proposition that interpretation of the phrase 'drug trafficking crime for purposes of [21 U.S.C.] § 1101(a)(43)(B) could differ depending on the context in which it arose." *Id*. at 392-93.

Relevance of Deportation Hearing - United States v. Torres, 383 F.3d 92 (3d Cir. 2004).

The 3d Circuit reviewed the conviction of an illegal alien for unlawful entry into the country after the defendant had been convicted of previous crimes while in the United States. *Id.* at 94. Torres claimed that his prior deportation proceedings were flawed and that he was denied discretionary relief in his 1998 deportation proceedings, pursuant to 8 U.S.C. § 1182(c). *Id.* at 95. This claim was based on the Supreme Court ruling in *INS v. St. Cyr*, 533 U.S. 289 (2001). The court, in determining if Torres' hearing had been "fundamentally unfair," reviewed other circuits' holdings in the wake of the *St. Cyr* decision. *Torres*, 383 F.3d at 103. The 9th Circuit held that if defendant's removal hearing was constitutionally inadequate, the removal could not be a basis for subsequent convictions. The 4th, 5th, 7th, and 10th Circuits hold otherwise, applying a "reasonable likelihood" test to determine if a

deportation hearing, if offered, would have changed the result. The 3d Circuit affirmed judgment for Torres, relying on the majority view of the circuits. *Torres*, 383 F.3d at 106.

Reopening of Deportation Proceeding - Barrios v. Attorney Gen. of the United States, 399 F.3d 272 (3d Cir. 2005).

The 3d Circuit, in an unpublished decision, reviewed a deportation proceeding for an illegal alien who married an American citizen following a court-ordered deportation. *Id.* at 272-73. Defendant Barrios filed a motion to reopen his immigration case, but the Board of Immigration Appeals ("BIA") denied his request. *Id.* at 273. 8 U.S.C. § 1252b(e) prohibits an alien for applying for an adjustment of immigration status for five years, absent "exceptional circumstances." *Id.* at 273-74. The 9th Circuit "held that the mere filing of a motion to reopen [did] not constitute 'exceptional circumstances' within the meaning of the statute." *Id*. at 275 (quoting Shaar v. INS, 141 F.3d 953, 957 (9th Cir.1998)). The 3d Circuit agreed with the dissent in the 9th Circuit case that "the failure of the immigration authorities to act on a legitimate application for relief filed within the voluntary departure period [wa]s an exceptional circumstance 'beyond the control of the alien.'" *Id*. at 277. As a result, the court found that the Barrios' family situation warranted him receiving a hearing on his motion to reopen. *Id*. at 278.

Retroactivity of Bar to Relief - Fernandez-Vargas v. Ashcroft, 394 F.3d 881 (2005)

This case presented the 10th Circuit with the issue of whether the Immigration and Nationality Act § 241(a)(5)'s bar to relief is impermissibly retroactive when applied to an immigrant deported prior to the bar's effective date. *Id.* at 886-87.

The court notes that there is a three step test to be used when determining whether § 241(a)(5) may be applied retroactively: (1) The court must determine whether retroactive effect has been expressly prescribed by Congress; (2) where there is no express language, the "normal rules of statutory construction" are used to "ascertain the statute's temporal scope"; and (3) if congressional intent cannot be ascertained, the court considers "whether the statute has retroactive effect . . . . If a retroactive effect exists, it triggers the traditional judicial presumption against retroactivity and the new law will not be applied." *Id.* at 887. It is consideration of the second prong of this test that has resulted in a division among the circuits.

The 9th and 6th Circuits take the minority position, holding that "Congress unambiguously intended for INA § 241(a)(5) to be applied only to previously deported aliens who re-entered the country *after* the effective date of the statute." *Id.* at 888 (citations omitted) (emphasis added). In sharp contrast, the 1st, 3d, 4th, 5th, 8th and 11th Circuits have determined that "application of the normal rules of statutory construction does not reveal unambiguous congressional intent as to the temporal scope of INA § 241(a)(5)." *Id.* (citations omitted). The 10th Circuit ultimately sided with the majority position, finding that "Congress's failure to expressly state that the reinstatement statute *applied* to aliens who re-entered the country prior to its effective date, does not mean Congress therefore unambiguously intended for the statute *not* to apply to these aliens." *Id.* at 890.

SEARCH AND SEIZURE

DNA Act - United States v. Sczubelek, No. 03-2173, 2005 WL 638158 (3d Cir. Mar. 21, 2005).

This case presented the 3d Circuit with the question of whether the DNA Analysis Backlog Elimination Act of 2000 (DNA Act), 42 U.S.C. §§ 14135-14135e, is constitutionally valid under a Fourth Amendment analysis. *Id.* at *1. The DNA Act requires certain individuals entwined within the criminal justice process to give DNA samples for entry into a national database. *Id.* at *5.

Although circuit courts presented with the same issue have unanimously upheld the statute, they are split in their application of two standards: (1) the *Knights* reasonableness standard, or (2) the *Griffin* special needs exception. *Id.* at *8. The 4th, 5th, 10th and 9th Circuits have utilized the reasonableness standard, which requires an examination of "the totality of the circumstances" when considering whether a search is conducted in violation of the Fourth Amendment. *Id.* at *7-8 (citing United States v. Knights, 534 U.S. 112, 118 (2001)). The 2d and 7th Circuits have utilized the special needs exception, which holds that "special needs" make it "unnecessary to consider whether warrantless searches of probationers were otherwise reasonable within the Fourth Amendment." *Id.* at *7-8 (citing Griffin v. Wisconsin, 483 U.S. 868, 880 (1987)) (internal quotation marks omitted).

The 3d Circuit took the position of the majority of the circuits, applying the *Knights* reasonableness test, finding it "appropriate to examine the reasonableness of the taking of the sample under the more rigorous *Knights* totality of the circumstances test rather than the *Griffin* special needs exception." *Id*. at *8.

DNA Collection - Padgett v. Donald, No. 03-16527, 2005 WL 503312 (11th Cir. Mar. 4, 2005).

In this 2005 unpublished case, the 11th Circuit reviewed a Georgia statute which required convicted felons to submit DNA testing for a state database. *Id.* at *1. Defendant attacked the statute as unconstitutional, and sought an injunction to prevent the collection and analysis of his DNA sample. *Id.* at *2. In upholding the statute, the court noted a split among the circuits for review of such DNA collection laws. *Id.* at *3. The 2d, 7th, and 10th Circuits undertook a balancing test only after "finding that the statute served a special need beyond general law enforcement." *Id.* The 4th, 5th, and 9th Circuits applied a balancing test without finding any special need, a standard less-friendly to defendants. *Id.* The 11th Circuit followed the lead of the 2d, 7th, and 10th Circuits, and employed a balancing test which weighed the individual's privacy interest against the state's legitimate interests, basing its decision on the "totality of circumstances." *Id*. at *5. Under this standard, the court found that the statute did not violate the defendant's rights to be free of unreasonable search and seizure. *Id*.

Federalism - United States v. Becerra Garcia, 397 F.3d 1167 (9th Cir. 2005).

In a criminal proceeding, the court considered "whether state or federal law govern[s] the reasonableness of seizures." *Id.* at 1173. The court declared "that the reasonableness of a seizure depends exclusively on federal law." *Id.* The court reasoned that the "weight of authority establishes that the test of whether a search or seizure 'is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what may have colorably suppressed.'" *Id.* (quoting Elkins v. United States, 364 U.S. 206, 224 (1967)). Thus, the 9th Circuit concurred with at least the 4th, 5th, and 8th Circuits. *Id.* By contrast, the 2nd, 7th, and 10th Circuits consider state law when adjudicating the reasonableness of searches and seizures.

SENTENCING

Enhancement for Flight - United States v. Southerland, No. 03-11319, 2005 WL 729469 (5th Cir. Mar. 31, 2005).

This case required the Fifth Circuit to address a circuit split concerning the federal sentencing guidelines. *See id.* at *3. The defendant pled guilty to bank robbery and access device fraud and had his sentence increased due to reckless endangerment during flight. *Id*. at

*1. Addressing the question of whether a causal nexus is required between the flight and the underlying crime, the *Southerland* court noted that the 9th Circuit had assumed that such a nexus must exist and that the underlying offense caused the reckless flight. *Id*. at *3 (citing United States v. Duran*,* 37 F.3d 557 (9th Cir. 1994)). In unpublished opinions the 6th and 10th Circuits, however, have declined to hold that a nexus is required. *Id.* at *4 (citations omitted). The 5th Circuit declined to follow either approach, holding that while a nexus was required for an increased sentence due to reckless flight, there need not be causation as required by the Ninth Circuit. *Id*. at *4.

Guidelines: Statutory Interpretation - United States v. Edwards, 397 F.3d 570 (7th Cir. 2005).

This case presented the 7th Circuit with the question of whether the distinction between crack and cocaine base was meaningful for purposes of enhanced penalties under 21 U.S.C. § 841(b)(1)(A)(iii) (2000). *Id.* at 571. The court noted a "significant division among the circuits on this issue." *Id.* at 575. The *Edwards* court identified the 4th, 8th and 11th Circuits as holding "that the mandatory minimum sentence under the statute applies only to crack." *Id.* The court noted that the 6th Circuit "appears to have reached the conclusion that 'cocaine base' . . . means crack[,] . . . but the [6th Circuit] simply assumed that cocaine base and crack are equivalent in all senses." *Id.* The court also noted that the 9th Circuit's interpretation "includes[,] but might not be limited to crack." *Id.* The D.C. Circuit takes a middle ground approach, declaring "that the term 'cocaine base' should [not] be read literally to include anything that chemically constitutes base cocaine, but [it] has declined to adopt the 'crack only' definition." *Id*. Still others, namely the 2d, 3d, 5th and 10th Circuits, have concluded that the Congressional intent of using the term "cocaine base" rather than "crack" was to prevent limiting enhanced penalty applications to crack alone and thus "cocaine base" encompasses noncrack forms of cocaine base. *Id.* at 576. Finally, the *Edwards* court noted that the 1st Circuit first held that the statute only intended crack, "but on rehearing retreated from that position" to take a broader view of the term. *Id.* Ultimately, the 7th Circuit in *Edwards* reaffirmed that circuit's holding in a previous case that "cocaine base" means "crack," thereby agreeing with the 4th, 8th and 11th Circuits. *Id*. at 577.

Plain-Error Review - United States v. Shelton, 400 F.3d 1325 (11th Cir. 2005).

In this case the 11th Circuit observed a split from the 6th Circuit on two different issues concerning an incorrect application of mandatory

sentencing by the district court. *Id.* at 1331 nn.7-8. First, the 11th Circuit disagreed with the 6th Circuit's position that all incorrect applications of mandatory sentencing guidelines require remand, instead requiring that the sentenced party first "establish all four prongs of the plain-error test." *Id*. at 1331 n.7. In the second split, the court diverged from the position of the 6th Circuit that "presumed prejudice" from the incorrect application. *Id*. at 1331 n.8. Alternatively, the court maintained "that a defendant has the burden to show actual prejudice in plain-error review." *Id*.


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