Current Circuit Splits

The following pages contain brief summaries of circuit splits identified by federal court of appeals opinions announced between February 21, 2012 and August 28, 2012. This collection, written by the members of the *Seton Hall Circuit Review*, is organized into civil and criminal matters, and then by subject matter and court.

Each summary briefly describes a current circuit split, and 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 aims to serve the reader well as a referential starting point.

Preferred citation for the summaries below: *Circuit Splits*, 9 SETON HALL CIR. REV. [n] (2012).

CIVIL MATTERS

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ADMINISTRATIVE LAW

Federal Communications Commission – Telecommunications Act of 1996 (TCA): *T-Mobile Central, LLC v. Charter Township of West Bloomfield*, 691 F.3d 794 (6th Cir. 2012).

Issue One: The 6th Circuit addressed whether a township's denial of a company's application to build a cellular tower had the effect of prohibiting the company from providing wireless services, and as a result, violated 47 U.S.C § 332(c)(7)(B)(i)(II). *Id*. 796. The court noted that the 4th Circuit determined that "*only* a general, blanket ban on the construction of all new wireless facilities would constitute an impermissible prohibition of wireless services . . . ." *Id*. at 805 (internal quotation marks omitted). The 6th Circuit rejected the 4th Circuits approach, "which requires a blanket ban to trigger a violation of the statute . . . [because it] seem[ed] inconsistent both with the plain text of the statute as well as the broader goal of the TCA to promote construction of cellular towers." *Id*. at 805–06. The 6th Circuit favored the 1st, 2nd, 3rd, and 7th Circuits' interpretation that "the clause is not restricted to blanket bans on cell towers and that the clause may, at times, apply to individual zoning decisions." *Id*. at 805 (internal quotation marks omitted). Thus, the 6th Circuit concluded that "the denial of a

single application can constitute a violation of . . . [the TCA]." *Id*. at 806.

Issue Two: The 6th Circuit next addressed "whether the 'significant gap' in services focuses on the coverage of the applicant provider . . . or whether service by any other provider . . . is sufficient." *Id*. at 806. The court noted that the 2nd, 3rd, and 4th Circuits "have held that no 'significant gap' exists if any 'one provider' is able to serve the gap area in question[,]" while the 1st and 9th Circuits have "rejected the 'one provider rule' and adopted a standard that considers whether a provider is prevented from filling a significant gap in *its own* service coverage." *Id*. (original emphasis). The 6th Circuit agreed with the 1st and 9th Circuits because of the Federal Communication Commission's (FCC) "endorsement of the standards used by the 1st and 9th Circuits . . .[,]" and the FCC's express rejection of the "blanket ban" approach." *Id*. at 807. The court disagreed with the "'blanket ban' approach adopted by the . . . [2nd, 3rd, and 4th] Circuits." *Id*. Thus, the 6th Circuit concluded that "the denial of . . . [a company's] application prevented it . . . from filling a significant gap in *its own* service coverage." *Id*. at 807–08.

Issue Three: The 6th Circuit addressed "whether there are feasible alternate locations." *Id.* at 808. The court noted that 1st, 2nd, 3rd, and 7th Circuits have all adopted "versions of the 'significant gap' test." *Id*. The 2nd, 3rd, and 9th Circuits "require the provider to show that the manner in which it proposes to fill the significant gap in services is the least intrusive on the values that the denial sought to serve," while the 1st and 7th Circuits "require a showing that there are no alternative sites which would solve this problem." *Id*. The 6th Circuit agreed with the 2nd, 3rd, and 9th Circuits in finding that the "least intrusive standard . . . is considerably more flexible than the 'no viable alternatives' standard as a carrier could endlessly have to search for different, marginally better alternatives." *Id.* The court disagreed with the 1st and 7th Circuits because it considered their standard "too exacting." *Id*. Thus, the 6th Circuit "adopt[ed] the 'least intrusive standard.'" *Id*.

Judicial Review – Proper Consideration of Evidence: *Brewes v. Commissioner of Social Security Administration*, 682 F.3d 1157 (9th Cir. 2012)

The 9th Circuit addressed whether courts evaluating denials of social security benefits should consider evidence that was not provided to the Administrative Law Judge (ALJ) but was later provided to the Appeals Council. *Id.* at 1161. The court noted that the 2nd, 4th, 5th, 8th, and 10th Circuits determined that evidence presented to the Appeals Council should be incorporated into the administrative record, even

thought it was not initially presented to the ALJ, while the 3rd, 6th, 7th, and 11th Circuits found that only evidence presented before the ALJ should be included as part of the final record. *Id.* The 9th Circuit agreed with the 2nd, 4th, 5th, 8th, and 10th Circuits, finding that new evidence submitted to the Appeals Council, should be included as part of the record. *Id.* at 1161–62. The court disagreed with the 3rd, 6th, 7th, and 11th Circuits because the Social Security Commissioner's decision was only final after the Appeal Council's decision and not after the ALJ's decision. *Id.* Thus, the 9th Circuit concluded that district courts may consider evidence that is not before an ALJ but is later provided to the Appeals Council. *Id.* at 1161.

ALTERNATIVE DISPUTE RESOLUTION

Arbitration – Proper Scope of Judicial Review: *Reed v. Florida Metropolitan University Inc.*, 681 F.3d 630 (5th Cir. 2012)

The 5th Circuit addressed whether courts must "ensure that an arbitrator has a legal basis for his class arbitration determination, even while applying the appropriately deferential standard of review." *Id*. at 645. The court noted that the 2nd and 3rd Circuits had considered the issue, and both held the determination hinged on "whether the parties had submitted the class arbitration issue to the arbitrator and 'whether the agreement or the law categorically prohibited the arbitrator from reaching that issue.'" *Id*. at 644 & n.13 (internal citations omitted). The 5th Circuit pointed out that the primary thrust of the 2nd Circuit's decision was "whether the district court applied the appropriate level of deference when reviewing the arbitration award." *Id.* at 645 (internal quotation marks omitted). The 5th Circuit disagreed with the 2nd Circuit's analysis and concluded that the Supreme Court's decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010), requires courts to "undertake an inquiry into the arbitrator's reasoning," which requires "some consideration of the arbitrator's award and rationale." *Id.* at 645–46.

Federal Arbitration Act – Definition of "Arbitration": *Evanston Ins. Co. v. Cogswell Properties, LLC*, 683 F.3d 684 (6th Cir. 2012)

The 6th Circuit addressed which source of law should provide the definition of "arbitration" under the Federal Arbitration Act (FAA). *Id*. at 693. The court noted that the 5th and 9th Circuits determined that state law should control the definition, while the 1st and 10th Circuits found that federal law should apply. *Id*. The 6th Circuit agreed with the 1st and 10th Circuits, finding it counter-intuitive to look to state law to

define a term in a federal statute on a subject as to which Congress has declared the need for national uniformity. *Id*. (internal citations omitted). Thus, the 6th Circuit held that federal law should control the definition of "arbitration" under the FAA. *Id*.

ANTITRUST

The Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) – Jurisdiction: *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845 (7th Cir. 2012)

The 7th Circuit addressed whether the causal nexus standard is the proper test for determining if a defendant's conduct had a "direct" effect on domestic commerce within the context of the FTAIA. *Id*. at 856. The court noted that the 9th Circuit holds that "an effect is direct if it follows as an immediate consequence of the defendant's . . . activity." *Id*. (internal quotation marks omitted). The 7th Circuit declined to adopt the 9th Circuit's "immediate consequence" test, and found more persuasive the Department of Justice's Antitrust Division approach, "which takes the position that, for FTAIA purposes, the term 'direct' means only a reasonably proximate causal nexus." *Id*. at 856–57 (internal quotation marks omitted). The court reasoned that "[s]uperimposing the idea of 'immediate consequence' on top of the full phrase results in a stricter test than the complete text of the statute can bear." *Id*. at 857. Additionally, the court noted that the causal nexus standard ensures that the FTAIA will "exclude from the Sherman Act foreign activities that are too remote from the ultimate effects on U.S. domestic or import commerce." *Id*. Thus, the court adopted the Department of Justice's causal nexus approach as the test for determining whether a defendant's conduct has had a "direct" effect on domestic commerce. *Id*.

BANKRUPTCY

Chapter Eleven – Debtor's Duties and Benefits: *In re Bandi v. Becnel*, 683 F.3d 671 (5th Cir. 2012)

The 5th Circuit addressed what the phrase "statement respecting the debtor's or an insider's financial condition" in § 523(a)(2)(a) of the Bankruptcy Code means for the purpose of deciding whether a party's debt can be discharged after making false statements. The court noted that the 8th and 10th Circuits determined "that statements within the meaning of that section are those that purport to present a picture of the debtor's overall financial health." *Id.* at 677 (quoting *Cadwell v. Joelson*, 427 F.3d 700, 714 (10th Cir. 2005)) (internal quotation marks

omitted). The 4th Circuit "held that a debtor's false representation [about] certain property he owned . . . was a statement regarding the debtor's financial condition and therefore dischargeable." *Id.* The 5th Circuit agreed with the 8th and 10th Circuits and found that "the use of 'financial condition' in the definition of 'insolvent' suggests that the term 'financial condition' in § 523(a)(2)(A) and (B) also relates to a debtor's net worth or overall financial condition." *Id.* (quoting *Cadwell*, 427 F.3d at 707) (internal quotation marks omitted). The 5th Circuit concluded that "financial condition" meant "the general overall financial condition of an entity or individual, that is, the overall value of property and income as compared to debt and liabilities . . ." and that "a representation that one owns a particular residence or a particular commercial property says nothing about the overall financial condition of a person. . . ." *Id.* at 676.

District Court Sanctions – Federal Rule of Bankruptcy Procedure 9011: *Klestadt & Winters, LLP v. Cangelosi*, 672 F. 3d 809 (9th Cir. 2012).

The 9th Circuit addressed whether more flexible jurisdictional principles regarding the appealability of bankruptcy orders apply to district court judges sitting in bankruptcy court. *Id*. at 813. The majority noted that a previous decision in the 9th Circuit supported it's holding that the flexible jurisdictional principles do not apply in this situation. *Id.* Additionally, the Court suggested that it was bound by the Supreme Court's interpretation of the jurisdictional restrictions under 28 U.S.C. § 1291 set forth in *Carroll v. United States*, 354 U.S. 394 (1957), which precludes the Court from applying the more flexible approach. The 1st, 2nd, 3rd, and 5th Circuits agree that different rules regarding the finality of bankruptcy proceedings should not apply to appeals from a district court sitting in bankruptcy and a district court's review of a bankruptcy court's decision. *Id.*

CIVIL PROCEDURE

Subject Matter Jurisdiction – Discovery Requests: *EM Ltd. v. Republic of Argentina*, 695 F.3d 201 (2nd Cir. 2012).

The 2nd Circuit addressed whether a district court has jurisdiction to order discovery judgments against a foreign sovereign. *Id.* at 205. The 2nd Circuit disagreed with the 7th Circuit's conclusion that a "district court's subject matter jurisdiction over a foreign sovereign was insufficient to confer the power to order discovery from a person subject to the court's jurisdiction that is relevant to enforcing a judgment against the sovereign." *Id.* at 209. The court reasoned that "such a result is not

required by the [Foreign Sovereign Immunities Act (FSIA)]" and is inconsistent with 2nd Circuit precedent, which holds "that a district court's jurisdiction over a foreign sovereign extends to proceedings to enforce a valid judgment." *Id*. Thus, the court held that a district court has jurisdiction to order discovery judgments against a foreign sovereign. *Id.*

Federal Subject Matter Jurisdiction – Reverse Preemption: *ESAB Grp., Inc. v. Zurich Insurance PLC*, 685 F.3d 376 (4th Cir. 2012)

The 4th Circuit addressed whether "the McCarran-Ferguson Act appl[ies] such that state law can reverse preempt federal law [such as the Convention or Convention Act] and invalidate a foreign arbitration agreement." *Id.* at 382. The court noted that the 2nd Circuit held that because "the Convention is not self-executing, and therefore, relies upon an Act of Congress for its implementation," pursuant to McCarran-Ferguson Act, "state laws precluding arbitration of disputes with a delinquent insurer reverse preempt the Convention Act." *Id.* at 385. Conversely, according to the 5th Circuit, "even assuming the Convention was non-self-executing, reverse preemption did not apply." *Id*. The 4th Circuit agreed with the 5th Circuit in finding that "the Convention, not the Convention Act, . . . directs courts to enforce international arbitration agreements," and because the McCarran-Ferguson Act's text limits its scope to federal statutes, McCarran-Ferguson could not disrupt the application of traditional preemption rules. *Id.* at 384, 388. The 4th Circuit reasoned that "McCarran-Ferguson is limited to legislation within the domestic realm" and must be read narrowly. *Id.* at 388. Therefore, "even assuming Article II of the Convention is non-self-executing, the Convention Act, as implementing legislation of a treaty, does not fall within the scope of the McCarran-Ferguson Act." *Id.* Thus, the 4th Circuit concluded that under the McCarran-Ferguson Act, the state law does not reverse preempt federal law. *Id.* at 379.

***Qui Tam* Actions – False Claims Act (FCA):** *Little v. Shell Exploration & Production Co.*, 690 F.3d 282 (5th Cir. 2012)

The 5th Circuit addressed whether "a federal employee, even one whose job it is to investigate fraud, [is] a 'person' under the FCA such that he may maintain a *qui tam* action." *Id*. at 284. The court noted that the 6th, 9th, 10th, and 11th Circuits determined that federal employees are persons under the FCA, while the 1st Circuit found "that at least some federal employees may not be *qui tam* claimants." *Id*. at 286. The 5th Circuit agreed with the 6th, 9th, 10th, and 11th Circuits in finding that the plain language of the statute suggested that any person may bring

a suit and that the language about "private persons" was not meant to exempt government employees in general. *Id*. at 288–89. The court disagreed with the 1st Circuit because the express limitations in the statute implied "that Congress wished to limit the statute only as stated[,]" and the court does not have authority to create new exceptions. *Id.* at 287. Thus, the 5th Circuit concluded that federal employees are persons under the FCA and therefore may bring a *qui tam* action. *Id.* at *2.

Privileged Communications and Confidentiality – Attorney-Client Privilege: *In re Pacific Pictures Corporation*, 679 F.3d 1121 (9th Cir. 2012)

The 9th Circuit addressed whether voluntary disclosure of privileged documents to third parties destroys attorney-client privilege when the third party is the federal government. *Id.* at 1124. The 8th Circuit has adopted a "selective waiver" theory, in which disclosure of privileged materials to the government for purposes of a separate and nonpublic investigation results in only a limited waiver of the attorney-client privilege, while the D.C., Federal, 1st, 2nd, 3rd, 4th, 6th, 7th, and 10th Circuits have rejected the "selective waiver" theory. *Id.* at 1127. The 9th Circuit agreed with the majority of its sister circuits in finding that "selective waiver does not serve the purpose of encouraging full disclosure to one's attorney in order to obtain informed legal assistance; it merely encourages voluntary disclosure to government agencies, thereby extending the privilege beyond its intended purpose." *Id.* The court disagreed with the 8th Circuit's reasoning that full waiver by voluntary disclosure to government may discourage corporations from consulting with independent outside counsel on pertinent issues for the protection of stockholders, finding this concern to be unjustified. *Id.* Thus, the 9th Circuit rejected the "selective waiver" theory and held that documents that had been voluntarily disclosed to the federal government were no longer protected by the attorney-client privilege. *Id.* at 1129.

Removal of Cases – Class Action Fairness Act (CAFA): *Frederick v. Hartford Underwriters Insurance Co.*, 683 F.3d 1242 (10th Cir. 2012)

The 10th Circuit addressed whether a party seeking to remove a case under CAFA that has alleged an amount less than the jurisdictional minimum must prove the amount in controversy under the "legal certainty" standard or the "preponderance" standard. *Id*. at 1246. The court noted that the 9th and 3rd Circuits require "the party seeking removal . . . prove with 'legal certainty' that the amount in controversy is satisfied, notwithstanding the prayer for relief in the complaint." *Id.*

(internal quotation marks omitted). The court further pointed out that the 1st, 2nd, 6th, 7th, 8th, and 11th Circuits subscribe to the preponderance standard, which requires that the "party seeking to remove under CAFA . . . establish the amount in controversy by a preponderance of the evidence regardless of whether the complaint alleges an amount below the jurisdictional minimum." *Id*. (internal quotation marks omitted). The 10th Circuit joined the majority of other circuits in adopting the preponderance standard, and posited that there is "no logical reason why we should demand more from a CAFA defendant than other parties invoking federal jurisdiction." *Id*. (internal quotation marks omitted). Thus, the court concluded that "a defendant seeking to remove under CAFA must show that the amount in controversy exceeds $5,000,000 by a preponderance of the evidence." *Id*.

Statutory Time Bar – Truth In Lending Act: *Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172 (10th Cir. 2012)

The 10th Circuit addressed whether one can properly rescind a contract within the Truth in Lending Act's (TILA) three-year statutory time-bar by sending written notice of intent to rescind or by "asserting a defense of rescission during a Colorado Rule 120 Proceeding." *Id.* at 1180–81. The 3rd and 9th Circuits strictly applied the three-year statutory time-bar, holding that "rescission suits must be brought within three years from the consummation of the loan, regardless whether notice of rescission was delivered within that three-year period." *Id.* at 1187 (internal quotation marks omitted). The court noted that the 4th Circuit recently disagreed, stating that "a borrower must file a lawsuit within the three-year time period to exercise her right to rescind, as opposed simply to notifying the creditor." *Id.* at 1188 n.12. The 10th Circuit joined the 3rd and 9th Circuits in holding that "notice, by itself, is not sufficient to exercise (or preserve) a consumer's right of rescission under TILA." *Id.* at 1188.

Prudential Standing – Jurisdictional or Non-Jurisdictional: *Grocery Manufacturer's Association v. Environmental Protection Agency*, 693 F.3d 169 (D.C. Cir. 2012)

The D.C. Circuit addressed whether prudential standing is jurisdictional. *Id.* at 174, 185. The majority relied on D.C. Circuit precedent in holding that prudential standing is a jurisdictional issue, meaning that it is always before the court and cannot be waived. *Id.* at 175. The dissent, however, posited that the majority's holding "creates a deep and important circuit split on this important issue." *Id*. at 185 (Kavanaugh, C.J., dissenting). While noting that the "Supreme Court has

not yet directly addressed whether prudential standing is jurisdictional[,]" *id.* at 184, the dissent points to decisions of the 5th, 7th, 9th, 10th, 11th, and Federal Circuit Courts, which all held prudential standing to be a non-jurisdictional issue, *id*. at 184–85. Accordingly, the dissent reasoned that the weight of authority indicates that prudential standing is non-jurisdictional and that a defendant who fails to raise prudential standing forfeits the argument. *Id.* at 185. The majority, however, concluded that "[s]tanding under Article III is jurisidcitonal[,]" and "[i]f no petitioner has Article III standing, then this court has no jurisdiction to consider [the] petitions." *Id*. at 174.

CONSTITUTIONAL LAW

ADEA Preclusion – Equal Protection Claims: *Levin v. Madigan*, 692 F.3d 607 (7th Cir. 2012)

The 7th Circuit addressed whether the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621–634, precluded a 42 U.S.C. § 1983 equal protection claim. *Id.* at 616. The court noted that all other circuits considering the issue have decided "that the ADEA is the exclusive remedy for age discrimination claims." *Id.* The 7th Circuit, however, disagreed with the 1st, 4th, 5th, 9th, 10th, and D.C. Circuits in finding a lack of "clear or manifest congressional intent" as to the ADEA's preclusive effects. *Id*. at 621. The 7th Circuit compared the rights and protections granted under both the ADEA and § 1983 to determine whether the ADEA precludes a § 1983 claim. *Id*. First, the court explained that "an ADEA plaintiff may only sue his employer, an employment agency, or a labor organization," while a § 1983 plaintiff "may file suit against an individual, so long as that individual caused or participated in the alleged deprivation of the plaintiff's constitutional rights . . . [or] a government organization." *Id*. The court also found relevant that "the ADEA expressly limits or exempts claims by certain individuals . . . [while] there are no such limitations for § 1983 equal protection claims." *Id.* Finally, the court explained that "[w]ithout the availability of a § 1983 claim, a state employee . . . who suffers age discrimination in the course of his employment is left without a federal damages remedy" because "such [ADEA] claims are barred by Eleventh Amendment sovereign immunity." *Id.* Thus, the 7th Circuit concluded that "given these divergent rights and protections, the ADEA is not the exclusive remedy for age discrimination in employment claims," and that a § 1983 claim is not precluded by the ADEA. *Id.* at 622.

EVIDENCE

Attorney-Client Privilege – Selective Waiver: *In re Pacific Pictures Corp.*, 679 F.3d 1121 (9th Cir. 2012)

The 9th Circuit addressed the issue of "whether a party waives attorney-client privilege forever by voluntarily disclosing privileged documents to the federal government." *Id*. at 1124. The court noted that the 8th Circuit determined that a "selective waiver" theory might allow a party to disclose documents to the government and not destroy the privilege, while every other circuit that has considered the theory has rejected it. *Id*. at 1127. The court agreed with the 3rd Circuit in finding that the "selective waiver" is "extending the privilege beyond its intended purpose." *Id*. Thus the 9th Circuit concluded that "given that Congress has declined broadly to adopt a new privilege to protect disclosures of attorney-client privileged materials to the government," the court would not overstep its boundaries and adopt the "selective waiver" theory. *Id*. at 1128.

FAMILY LAW

Child Welfare Act – Case Plan Provisions: *Henry A. v. Willden*, 678 F.3d 991 (9th Cir. 2012)

The 9th Circuit addressed whether case plan provisions are enforceable through § 1983 of the Child Welfare Act (CWA). *Id.* at 1006. The court noted that the majority of circuits hold that case plan provisions are enforceable through § 1983 of the CWA because such provisions contain sufficient "rights-creating language" described in *Blessing v. Freestone*, 520 U.S. 329 (1997). The 9th Circuit split from the 11th Circuit which held that case plan provisions cannot be enforced under a § 1983 cause of action. *Henry A.*, 678 F.3d at 1008. The 9th Circuit agreed with the majority of circuits in finding that the unambiguous language of the CWA revealed a congressional intent to create a right enforceable under § 1983. *Id.* at 1009. Thus, the 9th Circuit concluded case plan provisions were enforceable through § 1983. *Id*.

FEDERAL RULES OF EVIDENCE

Fed. R. Evid. 501 – Settlement Negotiation Privilege: *In re MSTG, Inc.*, 675 F.3d 1337 (Fed. Cir. 2012)

The Federal Circuit addressed whether "communications related to reasonable royalties and damages are protected from discovery based on

a settlement negotiation privilege." *Id.* at 1339. The court recognized that the 6th Circuit invoked Rule 501 of the Federal Rules of Evidence to "fashion a new privilege in patent cases that would prevent discovery of litigation settlement negotiations related to reasonable royalties and damages," while the 7th Circuit declined to adopt a settlement privilege. *Id.* at 1342. The Federal Circuit articulated several reasons for not adopting a settlement negotiation privilege and relied on factors identified by the Supreme Court in *Jaffee v. Redmond*, 518 U.S. 1 (1996). *Id.* at 1343. The court determined that "failure to recognize a federal settlement privilege [would] not frustrate the purposes of any state legislation," and that "Congress's failure to adopt a settlement privilege supports our conclusion that no privilege for settlement negotiation should be recognized." *Id*. at 1343, 1345 (internal quotation marks omitted. Thus, the Federal Circuit joined the 7th Circuit and concluded that "settlement negotiations related to reasonable royalties and damage calculations are not protected by a settlement negotiation privilege." *Id.* at 1348.

HABEAS CORPUS

Parole Hearings – Interpreting 18 U.S.C. § 4210(b)(2) and 28 C.F.R. § 2.52(c)(2): *Edwards v. Dewalt*, 681 F.3d 780 (6th Cir. 2011)

The 6th Circuit addressed whether 18 U.S.C. § 4210(b)(2) mandates the Parole Commission "to conduct case-by-case hearings with notice to the parolees and an opportunity to be heard" when denying an award of credit for street time following the parolee's commitment of an offense punishable by imprisonment. *Id.* at 786. The court noted that the 9th Circuit held there to be such a mandate by treating the Commission-established regulations, 28 C.F.R. § 2.52(c)(2), which require a parolee to forfeit "all street time if he is convicted of a new offense punishable by any term of imprisonment" while on parole, as an incorrect interpretation of the statute. *Id.* at 785. The 6th Circuit disagreed with the 9th Circuit's interpretation, but instead found the Commission's regulations to be a valid exercise of its delegated authority. *Id.* at 786. The court found the statutory language, "the Commission shall determine," as giving "the Commission . . . permi[ssion] to make its determination on an across-the-board basis, if in its discretion it decides to do so." *Id.* It further reasoned that "even when a regulation purports to 'interpret' a statutory term, the regulation may serve as an exercise of properly delegated discretion." *Id.* Thus, the court concluded that the Commission is not required to conduct case-by-case hearings, and may establish across-the-board that parolees who violate parole with an

offense punishable by imprisonment must forfeit street time. *Id.* at 787–88.

IMMIGRATION

Naturalization and Removal Proceedings – Immigration and Nationality Act: *Gonzalez v. Aytes*, 678 F.3d 254 (3d Cir. 2012)

The 3rd Circuit addressed whether "district courts have jurisdiction to review a denial of naturalization during the pendency of removal proceedings and may issue a declaratory judgment regarding the lawfulness of such denial." *Id.* at 258. The court agreed with the 6th Circuit's determination that a district court may not order the Attorney General to naturalize an alien who is subject to pending removal proceedings. The court disagreed with the 2nd and 5th Circuits' conclusions that this determination requires district courts to dismiss these cases. *Id.* The court reasoned that allowing declaratory relief "strikes a balance between the petitioner's right to full judicial review as preserved by [8 U.S.C.A.] § 1421(c) and the priority of removal proceedings enshrined in [8 U.S.C.A.] § 1429." *Id.* at 259–60. The court emphasized that creation of § 1421(c) evidences Congress's intent to maintain a petitioner's right to judicial review of a naturalization denial rather than vesting full authority to grant or deny a naturalization application with the Attorney General. *Id.* at 260. Further, the court reasoned that declaratory judgment regarding the lawfulness of a denial of naturalization permits the alien his or her day in court while not "upsetting" the priority of removal proceedings. *Id.* at 261. Thus, the 3rd Circuit held that declaratory relief is appropriate in a district court's review of a denial of naturalization during pending removal proceedings. *Id.* at 259.

Discretionary Asylum Determinations – Immigration and Nationality Act: *Orellana-Monson v. Holder*, 685 F.3d 511 (5th Cir. 2012)

The Fifth Circuit addressed whether the Board of Immigration Appeals (BIA) acted arbitrarily and capriciously in adding "social visibility" and "particularity" as requirements to establish "membership in a particular social group," such that the BIA's decision did not warrant deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Id*. at 519. The court noted that the 1st, 2nd, 6th, 9th, 10th, and 11th Circuits determined that the BIA's "interpretations of what constitutes a 'particular social group' are entitled to deference." *Id*. at 520. The court further observed that the 9th and

10th Circuits had addressed the narrower issue in the case at bar, and held that "individuals from Central America resisting gang activity . . . are not members of particular social groups." *Id*. In contrast, the 3rd and 7th Circuits declined to apply the BIA's "social visibility" and "particularity" framework for "membership in a particular social group." *Id*. The 5th Circuit agreed with the 1st, 2nd, 6th, 9th, 10th, and 11th Circuits stating that it "d[id] not believe that the BIA's interpretation incorporating the 'particularity' and 'social visibility' test is an impermissible construction of a statute that is decidedly vague and ambiguous." *Id*. at 521. The court disagreed with the 3rd and 7th Circuits' rejection of the BIA's framework, but noted that "even the opinions in our sister circuits that reject the BIA's framework do not necessarily support [defendant's] argument," because "a social group cannot be defined by its relationship to its persecutor alone or by the fact that its members face dangers in retaliation for the actions against the persecutor." *Id*. at 520. Thus, the 5th Circuit held that "the BIA's interpretation is . . . entitled to deference since agency interpretations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id*. at 521.

Selection System – Revocation of Approval of Petitions: *Mehanna v. United States Citizenship & Immigration Services*, 677 F.3d 312 (6th Cir. 2012)

The 6th Circuit addressed "whether section 1252 (a)(2)(B)(ii) [of the Immigration and Nationality Act] removed [the 6th Circuit's] jurisdiction to review the [Attorney General's or Secretary of Homeland Security's] decision under section 1155 to revoke a visa petition" as an act of discretion. *Id*. at 314. The court noted that at least seven other circuits "have interpreted revocations of visa petitions under section 1155 to be discretionary, while the 9th Circuit found that the "power to revoke a visa petition is *not entirely* within the Attorney General's [or the Secretary's] judgment or conscience because the 'good and sufficient cause' language constitutes a legal standard the meaning of which we retain jurisdiction to clarify." *Id*. at 315 (internal citations and quotation marks omitted). The 6th Circuit agreed with the majority of the circuits in finding "[t]he statute, when read in its totality, plainly commits the decision of whether to revoke a visa petition to the discretion of the Secretary [or Attorney General]. *Id*. The court disagreed with the 9th Circuit's reading of the section stating that it would require "focusing on the 'good and sufficient cause' language to the exclusion of the word 'deems.'" *Id*. Thus the 6th Circuit concluded, "the Secretary's decision

to revoke a visa petition under section 1155 is an act of discretion that Congress has removed from our review." *Id*. at 315.

Discretionary Asylum Determinations – Immigration and Nationality Act: *Gaitan v. Holder*, 671 F.3d 678 (8th Cir. 2012)

The 8th Circuit addressed whether the Board of Immigration Appeals (BIA) acted arbitrarily and capriciously in adding "social visibility" and "particularity" as requirements to establish of "membership in a particular social group." *Id.* at 682 (Bye, J., concurring). The court noted that the 3rd, 6th, and 7th Circuits determined that "social visibility" and "particularity" requirements were inconsistent with BIA precedent, and that the BIA failed to provide its rationale for their addition. *Id*. at 685. In contrast, the 1st, 2nd, 4th, and 9th Circuits upheld the BIA's addition of the "social visibility" and "particularity" requirements, as well as the BIA's authority to refine its definition of "particular social group." *Id.* The 8th Circuit noted that it was bound by prior decisions in which it had adopted the findings of the 1st, 2nd, 4th, and 9th Circuits that "'persons resistant to gang violence' are too diffuse to be recognized as a particular social group." *Id*. at 681. The court disagreed with the 3rd, 6th, and 7th Circuits that these individuals are perceived as a distinct group by society such that they "suffer from a higher incidence of crime than the rest of the population." *Id*. at 680. Thus, the 10th Circuit concluded that it had no choice but to hold that the BIA did not act arbitrarily and capriciously in requiring that a "particular social group" be "a discrete class of persons who would be perceived as a group by the rest of society." *Id*. at 682.

LABOR AND EMPLOYMENT

Employee Retirement Income Security Act (ERISA) – Equitable Relief: *CGI Technologies & Solutions, Inc. v. Rose*, 683 F.3d 1113 (9th Cir. 2012)

The 9th Circuit addressed "whether strict adherence to the terms of an ERISA plan that disclaims the application of traditional equitable defenses constitutes appropriate equitable relief." *Id*. at 1122 (internal quotation marks omitted). The court noted that the 5th, 7th, 8th, and 11th Circuits determined that, "in balancing the equities, simple contract interpretation that provides for full reimbursement per the plain terms of a plan that disclaims the application of traditional equitable defenses . . . constitutes *appropriate* equitable relief . . .[,]" while the 3rd Circuit found "that under § 502(a)(3), the district court, in granting *appropriate* equitable relief, may consider traditional equitable defenses

notwithstanding express terms disclaiming their application." *Id*. at 1122–23 (internal quotation marks omitted). The 9th Circuit agreed with the 3rd Circuit in finding that there was "no indication in ERISA or in the Supreme Court's jurisprudence that Congress intended to limit relief under § 502(a)(3) to traditional equitable categories yet not limit relief by other equitable doctrines and defenses that were traditionally applicable to those categories." *Id*. at 1123 (internal quotation marks omitted). The court disagreed with the 5th, 7th, 8th, and 11th Circuits because it did "not see good reason in interpreting § 502(a)(3) to recede from the traditional broad powers of a court in equity." *Id.* at 1124. Thus, the 9th Circuit concluded that "the parties may not by contract deprive the district court of its power to act as a court in equity in a § 502(a)(3) action." *Id*.

Labor-Employment – Employee Retirement Income Savings Act (ERISA): *Bilyeu v. Morgan Stanley Long Term Disability Plan*, 683 F.3d 1083 (9th Cir. 2012)

The 9th Circuit addressed whether a plan fiduciary can satisfy the requirements for an equitable lien by agreement if the "specifically identified property has been dissipated." *Id.* at 1095. The court noted that the Supreme Court, in *Sereboff v. Mid Atlantic Medical Services Inc.*, 547 U.S. 356 (2006), held that one of the "criteria for securing an equitable lien by agreement in an ERISA action" is that "the funds specifically identified by the fiduciary must be within the possession and control of the beneficiary." *Id.* at 1093 (internal quotation marks omitted). The court noted that the 1st, 3rd, 6th and 7th Circuits "have interpreted *Sereboff*[] [to mean] that a fiduciary can assert an equitable lien . . . even if the beneficiary no longer possesses the specifically identifiable funds." *Id.* at 1094. The court acknowledged that the 5th Circuit has held that "[p]osession is key to awarding equitable restitution in the form of a constructive trust or equitable lien." *Id.* at 1095 (internal quotation marks omitted). The court found the reasoning of the 1st, 3rd, 6th, and 7th Circuits unpersuasive. The 9th Circuit held that a fiduciary cannot "enforce an equitable lien against a beneficiary's *general assets* when specifically identified funds are no longer in the beneficiary's possession." *Id.*

Black Lung Benefits Act (BLBA) – Irrebuttable Presumption of Complicated Pneumoconiosis: *Bridger Coal Co. v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor*, 669 F.3d 1183 (10th Cir. 2012)

The 10th Circuit addressed "whether equivalency determinations were necessary in applying the irrebuttable presumption of [complicated] pneumoconiosis set forth in § 921(c)(3) [of the BLBA] . . . ." *Id*. at 1189. The court noted that the 4th Circuit determined that "§ 921(c)(3) implicitly requires an 'equivalency determination,' i.e., a claimant seeking to prove complicated pneumoconiosis under the 'massive lesions' clause of § 921(c)(3) must show that such lesions would show up as one-centimeter-or-greater opacities if detectable by chest x-ray." *Id*. at 1187. In contrast, the 11th Circuit found that "[i]t is sufficient if the claimant can establish by a preponderance of the evidence that the miner's autopsy or biopsy results are consistent with a diagnosis of complicated pneumoconiosis under accepted medical standards." *Id*. at 1188. The 10th Circuit agreed with the 11th Circuit in finding that "[r]equiring 'equivalency determinations' in applying the § 921(c)(3) presumption is contrary to the plain language of the statute and, thus, inconsistent with congressional intent." *Id.* at 1194. The court disagreed with the 4th Circuit as "the lack of similar language in another part of the statute indicates congressional intent *not* to require such determinations[,]" and "regardless of whether equivalency determinations are required, the ALJ is not relieved of its obligation [under § 923(b)] to consider all relevant evidence in making a benefits determination." *Id.* Thus, the 10th Circuit concluded that a claimant is only required to establish by a preponderance of the evidence that "autopsy or biopsy results are consistent with a diagnosis of complicated pneumoconiosis under accepted medical standards." *Id.* at 1194.

LANDLORD–TENANT

Truth in Lending Act – Notification Requirement: *Gilbert v. Residential Funding LLC*, 678 F.3d 271 (4th Cir. 2012)

The 4th Circuit addressed "whether the borrower must file a lawsuit within three years after the consummation of a loan transaction to exercise her right to rescind, or whether the borrower need only assert the right to rescind through a written notice within the three-year period" under the Truth in Lending Act (TILA). *Id*. at 276. The court noted that the 9th Circuit held that "rescission suits must be brought within three years from the consummation of the loan, regardless [of] whether notice of rescission is delivered within that three-year period." *Id.* The 4th Circuit disagreed with the 9th Circuit because the plain language of the statute does not say "anything about the filing of a lawsuit," and declined to implement such a requirement. *Id*. at 277. Thus, the 4th Circuit

concluded that a borrower need only notify a creditor of her rescission within a three-year period to exercise that right. *Id*.

STATUTORY INTERPRETATION

The Lanham Act – Standard of Proof: *Fishman Transducers, Inc. v. Paul*, 684 F.3d 187 (1st Cir. 2012)

The 1st Circuit addressed whether "to equate fraud or willfulness with a heightened standard of proof" in Lanham Act cases. *Id.* at 193. The court noted that the 3rd Circuit determined that a heightened burden of proof is necessary to demonstrate intent to deceive, while the 4th Circuit found that a preponderance of the evidence standard should be applied to the Lanham Act's bad faith provisions. *Id.* at n.7. The 1st Circuit agreed with the 4th Circuit, and found that the application of a preponderance of the evidence standard is appropriate. *Id.* The court disagreed with the 3rd Circuit as applying a heightened standard because the Lanham Act does not call for more than a preponderance standard. *Id.* at 193. Thus, the 1st Circuit concluded that preponderance is the proper standard. *Id.*

TAX

Foreign Tax Credit – Interpreting 26 C.F.R. § 1.901-2(a): *Entergy Corp. & Affiliated Subsidiaries v. Commissioner of Internal Revenue*, 683 F.3d 233 (5th Cir. 2012)

The 5th Circuit addressed whether an American corporation is "entitled to a foreign income tax credit for its subsidiary's payment of the United Kingdom's Windfall Tax" under 26 U.S.C. § 901 and I.R.C. § 901. *Id.* at 233. The court explained that under 26 C.F.R. § 1.901-2(a) an American corporation is entitled to a tax credit for any amounts that a foreign government assesses against the corporation as a levy when such a levy satisfies "each of the realization, gross receipts, and net income requirements established by the regulation." *Id*. at 235 (internal quotation marks omitted). The court stated that the Windfall Tax met the realization and net income requirements, but the method for calculating the foreign tax makes unclear whether the levy satisfies the final regulatory requirement. *Id*. at 236. The court noted that the 3rd Circuit determined the United Kingdom's Windfall Tax "fails at least the gross receipts requirement of the governing regulation, 26 C.F.R. § 1.901-2(a) . . . ." *Id*. at 237. The 5th Circuit eschewed the 3rd Circuit's analysis and noted that "the Windfall Tax is based on excess profits—realized income derived from gross receipts" minus deductions for substantial business

expenses. *Id.* at 239. Thus, the 5th Circuit held that the foreign levy satisfies the three net gain requirements for a foreign tax credit. *Id*.

TORTS

Preemption – State Fraud-on-the-FDA Claim: *Lofton v. McNeil Consumer & Specialty Pharmaceuticals*, 672 F.3d 372 (5th Cir. 2012)

The 5th Circuit addressed whether, under the Supreme Court's decision in *Buckman Co. v. Plaintiffs' Legal Committee,* 531 U.S. 341 (2001), a state fraud on the United States Food and Drug Administration (FDA) claim is preempted by federal law unless the FDA itself finds fraud. *Id.* at 377. The court noted that the 6th Circuit determined that state fraud-on-the-FDA provisions are preempted unless the FDA finds that fraud has been committed during the approval process, while the 2nd Circuit determined the applicable state fraud-on-the-FDA provision was distinguished from *Buckman*. *Id*. at 377, 78. The court also noted that the 6th Circuit, in requiring preemption under *Buckman*, determined that the state fraud-on-the-FDA provision at issue required proof that the drug manufacturer defrauded the FDA in conflict with the FDA's duties, a violation of the Supremacy Clause. *Id*. at 378, 80. The court joined the 6th Circuit's interpretation of *Buckman* and held that the Texas tort reform law, *Tex. Civ. Prac. & Rem. Code Ann.* §82.007(b)(1), is preempted unless the FDA itself has found fraud. *Id*. at 380.

CRIMINAL MATTERS

CRIMINAL PROCEDURE

Antiterrorism and Effective Death Penalty Act's (AEDPA) Limitations Period – Claim of Actual Innocence: *Rivas v. Fischer*, 687 F.3d 514 (2d Cir. 2012)

The 2nd Circuit addressed whether an equitable remedy for actual innocence exists to defeat the AEDPA's, 28 U.S.C. § 2244(d)(1), 1-year limitations period. *Id*. at 548–49. The 2nd Circuit disagreed with the reasoning of the 1st, 5th, and 7th Circuits, which held that because the statute identifies specific exceptions to the limitations period, Congress did not intend for courts to apply an additional actual-innocence exception. *Id*. at 548. The 2nd Circuit agreed with the 6th, 9th, 10th, and 11th Circuits "that the *Schlup* actual-innocence gateway extends to claims otherwise barred by § 2244(d)(1)." *Id*. The court found relevant the fact that "no court has settled on the contrary conclusion following the Supreme Court's decision on a related question in *Holland v.*

Florida, 130 S. Ct. 2549(2010)," which "demonstrates that traditional principles of equity continue to have a place in the review of habeas petitions following the enactment of AEDPA." *Id*. at 549. Thus, the 2nd Circuit concluded that, "absent a clear congressional command to the contrary, . . . the preexisting equitable authority of federal courts to hear barred claims if they are accompanied by a compelling showing of actual innocence survives the enactment of the AEDPA and applies to claims otherwise barred by its statute of limitations, § 2244(d)(1)." *Id*. at 551.

Fed. R. Crim. P. 41(g) – Transfer of Seized Firearms to Third-Parties: *United States v. Zaleski*, 686 F.3d 90 (2d Cir. 2012)

The 2nd Circuit addressed whether a district court may, pursuant to Federal Rule of Criminal Procedure 41(g), order the transfer of seized, lawfully-owned firearms to a third-party so that they may be resold for the financial benefit of a criminal defendant, even "after the defendant becomes a convicted felon unable to possess a firearm under 18 U.S.C. § 922(g)." *Id*. at 91. The court observed that Rule 41(g) allows a person to "move for the [seized] property's return[,]" and "[i]f it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property . . . ." *Id*. at 92. The court noted that the 11th and 8th Circuits have held that a transfer of firearms for the benefit of a convicted felon under 41(g) is not permissible, as it necessarily constitutes constructive possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g). *Id.* at 92–93. The court also recognized that the 7th and 5th Circuits have "suggested that a convicted felon may devise an arrangement in which he recovers the value of the seized firearms without contravening Section 922(g)(1)." *Id*. at 93. The 2nd Circuit was persuaded by the 7th and 5th Circuits reasoning that a 41(g) transfer of seized firearms for the benefit of a convicted felon does not necessarily constitute constructive possession if the district court ordering the transfer provides sufficient safeguards to "in fact strip [the defendant] of any power to exercise dominion and control over them." *Id*. at *9. Thus, the 2nd Circuit held that the district court was authorized to order the transfer of seized, lawfully-owned firearms to a third-party for the financial benefit of a convicted felon without contravening Section 922(g).

Habeas Corpus – Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA): *Rivas v. Fischer*, 687 F.3d 514 (2nd Cir. 2012)

The 2nd Circuit addressed "whether a gateway claim of actual innocence may also excuse an untimely filing under AEDPA's limitation period." *Id.* at 539. The court noted that the 6th, 9th, 10th, and 11th

Circuits determined that "a compelling claim of actual innocence constitutes an equitable exception to AEDPA's limitations period[,]" while the 1st, 5th and 7th Circuits found that "no such exception exists." *Id.* at 548. The 2nd Circuit agreed with the 6th, 9th, 10th, and 11th Circuits by finding "more persuasive the reasoning expressed in the cases holding that an equitable exception to AEDPA's limitations period exists for compelling claims of actual innocence." *Id*. The court reasoned that, "because § 2244(d) is not jurisdictional, it does not set forth an inflexible rule requiring dismissal whenever its clock has run." *Id*. at 549 (internal citation and quotation marks omitted). Additionally, the court indicated that, traditionally, the habeas courts have "equitable discretion to see that federal constitutional errors do not result in the incarceration of innocent persons." *Id.* (internal quotation marks omitted). Thus, the 2nd Circuit concluded "that the preexisting equitable authority of federal courts to hear barred claims if they are accompanied by a compelling showing of actual innocence survives the enactment of AEDPA and applies to claims otherwise barred by its statute of limitations." *Id.* at 551.

Subsequent Search – Foregone Conclusion: *United States v. Davis*, 690 F.3d 226 (4th Cir. 2012)

The 4th Circuit held that a subsequent search of defendant's seized bag was warranted as it was a "foregone conclusion" that the bag contained clothing that was evidence of a crime. *Id.* at 232. In reaching this decision, the majority relied on 4th Circuit precedent in finding that an officer's experience is relevant to determining whether the contents of a bag are a "foregone conclusion." *Id.* at 235–36. The dissent, however, identifies that there is a circuit split as to the exact scope of the "foregone conclusion" inquiry. *Id.* at 270 n.13 (Davis, C.J., dissenting). "The constitutionality of this corollary to the plain view seizure doctrine is widely accepted, but there seems to be a circuit split with respect to whether the 'foregone conclusion' analysis incorporates extrinsic evidence and/or an officer's specialized knowledge." *Id.* The dissent explains that the 1st, 5th, 9th, and 10th Circuits have "instead analyzed the question from the objective viewpoint of a reasonable layperson." *Id.*

Standard of Review – Plain Error Test: *United States v. Escalante-Reyes*, 689 F.3d 415 (5th Cir. 2012)

The 5th Circuit addressed "whether, when the law at the time of trial or plea is unsettled, but becomes clear while the case is pending on appeal, review for the second prong of the 'plain error' test properly considers the law as it stood during the district court proceedings ('time of trial') or at the time of the appellate court's decision ('time of

appeal')." *Id*. at 418 (footnote omitted). The court noted that the 1st, 2nd, 10th, and 11th Circuits determined "the plainness of error is evaluated at the time of appellate review when the law is unsettled at the time of trial but becomes clear by the time of appeal[,]" while the 9th and D.C. Circuits found "that if the law is unclear at the time of trial and later becomes clear, the error is evaluated based on the law as it existed at the time of trial." *Id*. at 421. The 3rd, 6th, 7th, and 8th Circuits stated "that they would evaluate the plainness of error at the time of appeal, although [the] circuits have not expressly decided the issue of whether this principle applies when the error is unclear at the time of trial." *Id*. The 5th Circuit agreed with the 1st, 2nd, 10th, and 11th Circuits in finding that "the purpose of plain error review in the first place is so that justice may be done . . ." and the time of appeal test is fairer and "more practical." *Id*. at 422. The court disagreed with the 9th and the D.C. Circuits because "establishing a 'time of appeal' rule would not significantly alter trial counsel's incentive to object." *Id*. Thus, the 5th Circuit concluded that the time of appeal rule "presents the better-reasoned view." *Id*.

Failure to Instruct – Lesser Offenses: *United States v. Lapointe*, 690 F.3d 434 (6th Cir. 2012)

The 6th Circuit addressed whether a defendant is entitled to a jury instruction for the lesser-included offense of conspiracy to possess a controlled substance where "the elements of the lesser offense are identical to part of the elements of the greater offense[,] . . . [and] the evidence would support a conviction on the lesser offense." *Id*. at 439. The court noted that the 10th Circuit determined that a defendant charged with conspiracy to possess with intent to distribute, and who seeks a lesser-included offense jury instruction for conspiracy to possess, "must demonstrate with separate evidence a separate group conspiring only to possess contraband." *Id*. at 441. The court further noted that the 1st Circuit disagreed with this determination, and found instead that a defendant's being entitled to a lesser-included defense instruction depends only on "whether there is some core of facts that is common to the scenario that the government sought to prove and the one that the defendant claims to show only a lesser included offense." *Id*. (internal quotation marks omitted). The 6th Circuit agreed with the 1st Circuit, finding that "a defendant may be convicted, with the same body of evidence, of joining the conspiracy as to all or merely some subset of the conspiracy's objectives." *Id*. at 442. The 6th Circuit disagreed with the 10th Circuit's requirement that there must be evidence of a group conspiring exclusively to commit a lesser offense since "it is well-

established that a single conspiracy may have multiple objectives, including the violation of several criminal laws." *Id*. at 441. Thus, the 6th Circuit concluded that a defendant is entitled to a lesser-included offense instruction where there is a "core of facts that is common to the scenario that the government sought to prove and the one that the defendant claims to show only a lesser included offense." *Id*. (internal quotation marks omitted).

Ineffective Assistance of Counsel – Failure to File an Appeal: *Campbell v. United States*, 686 F.3d 353 (6th Cir. 2012).

The 6th Circuit addressed whether an "attorney's failure to file a requested notice of appeal" when the defendant partially waived the right to appeal his conviction and sentence constituted ineffective assistance of counsel. *Id*. at 355, 356. The court noted that the 2nd, 4th, 5th, 8th, 9th, 10th, and 11th Circuits and a previous unpublished decision in the 6th Circuit determined that "if counsel had ignored the defendant's express instruction to file an appeal, such action amounts to a per se violation of the Sixth Amendment," while the 3rd and 7th circuits have found differently. *Id*. at 359 (internal quotation marks omitted). The court disagreed with the 7th Circuit's reasoning that where a defendant has made valid waiver of his right to appeal, counsel may ignore his client's desire to appeal in order to retain the benefit of a plea bargain, unless there is a non-frivolous appealable issue. *Id*. The court also disagreed with the 3rd Circuit's holding that waiver is the threshold issue of whether a defendant can bring an ineffective-assistance claim when counsel does not appeal after defendant waives appellate rights in a pleas agreement, and only an informed voluntary waiver is valid to prevent an ineffective-assistance claim. *Id*. The 6th Circuit stated that the outcome in the majority of circuits as well as its own unpublished decisions, "is the more faithful application of both [United States] Supreme Court and Sixth Circuit precedent" to the issue. *Id*. The 6th Circuit reasoned that it is the "defendant's decision to pursue an appeal, even if that right has been severely limited and the outlook on the merits is bleak." *Id*. at 359–60. Thus, the 6th Circuit concluded "that even when a defendant waives all or most of his right to appeal, an attorney who fails to file an appeal that a criminal defendant explicitly requests has, as a matter of law, provided ineffective assistance of counsel that entitles the defendant to relief in the form of a delayed appeal." *Id*. at 360.

Habeas Corpus – Antiterrorism and Effective Death Penalty Act of 1996: *Wentzell v. Neven,* 674 F.3d 1124 (9th Cir. 2012)

The 9th Circuit addressed whether a petitioner must obtain leave from a federal appellate court in order to file a "second or successive" *habeas corpus* petition with the district court as required by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") when the "second or successive" petition is the first petition challenging an amended judgment of conviction. *Id*. at 1126–27. The court noted that the 2nd Circuit determined that a subsequent petition is not successive "where a first habeas petition results in an amended judgment," even if its claims could have been raised in a prior petition or the petitioner "effectively challenges an unamended component of the judgment." *Id.* at 1127. The 5th Circuit found such a petition successive where it "involved the vacation of a conviction and sentence for a lesser included offense," which under 5th Circuit practice left the conviction and sentence intact and did not involve a new, amended judgment. *Id.* The 9th Circuit agreed with the 2nd Circuit in finding that procedural default rules, and not the rules governing "second or successive" petitions, are "the more appropriate tools for sorting out new claims from the old." *Id*. The court stated that the 2nd Circuit practice aligns with existing law in the 9th Circuit: "In the context of finality, we treat the judgment of conviction as one unit, rather than separately considering the judgment's components, *i.e.,* treating the conviction and sentence for each count separately." *Id*. at 1127–28. Thus, the 9th Circuit concluded that the latter of two habeas petitions is not "second or successive under the AEDPA because it challenges a new, intervening judgment." *Id*. at 1128.

Statute of Limitations – Antiterrorism and Effective Death Penalty Act (AEDPA): *Marciesich v. Cate*, 668 F.3d 1164 (9th Cir. 2012)

The 9th Circuit addressed whether, under the AEDPA, 28 U.S.C.S § 2244(d)(1), the court should apply a one-year statute of limitations on a claim-by-claim basis, or whether to consider the habeas petition as a whole. *Id*. at 1169. The court noted that the 11th Circuit held that an "application is timely so long as one claim within the application is timely." *Id.* Conversely, the 3rd Circuit held that the "AEDPA's statute of limitations should be applied to each individual claim in a habeas petition." *Id*. at 1170. The 3rd Circuit noted that the language of AEDPA's statute of limitations was ambiguous, so it considered the statute as a whole in determining that the statute of limitations should be applied on a claim by claim basis. *Id.* The 6th Circuit subsequently adopted the 3rd Circuit's interpretation of AEDPA's statute of limitations. *Id*. In addition, the 9th Circuit noted that it had previously adopted the 3rd Circuit's interpretation in a case later vacated on other

grounds. *Id*. Thus, the 9th Circuit joined the 3rd and 6th Circuits in concluding "that AEDPA's one year statute of limitations applies to each claim in a habeas application on an individual basis." *Id*. at 1171.

Privacy Rights – Freedom of Information Act: *World Publishing Co. v. U.S. Department of Justice*, 672 F.3d 825 (10th Cir. 2012)

The 10th Circuit addressed whether booking photos are exempt from disclosure based on Exemption 7(C) of the Freedom of Information Act (FOIA), 5 U.S.C. § 522(b)(7)C). *Id*. at 828. The 6th Circuit determined that "there is no privacy interest in a booking photo given ongoing and public criminal proceeding" and consequently, Exemption 7(C) is not applicable. *Id.* Alternatively, the 11th Circuit determined that booking photos are exempt from disclosure pursuant to Exemption 7(C), noting that "mug shots carry a clear implication of criminal activity." *Id.* (internal citations omitted). The court agreed with the 11th Circuit's finding that booking photographs are not generally available which supports a personal privacy interest in the photographs. *Id*. at 829. Thus, the 10th Circuit held there is a privacy interest in booking photos and Exemption 7(C) prevents their disclosure. *Id.*

ENVIRONMENTAL LAW

Standard of Review – Sentencing: *United States v. Pruett*, 681 F.3d 232 (5th Cir. 2012)

The 5th Circuit addressed the proper standard of review of abuse-of-trust sentencing enhancements under U.S.S.G. § 3B1.3, evaluating "whether adjustments under Section 3 of the Guidelines are questions of law reviewed *de novo* or questions of fact reviewed for clear error." *Id.* at 251. The court noted that the 1st Circuit determined that, since it is both a legal and factual question, the court should apply "a sliding scale of review depending on whether the trial judge's conclusion is more law-oriented or more fact-driven," while the 4th, 6th, 7th, 8th, 10th, and 11th Circuits "review the application of the Guidelines *de novo* and the district court's factual findings for clear error." *Id.* at 252. The 2nd and 3rd Circuits review the question of whether the defendant occupied a position of trust *de novo*, but review the factual question of abuse of trust for clear error. *Id.* Finally, the D.C. Circuit found that "due deference is the appropriate standard of review." *Id.* The 5th Circuit agreed with the D.C. Circuit in finding that due deference "reflects an apparent congressional desire to compromise between the need for uniformity in sentencing and the recognition that the district courts should be afforded

some flexibility in applying the guidelines to the facts before them." *Id.* The court disagreed with the other circuits, stating that their "scattershot approach" threatens uniformity in sentencing. *Id.* Thus, the 5th Circuit concluded that due deference is the appropriate standard of review in the application of U.S.S.G. § 3B1.3 guidelines for abuse-of-trust sentencing enhancements. *Id.*

SENTENCING

Prior Convictions – Applicability of the Modified Categorical Approach: *United States v. Beardsley*, 691 F.3d (2d Cir. 2012)

The 2nd Circuit addressed whether § 2252A(b)(1), "which applies to defendants convicted of certain federal child pornography offenses who have a prior conviction under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive conduct involving a minor or ward . . . . permits a modified categorical analysis of a prior state conviction." *Id*. at 254, 259 (internal quotation marks omitted). The court noted that the 1st, 3rd, 4th, 5th, 7th, 8th, and 11th Circuits "all take the view that only statutes of prior conviction that are divisible into qualifying and non-qualifying predicate offenses may be subject to modified categorical analysis." *Id*. at 266. The 2nd Circuit deemed the 6th and 10th Circuits' approaches unclear, and noted that the D.C. Circuit has not addressed the issue. *Id*. at 266–67. The court also noted that the 9th Circuit rejected the requirement of differentiating between divisible and non-divisible statutes, extending the scope of modified categorical questions. *Id*. The 2nd Circuit joined the majority of the circuits and held that the application of the modified categorical approach requires that a "conviction . . . [be] divisible into predicate and non-predicate offenses, listed in separate subsections or a disjunctive list." *Id*. at *46.

Sentence Enhancement – Crime of Violence: *United States v. Gomez*, 690 F.3d 194 (4th Cir. 2012)

The 4th Circuit addressed whether district courts "may apply the modified categorical approach under the [Armed Career Criminal Act (ACCA)]," to determine "if a prior conviction was a crime of violence for [sentence] enhancement purposes." *Id*. at 199, 202. The 4th Circuit noted from its own precedent that the "use of the modified categorical approach is only appropriate when the statute of conviction encompasses multiple distinct categories of behavior, and at least one of those categories constitutes an ACCA violent felony." *Id*. at 199 (internal quotation marks omitted). The court observed that the majority of circuits to consider the issue hold that where there is no divisible use-of-

force element under the applicable statute, the district courts may not employ the modified categorical approach to determine that the use of force in question was a crime of violence. *Id*. at 199–00. Meanwhile, the 6th, 9th, and 10th Circuit apply "the modified categorical approach to both divisible and indivisible statutes." *Id.* at 204 n.1. The 4th Circuit agreed with the majority of circuits based on an understanding of its own precedent and its reading of Supreme Court precedent. *Id*. at 203. Thus, the 4th Circuit held that "district courts may apply the modified categorical approach to a statute only if it contains divisible categories of proscribed conduct, at least one of which constitutes—by its elements—a violent felony." *Id*. at 199.

Crimes of Violence – Sentencing and Punishment: *United States v. Rede-Mendez*, 680 F.3d 552 (6th Cir. 2012)

The 6th Circuit addressed whether "aggravated assault" under N.M. Stat. § 30-3-2(A) qualifies as a crime of violence under the element prong of U.S.S.G. § 2L1.2. *Id*. at 558. The court noted that the 5th, 9th, and 10th Circuits have held that "even a general-intent crime may include the threatened use of physical force as an element if it includes the use of a deadly weapon as an element." *Id*. The 6th Circuit disagreed with this conclusion and instead found that "[n]ot every crime becomes a crime of violence when committed with a deadly weapon." *Id*. The 6th Circuit further explained that "[t]he use of a deadly weapon may exacerbate the threat of physical force, but does not necessarily supply the threat if it is not already present in the underlying crime." *Id*. Thus, the 6th Circuit concluded that the "broad definition of assault . . . obstructs any argument that New Mexico aggravated assault (deadly weapon) qualifies as a crime of violence." *Id.*


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