Current Circuit Splits

The following pages contain brief summaries of circuit splits identified by federal court of appeals opinions announced between February 18, 2014 and September 4, 2014. 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*, 11 SETON HALL CIR. REV. [n] (2014).

CIVIL MATTERS

Admiralty Torts 150

Standard of care – Maritime rescue doctrine: *Barlow v. Liberty Mar. Corp.*, 746 F.3d 518 (2d Cir. 2014) 150

Bankruptcy 150

Final Judgment Rule – Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: *Bullard v. Hyde Park Sav. Bank (In re Bullard)*, 752 F.3d 483 (1st Cir. 2014) 150

Orders Denying Stay of Relief – Appealability: *Pinpoint IT Services, LLC v. Rivera (In re Atlas IT Exp. Corp.)*, 761 F.3d 177 (1st Cir. 2014). 151

Secured Status Determination – U.S.C. § 506(b): Prudential Ins. Co. of Am. v. SW Boston Hotel Venture, LLC (In re SW Boston Hotel Venture, LLC), 748 F.3d 393 (1st Cir. 2014) 151

Standing – Parties in Interest: *In re C.P. Hall Co. v. Columbia Casualty Co.*, 750 F.3d 659 (7th Cir. 2014) 152

Civil Procedure 152

Appellate Jurisdiction – Collateral Order Doctrine: *Cobra Natural Res., LLC v. Fed. Mine Safety & Health Review Comm'n*, 742 F.3d 82 (4th Cir. 2014)..152

Banking Law – Citizenship: *Rouse v. Wachovia Mortg., FSB*, 747 F.3d 707 (9th Cir. 2014)..153

First to File Bar – Pending Action: *United States ex rel. Shea v. Cellco P'ship*, 748 F.3d 338 (D.C. Cir. 2014)............................153

Guilty Pleas – Authorization: *United States v. Harden*, 758 F.3d 886 (7th Cir. 2014) 154

Justiciability – Exhaustion of Remedies: *Rundgren v. Wash. Mut. Bank, FA*, 760 F.3d 1056 (9th Cir. 2014)..........................154

Tax Deficiency – Third Party Intervention in Citizens' Deficiency Proceedings: *Huff v. Comm'r of IRS*, 743 F.3d 790 (11th Cir. 2014) 154

Civil Rights 155

Fair Housing Act – Disparate Impact Claims: Inclusive Communities Project, Inc. v. Texas Dep't of Hous. & Cmty. Affairs, 747 F.3d 275 (5th Cir. 2014)..155

Communications Law 156

Definitions – Federal Communications Act: *J&J Sports Prods. v. Mandell Family Ventures, LLC.*, 751 F.3d 346 (5th Cir. 2014) 156

Constitutional Law 156

Civil Rights – Remedies against State Actors: *Campbell v. Forest Pres. Dist.*, 752 F.3d 665 (7th Cir. 2014)....................................156

First Amendment – Free Speech: *Tex. Div., Sons of Confederate Veterans, Inc. v. Vandergriff*, 2014 U.S. App. LEXIS 13507 (5th Cir. 2014) 157

Second Amendment– Concealed Weapons: *Peruta v. County of San Diego*, 742 F.3d 1144 (9th Cir. 2014)..................................157

Contracts...157

Forum Selection Clause – Choice of Law: *Jackson v. Payday Fin.*, 2014 U.S. App. LEXIS 16257 (7th Cir. 2014) 157

Copyright Law **158**

Copyright Infringement – Mobile Phone Software: *Oracle Am., Inc. v. Google Inc.,* 750 F.3d 1339 (9th Cir. 2014) **158**

Debt Collection Law **159**

Fair Debt Collection Practices Act– Disputed Debt: *Clark v. Absolute Collection Serv.,* 741 F.3d 487 (4th Cir. 2014) **159**

Education Law **159**

Individuals with Disabilities Education Act – Stay-Put Provision: *M.R. v. Ridley Sch. Dist.*, 744 F.3d 112 (3d Cir. 2014) **159**

Labor and Employment Law **159**

False Claims Act – Employer Liability: *Foglia v. Renal Ventures Mgmt., LLC*, 754 F.3d 153 (3d Cir. 2014) **159**

Family and Medical Leave Act – Leave to Care for a Family Member: *Ballard v. Chi. Park Dist.*, 741 F.3d 838 (7th Cir. 2014) **160**

Fair Labor Standards Act – Offsetting Overtime Payment: *Haro v. City of Los Angeles*, 745 F. 3d 1249 (1st Cir. 2014) **160**

Environmental Law **161**

Critical Habitats – Endangered Species Act: *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581 (9th Cir. 2014) **161**

Immigration **161**

Administrative Agency Discretion – Immigration and Naturalization Act: *Silva-Trevino v. Holder*, 742 F.3d 197 (5th Cir. 2014) **161**

Statutory Interpretation – Immigration and Nationality Act: *Bautista v. AG of the U.S.*, 744 F.3d 54 (3d Cir. 2014) **162**

Waiver of Status Post Conviction – Eligibility of Waiver: *Roberts v. Holder*, 745 F. 3d 928 (8th Cir. 2014) **162**

Labor Law **163**

Employee Retirement Income Security Act of 1974 – Statute of Limitations: *Fish v. Greatbanc Trust Co.*, 749 F.3d 671 (7th Cir. 2014) **163**

Tax Law **163**

Civil Settlement – Deductibility: *Fresenius Med. Care Holdings, Inc. v. United States*, No. 13-2144, 2014 U.S. App. LEXIS 15536 (1st Cir. 2014) **163**

Notice Requirement – IRS Summons: *Jewell v. United States*, 749 F.3d 1295 (10th Cir. 2014) **164**

CRIMINAL MATTERS

Criminal Procedure **165**

Appeals – Habeas Corpus: *Collins v. Sec'y of the Pa. Dep't of Corr.*, 742 F.3d 528 (3d Cir. 2014) **165**

Career Offender Enhancement – United States Sentencing Guidelines: *Whiteside v. United States*, 748 F.3d 541 (4th Cir. 2014) **165**

Fourth Amendment – Warrantless Searches: *United States v. Noble*, 2014 U.S. App. LEXIS 15279 (6th Cir. 2014) **166**

Fugitive Disentitlement Statute – Criminal Prosecution: *United States v. Technodyne*, 753 F. 3d 368 (2d Cir. 2014) **166**

Removal of Non-Citizens – Eligibility for Relief: *Syblis v. AG of the U.S.*, 2014 U.S. App. LEXIS 15801 (3d Cir. 2014) **167**

Sentencing – Armed Career Criminal Act: *United States v. Prater*, 2014 U.S. App. LEXIS 16889 (6th Cir. 2014) **167**

Sentencing – Resentencing Hearings: *United States v. Alvarez*, No. 13-40812, 2014 U.S. App. LEXIS 13938 (5th Cir. 2014) ... **168**

Sentencing – Restitution: *United States v. Farano*, 749 F.3d 658 (7th Cir. 2014) **168**

Sex Trafficking of Children – Sentencing Enhancement: *United States v. Pringler*, 2014 U.S. App. LEXIS 16481 (5th Cir. 2014) **169**

Criminal Statutes **169**

Hobbs Act – Overt Act Requirement: *United States v. Salahuddin*, 2014 U.S. App. LEXIS 17000 (3rd Cir. 2014) **169**

Federal Rules of Evidence **170**

Witness – Lay Witness Testimony: *United States v. Gadson*, 2014 U.S. App. LEXIS 15969 (9th Cir. 2014) **170**

Intellectual Property Law **170**

Jurisdictional Dispute – Pre-Patent Inventorship: *Camsoft Data Sys., Inc. v. S. Elec. Supply, Inc.*, 756 F.3d 327 (5th Cir. 2014) **170**

Search and seizure **171**

Fourth Amendment – Third Party Consent to Searches: *United States v. Peyton*, 745 F. 3d 546 (D.C. Cir. 2014) **171**

Sentencing **171**

Enhancement Applications – 18 U.S.C. § 924(e): *United States v. Barbour*, 750 F.3d 535, 537 (6th Cir. 2014) **171**

Enhancement Applications – Causation Standard for Death Occurring During Commission of a Crime: *United States v. Ramos-Delgado*, No. 13-40367, 2014 U.S. App. LEXIS 12359 (5th Cir. 2014) **172**

Probation Dispositions – Revoking Supervised Release: *United States v. Vandergrift*, 754 F.3d 1303 (11th Cir. 2014) **172**

Restitution – Calculation: *United States v. Holmich*, 563 F. App'x 483 (7th Cir. 2014) **173**

Sentencing Juveniles **173**

Review of Writ of Habeas Corpus Denial for Imposed Adult Criminal Sentences on Juveniles – AEDPA: *Goins v. Smith*, 556 F. App'x 434 (6th Cir. 2014) **173**

Statutory Interpretation **174**

Prior Convictions Constituting Violent Felonies – ACCA Sentencing: *United States v. Chandler*, 743 F.3d 648 (9th Cir. 2014) **174**

CIVIL

ADMIRALTY TORTS

Standard of care – Maritime rescue doctrine: *Barlow v. Liberty Mar. Corp.*, 746 F.3d 518 (2d Cir. 2014)

The 2nd Circuit addressed whether the "maritime rescue doctrine", under which "a would-be rescuer, faced with an emergency, can only be held contributory liable for injuries resulting from his rescue attempt, if his conduct was reckless and wanton," is the proper standard of care to be applied to maritime torts. *Id.* at 524. The 4th Circuit determined that "the wanton and reckless standard reflects the value society places upon rescue as much as any desire to avoid a total defeat of recovery under common law," while the 9th and 5th Circuits held similarly. *Id.* at 525. The 2nd Circuit noted that "the rescue doctrine originated at a time when contributory negligence was an absolute bar to recovery." *Id.* at 525. The court noted that "maritime law has long used comparative fault in resolving competing claims of negligence between the injured and the tortfeasor, and today a majority of the states do the same." *Id.* at 525–26. The court reasoned that, because "under comparative negligence, of course, even a negligent rescuer can recover . . . the principal justification for the rescue doctrine — encouraging rescue — has largely disappeared." *Id.* at 526. Thus, the 2nd Circuit distinguished itself and concluded that the maritime standard of care "in comparative negligence jurisdictions is that rescuers must act reasonably under emergency circumstances." *Id.*

BANKRUPTCY

Final Judgment Rule – Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: *Bullard v. Hyde Park Sav. Bank (In re Bullard)*, 752 F.3d 483 (1st Cir. 2014)

The 1st Circuit considered whether a Bankruptcy Appellate Panel's ("BAP") "order denying confirmation is per se not a final order appealable under 28 U.S.C. § 158(d)(1) of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") and *can* be final, but should be *presumed* to be final unless the appellee can show otherwise." *Id*. at 486. The court noted that jurisdictional statutes should not be construed too liberally, because then "parties will run to the court of appeals for higher advice at every stage of the bankruptcy proceedings." *Id*. However, the court recognized that if statutes were construed too stringently, it would

"require[e] case-by-case, fact-intensive review . . . ." *Id*. The 1st Circuit held, consistent with the 2nd, 6th, 8th, 9th and 10th Circuits, that "an intermediate appellate court's affirmance of a bankruptcy court's denial of confirmation of a reorganization plan is not a final order appealable under § 158(d)(1) so long as the debtor remains free to propose an amended plan." *Id*. at 489.

Orders Denying Stay of Relief – Appealability: *Pinpoint IT Services, LLC v. Rivera (In re Atlas IT Exp. Corp.)*, 761 F.3d 177 (1st Cir. 2014).

The 1st Circuit addressed whether orders denying stays of relief are appealable as final judgments. *Id.* at 182. The court started by noting that all of the Circuits have agreed that orders granting stays relief are final and appealable, however there is a circuit split regarding whether the denial of a stay is final and appealable. *Id.* at 183. The 1st Circuit refers to the majority approach as "the blanket rule," which categorically allows for appeals of orders either granting or denying stays. *Id.* However, the minority view, exemplified by the 3rd Circuit, takes into account the status of the case itself to determine if the order is truly "final," or whether the District Court below can still engage in considerable activity. *Id*. The 1st Circuit ultimately sided with the 3rd Circuit's approach, and concluded that appealability is determined by "whether that edict definitively decided a discrete, fully-developed issue that is not reviewable somewhere else." *Id.* at 185.

Secured Status Determination – U.S.C. § 506(b): Prudential Ins. Co. of Am. v. SW Boston Hotel Venture, LLC (In re SW Boston Hotel Venture, LLC), 748 F.3d 393 (1st Cir. 2014)

The 1st Circuit addressed whether to "uphold the bankruptcy court's application of the flexible approach" in determining secured status and collateral value in a bankruptcy proceeding. *Id*. at 405. The court noted that "several circuits," including the 5th Circuit, have adopted a "single-valuation" approach, where the determination of over-security for § 506(b) purposes always occurs at a fixed point in time. *Id.* The court noted that "other circuits," including the 11th Circuit, have adopted a "'flexible' approach, giving the bankruptcy court discretion to determine the appropriate measuring date based on the circumstances of the case." *Id*. In addition, the court recognized that the Bankruptcy Court adopted the flexible approach. *Id.* The court noted that "neither § 506(b)'s language, nor its legislative history, nor the bankruptcy rules define the measuring date of post-petition interest" which suggests flexibility. *Id*. The 1st Circuit concluded that "at least in the circumstances presented here, a

bankruptcy court, may, in its discretion, adopt a flexible approach." *Id*. Thus, the 1st Circuit agreed with the 11th Circuit, and held that "under the particular facts presented in this case, the bankruptcy court did not err in adopting a flexible approach for determining oversecured status."

Standing – Parties in Interest: *In re C.P. Hall Co. v. Columbia Casualty Co.*, 750 F.3d 659 (7th Cir. 2014)

The 7th Circuit addressed whether 11 U.S.C. § 1109(b), defining parties in interest, entitles a debtor's excess insurer the right to intervene in a bankruptcy settlement. *Id.* at 661. The Court noted that the 2nd, 10th, and 11th Circuits found that the interest of an entity that "may suffer collateral damage from a bankruptcy proceeding" is too remote to entitle that entity to intervene in a bankruptcy proceeding. *Id.* at 661. The court distinguished the facts of this case from opinions in the 3rd and 9th Circuits, where those courts found that insurers of the debtor were entitled to object to settlements because their injuries were more than probabilistic and the bankruptcy settlements in question affected the insurer's rights. *Id* at 662-63. Thus, the 7th Circuit concluded, in line with the 2nd, 10th, and 11th Circuits, that because the excess insurer's loss was too remote and the excess insurer was not a party in interest as defined by 11 U.S.C. § 1109(b), there was no right to intervene in a settlement negotiation between two other parties. *Id.* 661–62.

CIVIL PROCEDURE

Appellate Jurisdiction – Collateral Order Doctrine: *Cobra Natural Res., LLC v. Fed. Mine Safety & Health Review Comm'n,* 742 F.3d 82 (4th Cir. 2014)

The 4th Circuit addressed "whether a Commission decision granting temporary reinstatement to a coal miner is immediately appealable by the coal operator under the collateral order doctrine." *Id.* at 88. The court recognized that the collateral order doctrine only allows the immediate review of important issues that have been definitively decided and would be unreviewable after entering final judgment. *Id.* at 86. The court noted that the 11th and 7th Circuits determined that appellate jurisdiction is appropriate. *Id*. However, the court disagreed with the 11th and 7th Circuits as the 11th Circuit rendered its decision more than two decades ago and the 7th Circuit's resolution was resolved in a somewhat cursory fashion. *Id*. Thus the 4th Circuit concluded "the collateral order doctrine does not permit an interlocutory review of the proceedings below." *Id.* at 92.

Banking Law – Citizenship: *Rouse v. Wachovia Mortg., FSB*, 747 F.3d 707 (9th Cir. 2014)

The 9th Circuit addressed "whether, under 28 U.S.C. § 1348, a national bank is a citizen of both the state in which its principal place of business is located and the state where its main office is located as designated in the bank's articles of association." *Id.* at 709. The court noted that the Supreme Court previously held that a national bank is a citizen of the "state where its main office is located." *Id.* at 710. Further, the court noted that, following the Supreme Court decision, the 8th Circuit held that "a national bank is 'located' only in the state in which its main office is located." *Id.* at 712. While the 1st, 6th and 7th Circuits agree that banks can only be citizens of the state in which its main office is located, the 2nd and 4th Circuits have found that national banks may be citizens of two or more states. *Id.* at 710-11. The 9th Circuit posited that when "interpreting congressional intent, we look to the time of Congress's enactment of the legislation." *Id.* at 714. Agreeing with the 1st, 6th, and 7th Circuits, the 9th Circuit concluded that "a national bank is a citizen of the state in which its main office is located." *Id.* at 709.

First to File Bar – Pending Action: *United States ex rel. Shea v. Cellco P'ship*, 748 F.3d 338 (D.C. Cir. 2014)

The D.C. Circuit addressed whether the first-to-file bar applies only while the first-filed action remains pending. *Id*. at 343. The court stated that the 4th, 7th, 10th Circuits have held that the first-to-file bar only applies when the first-filed action remains pending. *Id*. Further, the court noted that the 7th and 10th Circuits only addressed the issue in dicta and that the 4th Circuit had twice considered the meaning of "pending" as a controlling issue but that it had based its decision on the 10th Circuit's understanding. *Id*. at 344. Interpreting the applicable statute, the court reasoned that the plain meaning of 31 U.S.C. § 3730(b)(5) "makes clear that the bar commences when a person brings an action under this subsection and thence forth bars any action based on the facts underlying the pending action." *Id*. The D.C. Circuit rejected the reasoning of the 4th, 7th, and 10th Circuits, and held that "the first-to-file bar applies even if the initial action is no longer pending," because the court interpreted "'pending' in the statutory phrase 'pending action' to distinguish the earlier-filed action from the later-filed action." *Id*. at 344.

Guilty Pleas – Authorization: *United States v. Harden*, 758 F.3d 886 (7th Cir. 2014)

The 7th Circuit addressed whether magistrate judges can accept guilty pleas under the Federal Magistrates Act with a defendant's consent. *Id.* at 888. The court noted that the 4th, 10th and 11th Circuits found that magistrate judges have the authority to accept felony guilty pleas. *Id.* at 891. The 7th Circuit found that while a magistrate judge may conduct a Fed. R. Civ. P. 11(b) colloquy for the purpose of making a report or recommendation, a magistrate judge cannot accept a defendant's guilty pleas because it violates the Federal Magistrates Act. *Id*. The court disagreed with the 4th, 10th, and 11th Circuits' statements that "Congress intended to give federal judges significant leeway to experiment with possible improvements in the efficiency of the judicial process." *Id*. Thus the 7th Circuit concluded that magistrate judges violate the Federal Magistrate Act by accepting guilty pleas. *Id*.

Justiciability – Exhaustion of Remedies: *Rundgren v. Wash. Mut. Bank, FA*, 760 F.3d 1056 (9th Cir. 2014)

The 9th Circuit addressed whether mortgage borrowers claims are affirmative defenses that are exempt from Financial Institutions Reform, Recovery, and Enforcement Act's ("FIRREA") exhaustion requirement. *Id.* at 1062–63. The court noted that the 1st Circuit determined that "it did not matter 'who happens to be the plaintiff' because '[t]he purpose of the exhaustion requirement is to make persons with claims against bank funds or property submit them promptly in a single administrative forum.'" *Id.* at 1063. The 9th Circuit disagreed with the 1st Circuit because "a borrower's claim that the bank is not entitled to foreclose due to past misdeeds plainly satisfies the criterion of being a 'claim relating to any act or omission' of a bank." *Id.* at 1064. Thus the 9th Circuit concluded that the mortgage borrowers claims were not affirmative defenses exempt from FIRREA's exhaustion requirement. *Id*.

Tax Deficiency – Third Party Intervention in Citizens' Deficiency Proceedings: *Huff v. Comm'r of IRS*, 743 F.3d 790 (11th Cir. 2014)

The 11th Circuit addressed whether the Internal Revenue Service ("IRS") correctly brought a deficiency action against taxpayers that had paid their taxes to the Virgin Islands stating that the taxpayers were not bona fide residents of the Virgin Islands. *Id*. The Virgin Islands moved to intervene but the Tax Court denied intervention and appeal was filed.

Id. The 11th Circuit noted that the Tax Court has previously stated that the Virgin Islands attempt to intervene using Fed. R. Civ. P. 24(a)(2) does not allow intervention as a matter of right. *Id.* at 794. Additionally, the court determined that the Virgin Islands have not been found to have a qualifying interest that allows such intervention in delinquency proceedings such as these. *Id*. The Court noted that the 3rd and 8th Circuits have reached the same conclusion, but argued that the Virgin Islands intervention should instead be required to satisfy Rule 24(b)(3), requiring a court to decide whether "the intervention will unduly delay or prejudice the adjudication of the original parties' rights." *Id.* 795. In contrast, the 4th Circuit held that the Tax Court used the correct permissive intervention standard and reached a proper denial of intervention. *Id*. The 11th Circuit agreed with the 3rd and 8th Circuits and concluded that Rule 24(a)(2) is the proper standard for deciding if intervention by a third party is proper. *Id*.

CIVIL RIGHTS

Fair Housing Act – Disparate Impact Claims: Inclusive Communities Project, Inc. v. Texas Dep't of Hous. & Cmty. Affairs, 747 F.3d 275 (5th Cir. 2014)

The 5th Circuit addressed the "correct legal standard to be applied in disparate impact claims under the [Fair Housing Act ("FHA")]". *Id.* at 276. The court noted that its "sister circuits have applied multiple different legal standards to similar claims under the FHA." *Id.* at 281. The court recognized that the 2nd and 3rd Circuits "require a defendant to bear the burden of proving that there are no less discriminatory alternatives to a practice that results in a disparate impact," while the 8th and 10th Circuits "place the burden on the plaintiff to prove that there are less discriminatory alternatives." *Id.* In addition, the court noted that the 7th Circuit "applied a four-factor balancing test rather than burden-shifting, while the 4th and 6th Circuits "applied a four-factor balancing test to public defendants and a burden-shifting approach to private defendants." *Id.* The 5th Circuit followed the 2nd and 3rd Circuits and adopted a "three-step burden-shifting approach" because "these standards are in accordance with disparate impact principles and precedent." *Id*.

COMMUNICATIONS LAW

Definitions – Federal Communications Act: *J&J Sports Prods. v. Mandell Family Ventures, LLC.,* 751 F.3d 346 (5th Cir. 2014)

The 5th Circuit addressed whether § 605(a) of the Federal Communication Act ("FCA") encompasses a receipt or inception of communications by wire from a cable system. *Id*. at 351. The court noted that the 3rd and 7th Circuits held that the 2nd Circuit's interpretation of § 605(a) "unacceptably blurs the line between radio and wire communications, which are separately defined terms that both refer to instrumentalities incidental to transmission of the communication." *Id*. at 352 (internal quotations omitted). The court noted that the 2nd Circuit concluded that the "definition for radio communications extends to all instrumentalities, facilities, apparatus, and services . . . " *Id*. (internal citations omitted). Thus, the 5th Circuit joined the 3rd and 7th Circuits in holding that § 605(a) does not encompass receipt of communications by wire from a cable system. *Id*. at 353.

CONSTITUTIONAL LAW

Civil Rights – Remedies against State Actors: *Campbell v. Forest Pres. Dist*., 752 F.3d 665 (7th Cir. 2014)

The 7th Circuit addressed whether 42 U.S.C. § 1981, which prohibits racial discrimination in the making and enforcement of private as well as public contracts, "provide[s] a remedy against state actors independent of 42 U.S.C. § 1983. *Id*. at 667. The court noted that the 9th Circuit determined that, although "the amended 42 U.S.C. § 1981 does not expressly authorize private claimants to sue state actors directly," the Supreme Court intended to imply a remedy because of the Court's previously inferred remedy against *private* actors. *Id*. at 671. The 7th Circuit disagreed with the 9th Circuit and noted that Congress's creation of a specific remedy against state actors under § 1983 counsels against inferring a remedy against them under § 1981. *Id*. The 7th Circuit joined the 4th, 5th, 6th, and 10th Circuits in holding that "§ 1983 remains the exclusive remedy for violations of § 1981 committed by state actors." *Id*.

First Amendment – Free Speech: *Tex. Div., Sons of Confederate Veterans, Inc. v. Vandergriff*, 2014 U.S. App. LEXIS 13507 (5th Cir. 2014)

The 5th Circuit addressed whether the decision of a governmental board to reject a specialty license plate containing a Confederate battle flag is government speech or private speech. *Id.* at *10. The court noted that the 6th Circuit "held that a specialty license plate was governmental speech." *Id.* at *19. The 5th Circuit observed that the 6th Circuit's conclusion made it the sole outlier among the circuits. *Id*. The court noted that the 4th, 7th, 8th, and 9th Circuits have all held that specialty license plates were private speech. *Id.* Furthermore, the court distinguished the case before the 6th Circuit because it involved a license plate specifically commissioned by the state government. *Id.* Thus, the court concluded that specialty license plates are private speech. *Id.* at *21.

Second Amendment– Concealed Weapons: *Peruta v. County of San Diego,* 742 F.3d 1144 (9th Cir. 2014)

The 10th Circuit addressed whether or not a state may require an individual to apply for a permit to carry a concealed weapon or if that requirement violates a citizen's right to bear arms. *Id*. at 1147. The court noted that the 2nd, 3rd and 4th Circuits have held that as long as a state can show a "justifiable need" for restrictive permit requirements, they do not violate a citizen's right to bear arms. *Id*. However, the 10th Circuit disagreed and sided with the 7th Circuit's interpretation that statutes requiring a citizen to "show cause" run afoul of the privileges and protections provided for by the Second Amendment. *Id*. at 1149. The 10th Circuit recognized the right of an individual to bear arms, which it interpreted as the right to carry a weapon in case of confrontation. *Id*. at 1179.

CONTRACTS

Forum Selection Clause – Choice of Law: *Jackson v. Payday Fin.*, 2014 U.S. App. LEXIS 16257 (7th Cir. 2014)

The 7th Circuit addressed whether a forum selection clause in a contract was valid. *Id*. at *16. The court noted that where there is no controlling federal statute the court is "without clear guidance from the Supreme Court; It has not yet decided the *Erie* issue of which law governs when, as here, a federal court, sitting in diversity, evaluates a forum selection clause in the absence of a controlling federal statute." *Id*. at *18–19 (internal quotations marks omitted). The court noted the 8th, 9th, 5th,

2nd, 11th, and 3rd Circuits "hold that the enforceability of a forum selection clause implicates federal procedure and should therefore be governed by federal law." *Id*. at *19 (internal quotations marks omitted). The 7th Circuit took a different approach, stating that "the law designated in the choice of law clause would be used to determine the validity of the forum selection clause." *Id*. at *19. Thus, the 7th Circuit rejected the reasoning of the majority of circuits and deferred to the law stated in the forum selection clause of a contract where there is no controlling federal statute in diversity jurisdiction cases. *Id*.

COPYRIGHT LAW

Copyright Infringement – Mobile Phone Software: *Oracle Am., Inc. v. Google Inc.,* 750 F.3d 1339 (9th Cir. 2014)

The 9th Circuit addressed what test should be "employed when attempting to draw the line between what is protectable expression and what is not[,]" specifically attempting to define whether the "non-literal elements of a computer program constitute protectable expression." *Id.* at. 1357. The 6th Circuit found that principles or merger and scenes a faire should not be assessed in the infringement analysis but rather "as a component of copyrightability." *Id.* The 9th Circuit held that "scenes a faire [is] a defense to infringement rather than . . . a barrier to copyrightability." *Id.* The 1st Circuit found that "methods of operation are means by which a user operates something and any words used to effectuate that operation are unprotected expression." *Id.* at 1357. Alternatively, the 3rd Circuit found that "everything not necessary to the purpose or function of a work is expression." *Id.* The 2nd Circuit considered the merger doctrine in order to determine if actionable infringement has occurred, "rather than whether a copyright is valid." *Id.* The 9th Circuit joined the 2nd Circuit, holding that "although an element of a work may be characterized as a method of operation, that element may nevertheless contain expression that is eligible for copyright protection," and rejecting the "assumption that, once any separable idea can be identified in a computer program everything else must be protectable expression, on grounds that more than one idea may be embodied in any particular program." *Id.*

DEBT COLLECTION LAW

Fair Debt Collection Practices Act– Disputed Debt: *Clark v. Absolute Collection Serv.,* 741 F.3d 487 (4th Cir. 2014)

The 4th Circuit addressed whether the Fair Debt Protection Act, 15 U.S.C. § 1692(g)(a) permits a consumer to dispute the validity of a debt orally, or whether it imposes a writing requirement. *Id.* at 489. The court noted that the 3rd Circuit has held that there is a writing requirement to satisfy the statute. *Id*. In addition, the 3rd Circuit considered the legislative purpose behind the statute. *Id*. However, the 4th Circuit stressed the importance of separation of power and plain language. *Id*. The Court noted that its sole purpose to enforce non-absurd language in statutes according to the text. *Id*. at 491. The 4th Circuit, joining the 2nd and 9th Circuits, concluded that § 1692(g)(a) does not require the debt dispute to be in writing. *Id*.

EDUCATION LAW

Individuals with Disabilities Education Act – Stay-Put Provision: *M.R. v. Ridley Sch. Dist.*, 744 F.3d 112 (3d Cir. 2014)

The 3rd Circuit addressed whether the stay-put provision provides for "the right to interim funding, if applicable, [to] extend[ ] through the time of a judicial appeal." *Id.* at 115. The court noted that the D.C. Circuit determined that Congress did not intend stay-put financing to cover federal appellate review, while the 9th Circuit found that stay-put obligation extends through appeals decision. *Id*. at 125. The 3rd Circuit reasoned that the "text [of § 1415(j)] is broadly written to encompass the pendency of any proceeding conducted pursuant to this section." *Id.* The 3rd Circuit agreed with the 9th Circuit and concluded that "the statutory language and the 'protective purposes' of the stay-put provision lead to the conclusion that Congress intended stay-put placement to remain in effect through the final resolution of the dispute." *Id*.

LABOR AND EMPLOYMENT LAW

False Claims Act – Employer Liability: *Foglia v. Renal Ventures Mgmt., LLC*, 754 F.3d 153 (3d Cir. 2014)

The 3rd Circuit addressed what a plaintiff must show at the pleading stage to satisfy the "particularity" requirement of Fed. R. Civ. P. 9(b) in the context of a claim under the False Claims Act, 31 U.S.C.S. § 3729 et seq. *Id.* at 155. The court noted that the "[t]he 4th, 6th, 8th, and 11th Circuits have held that a plaintiff must show 'representative samples' of

the alleged fraudulent conduct, specifying the time, place, and content of the acts and the identity of the actors," while, "[t]he 1st, 5th, and 9th Circuits . . . have taken a more nuanced approach regarding the heightened pleading requirements of Rule 9(b) by holding that it is sufficient for a plaintiff to allege 'particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted.'" *Id.* at 156. The 3rd Circuit agreed with the 1st, 5th, and 9th Circuits, and held that the more "nuanced" approach provides defendants fair notice of the plaintiff's claims. *Id.* at 157.

Family and Medical Leave Act – Leave to Care for a Family Member: *Ballard v. Chi. Park Dist.*, 741 F.3d 838 (7th Cir. 2014)

The 7th Circuit addressed whether or not providing physical and emotional care for a terminally ill person constituted "caring for" within the meaning of the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2612(a)(1)(C), even though the treatment was not part of the regimented care. *Id.* at 840. The court noted that the 1st and 9th Circuits determined that "care" had to be related to ongoing medical treatment. *Id.* at 842. The court disagreed with the 1st and 9th Circuits, as the circumstances involved in both cases cited were distinguishable, thus creating a circuit split. *Id.* The 7th Circuit concluded that so long as the employee attends to a family member's basic medical, hygienic, or nutritional needs, that employee is caring for the family member within the meaning of the FMLA, even if that care is not part of ongoing treatment of the condition. *Id.*

Fair Labor Standards Act – Offsetting Overtime Payment: *Haro v. City of Los Angeles*, 745 F. 3d 1249 (1st Cir. 2014)

The 1st Circuit addressed how previously-paid overtime should be offset under the Fair Labor Standard Act, 29 U.S.C § 207(a) by either using a week-by-week calculation or by using a cumulative approach. *Id.* at 1261. The court noted that the 6th and 7th Circuits determined that a week-by-week offset should be used to calculate offsets, while the 5th and 11th Circuits found that "previously-paid overtime can be cumulatively offset against the damages calculated." *Id.* at 1255, 1260. The 1st Circuit agreed with the 6th and 7th Circuits in finding that under 29 U.S.C § 207(a), "compensation already paid for work done within one workweek should not be transferrable and offset against overtime due in another workweek." *Id.* at 1260. The court disagreed with the 5th and 11th Circuits, as the case law set forth supporting the cumulative approach was

either summarily decided or inapposite in this case. *Id.* Thus the 1st Circuit concluded that previously-paid overtime should be offset using a week-by-week calculation. *Id.* at 1261.

ENVIRONMENTAL LAW

Critical Habitats – Endangered Species Act: *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581 (9th Cir. 2014)

The 9th Circuit addressed "whether [National Environmental Policy Act ("NEPA")] applies to the designation of critical habitats under Section 4 of the [Endangered Species Act]." *Id.* at 649, n. 50. The court held that NEPA is not applicable to the designation of a critical habitat under the Endangered Species Act, 16 U.S.C. § 1531 ("ESA") *Id.* at 648. The 9th Circuit stated that the procedures already in place for designating a critical habitat under the ESA were sufficient and requiring compliance with National Environmental Policy Act ("NEPA") when designating would be superfluous. *Id.* at 649. The 10th Circuit disagreed with the holdings of the 9th Circuit whereby the 9th Circuit stated the NEPA was not necessary to designate critical habitats. *Id.* at 649, n. 50. The 9th Circuit noted that all of the goals of the NEPA, such as public notice, were incorporated into the procedures for designation of critical habitats under Section 4 of the ESA. *Id.* at 649. The 9th Circuit concluded that the National Environmental Policy Act was not applicable to designation of critical habitats. *Id.*

IMMIGRATION

Administrative Agency Discretion – Immigration and Naturalization Act: *Silva-Trevino v. Holder*, 742 F.3d 197 (5th Cir. 2014)

The 5th Circuit addressed the question of whether the Immigration and Naturalization Act ("INA") is sufficiently ambiguous to allow for the consideration of additional evidence in accordance with the Attorney General's three-step approach to determining crimes involving moral turpitude. *Id.* at 200. The court noted that while the 3rd, 4th, 9th and 11th Circuits withheld deference and determined that the statute's language was unambiguous, the 7th and 8th Circuits found the opposite. *Id*. The 5th Circuit agreed with the 3rd, 4th, 9th and 11th Circuits, reasoning that, "if Congress intended for immigration judges to consider extrinsic evidence to classify a conviction as a crime of moral turpitude, the legislators would have included language to that effect." *Id.* at 201. In so reasoning, the court disagreed with the 7th and 8th Circuits, noting that "Congress is aware of the universal judicial interpretation of the 'convicted of' clause

of § 212, and we can assume that Congress expects us to abide by that construction." *Id.* at 203. Thus, the 5th Circuit concluded that its own precedent prohibits an inquiry into extrinsic evidence, and that such inquiries are "only viable when Congress has not spoken directly to the statutory question before the court." *Id.* at 205.

Statutory Interpretation – Immigration and Nationality Act: *Bautista v. AG of the U.S.*, 744 F.3d 54 (3d Cir. 2014)

The 3rd Circuit addressed the issue of whether the jurisdictional element of 18 U.S.C. § 922(g), the Immigration and Nationality Act ("INA") is necessary for a state attempted arson conviction to qualify as an aggravated felony under 8 U.S.C. § 101(a)(43)(E). *Id.* at 64. The court noted that the 5th, 7th, and 9th Circuits determined that Congress intended that the "interstate commerce" element of the federal statute supports the notion that the jurisdictional requirement is distinct from the substantive nature of the offense. *Id.* at 72. The 3rd Circuit agreed with the 5th, 7th, and 9th Circuits in finding that the penultimate sentence of § 101(a)(43)(E) conveys Congress's intent to qualify more than a negligible number of state convictions as aggravated felonies. *Id.* at 64. However, the court disagreed with the 5th, 7th, and 9th Circuits, and concluded that "the structure of § 101(a)(43)(E) evidences Congress's intent to accomplish that objective through the use of 'described in' rather than 'defined in' as a means to always discard jurisdictional elements of federal felonies for the purposes of § 101(a)(43)(E)." *Id.* The court noted that if Congress had intended to exclude the jurisdictional element of all federal statutes from the categorical approach analysis, it could simply have included a different penultimate sentence stating that jurisdictional elements should be ignored, as it clearly expressed its directives regarding specific subsections elsewhere in § 101(a)(43). *Id.* The 3rd Circuit concluded since the statute of the plaintiff's arson conviction did not contain the jurisdictional element of § 833(i), the conviction is not an aggravated felony under § 101(a)(43)(E)(i) because the state statute does not require a nexus with interstate commerce. *Id.* at 68.

Waiver of Status Post Conviction – Eligibility of Waiver: *Roberts v. Holder*, 745 F. 3d 928 (8th Cir. 2014)

The 8th Circuit addressed whether the aggravated felony bar to a waiver of aggravated felony conviction found in 8 U.S.C. § 112(h) applies to alien immigrants who attain Lawful Permanent Resident status post-admission to the United States. *Id.* at 933. The court noted that the 3rd, 4th, 5th, and 11th Circuits found that a person must have entered or been admitted to the Unites States as a Lawful Permanent Resident in order for

the aggravated felony bar to apply to them. *Id.* at 932 The 8th Circuit disagreed with the 3rd, 4th, 5th, and 11th Circuits, in finding that the Bureau of Immigration Appeals' reasonable construction of the statute is correct and that relief is unavailable for any alien convicted of an aggravated felony as a Lawful Permanent Resident, regardless of how such status was acquired. *Id.* The court disagreed with the 3rd, 4th, 5th, and 11th Circuits as the ambiguity in the immigration statutes makes the Bureau of Immigration Appeals' interpretation reasonable. *Id.* Thus the 8th Circuit concluded that the defendant was not entitled to review of his status. *Id.* at 935.

LABOR LAW

Employee Retirement Income Security Act of 1974 – Statute of Limitations: *Fish v. Greatbanc Trust Co.*, 749 F.3d 671 (7th Cir. 2014)

The 7th Circuit addressed what constitutes "actual knowledge" in the Employee Retirement Income Security Act's ("ERISA") statute of limitations, which "bars an action if it is commenced more than three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation." *Id*. at 678. The court noted that the 3rd Circuit determined that the three-year bar only applies when "the plaintiff knows not only the facts underlying the alleged violation but also that those facts constitute a violation under ERISA," while the 5th Circuit "do[es] not require knowledge that the law was violated but still demand[s] actual knowledge of all material facts necessary to understand that some claim exists." *Id*. at 679 (citations omitted). The court disagreed with the 3rd Circuit's strict test, despite its acknowledging that a strong textual argument can be made for it because the statute requires "actual knowledge *of the breach of violation*." *Id.* at 679. The 7th Circuit joined the 5th Circuit in holding that actual knowledge requires "knowledge of all material facts but not knowledge of every detail or knowledge of illegality." *Id.*

TAX LAW

Civil Settlement – Deductibility: *Fresenius Med. Care Holdings, Inc. v. United States*, No. 13-2144, 2014 U.S. App. LEXIS 15536 (1st Cir. 2014)

The 1st Circuit addressed whether, in determining the tax treatment of a civil settlement under the False Claims Act ("FCA") for deduction purposes, "a court may consider factors beyond the mere presence or absence of a tax characterization agreement between the government and

the settling party." *Id.* at *1–*2. The court noted that in a similar case involving an FCA settlement agreement, the 9th Circuit found that the characterization and purpose of the settlement agreement determined whether or not parties intended the payment to compensate the government or punish the taxpayer. *Id*. at *11. However, the 1st Circuit disagreed with this holding, and instead found that to focus solely on the intent of the parties "would be an anomaly in tax law," where in formulating tax characterizations, courts must focus on the "economic reality of the particular transaction." *Id*. at *12. Thus, the 1st Circuit disagreed with the 9th Circuit and held that "in determining the tax treatment of an FCA civil settlement, a court may consider factors beyond the mere presence or absence of a tax characterization agreement between the government and the settling party." *Id*. at *17.

Notice Requirement – IRS Summons: *Jewell v. United States*, 749 F.3d 1295 (10th Cir. 2014)

The 10th Circuit addressed the issue of "how to interpret the notice requirement." *Id*. at 1297. Four other circuit courts have "acknowledged *Powell*, but have declined to enforce the 23-day requirement as mandatory." *Id*. at 1300. The 1st Circuit has required the government to comply with all of the "required administrative steps," but ignores that "the 23-day notice is one the administrative steps required in the tax code." *Id*. The 2nd, 6th, and 11th Circuits "assume equitable power to excuse the notice defect if the taxpayer was not prejudiced. *Id*. The 5th Circuit declined to apply *Powell* when the IRS violated a separate provision," 26 U.S.C. § 7609(d). *Id*. The 10th Circuit followed the Supreme Court's decision in *Powell* by stating that if the "IRS does not comply with the administrative requirements of the Internal Revenue Code, its summons are unenforceable," and therefore, "the 23-day notice requirement is mandatory and an administrative requirement of the Internal Revenue Code." *Id*. at 1300–01.

CRIMINAL

CRIMINAL PROCEDURE

Appeals – Habeas Corpus: *Collins v. Sec'y of the Pa. Dep't of Corr.*, 742 F.3d 528 (3d Cir. 2014)

The 3rd Circuit addressed whether "a claim of cumulative error must be presented to the state courts before" seeking a writ of habeas corpus. *Id.* at 542–43. The court noted that the 5th Circuit determined that "cumulative error relief is available so long as the individual errors were themselves not procedurally defaulted," while the 6th, 9th, and 10th Circuits found that "cumulative error claims are distinct claims subject to exhaustion and procedural default." *Id.* at 542. The 3rd Circuit agreed with the 6th, 9th, and 10th Circuits in finding "that a claim of cumulative error must be presented to the state courts before it may provide a basis for habeas relief." *Id.* at 543. Thus, the 3rd Circuit concluded that cumulative error claims are subject to exhaustion and procedural default if not presented in state court, thus precluding the claim on appeal. *Id.* at 542–43.

Career Offender Enhancement – United States Sentencing Guidelines: *Whiteside v. United States*, 748 F.3d 541 (4th Cir. 2014)

The 4th Circuit addressed "whether a federal inmate may use a 28 U.S.C. § 2255 motion to challenge a sentence that was based on the career offender enhancement under the United States Sentencing Guidelines ("USSG") when subsequent case law reveals the enhancement to be inapplicable to him." *Id*. at 543. The court noted that the 8th Circuit held that a misapplication of career offender status "is not an error that results in a complete miscarriage of justice." *Id*. at 549 (internal quotation marks omitted). The court also noted that the 7th Circuit held errors related to sentences issued under the mandatory Guidelines to be "less serious[,] and that as long as the sentence imposed was beneath the statutory maximum it was not subject to correction on collateral review." *Id*. at 550 (internal quotation marks omitted). The court also noted that the 11th Circuit had reached the opposite conclusion and held that "an erroneous career offender enhancement amounts to a fundamental miscarriage of justice." *Id*. The 4th Circuit agreed with the 11th Circuit's reasoning, which in turn had relied on the Supreme Court's recent pronouncements. *Id*. at 551.

Thus, the 4th Circuit held that "an erroneous application of the career offender enhancement amounts to a fundamental miscarriage of justice that is cognizable on collateral review." *Id*.

Fourth Amendment – Warrantless Searches: *United States v. Noble*, 2014 U.S. App. LEXIS 15279 (6th Cir. 2014)

The 6th Circuit addressed the issue of "how to handle the government's professed waiver given that the consequence of this failure is the suppression of evidence against a defendant whose rights were not infringed." *Id*. at *43. The court noted that the 1st and 8th Circuits "hold that the government cannot waive the issue of Fourth Amendment standing." *Id*. However, the 3rd Circuit "holds that the government's failure to argue the standing issue before the district court represents a waiver that fully extinguishes the argument, even if the government catches its error on appeal." *Id*. at *45. The 9th Circuit reasoned "that when a defendant appeals the denial of a motion to suppress . . . the defendant continues to bear the burden of showing that he has standing, and absent reliance, the government- as the party without the burden of persuasion- can raise the standing issue on appeal . . . however [the 9th Circuit] will also treat the government's failure to raise the standing issue in its opening appellate brief as a waiver." *Id*. at *46. The 6th Circuit joined the majority of circuits and concluded "that the government can forfeit and waive any objections to the defendant's Fourth Amendment standing." *Id*. at *45.

Fugitive Disentitlement Statute – Criminal Prosecution: *United States v. Technodyne*, 753 F. 3d 368 (2d Cir. 2014)

The 2nd Circuit addressed whether, when a claimant under the fugitive disentitlement statute, 28 U.S.C. §2466, declines to enter or reenter the United States, the government is required to prove that his sole purpose was the "avoidance of criminal prosecution." *Id.* at 384. The court noted that the D.C. Circuit determined that the government must show that the avoidance of criminal prosecution is a claimant's sole intent for refusing to enter or reenter the United States, while the 9th Circuit found that the sole motivating factor of a claimant causing him to remain abroad need not be the desire to evade criminal prosecution. *Id.* The 2nd Circuit agreed with the 9th Circuit in finding that it is not a requirement that a claimant's desire to avoid criminal prosecution be the sole motivating factor of his declining to enter or reenter the United States. *Id*. The 2nd Circuit concluded that the sole intent of the claimant does not have to be the avoidance of criminal prosecution, but if any of the claimant's motivations for declining to enter or reenter the United States

is the avoidance of criminal prosecution, the intent standard specified in the fugitive disentitlement statute is satisfied. *Id.* at 386.

Removal of Non-Citizens – Eligibility for Relief: *Syblis v. AG of the U.S.*, 2014 U.S. App. LEXIS 15801 (3d Cir. 2014)

The 3rd Circuit addressed the issue of "whether an inconclusive record of conviction is sufficient to satisfy a noncitizen's burden to demonstrate eligibility for relief from removal." *Id.* at *17. The court noted that the 4th, 7th, 9th, and 10th Circuits have held "that an inconclusive record of conviction does not satisfy a noncitizen's burden of demonstrating eligibility for relief from removal." *Id.* at *21. The court also noted that the 2nd Circuit reached the opposite conclusion by employing a "categorical approach" to find "that presentation of an inconclusive record of conviction satisfies a noncitizen's burden to demonstrate that he has not been convicted of an aggravated felony." *Id.* at *18. The court agreed with the 10th Circuit's reasoning that "[t]he fact that [the noncitizen] is not to blame for the ambiguity surrounding his criminal conviction does not relieve him of his obligation to prove eligibility for discretionary relief." *Id.* The court departed from the 2nd Circuit's interpretation, noting that the 2nd Circuit failed to place the appropriate burden on the noncitizen to demonstrate eligibility for relief. *Id.* at *19. Thus, the 3rd Circuit joined the 4th, 7th, 9th, and 10th Circuits and held that an inconclusive record of conviction does not satisfy a noncitizen's burden of demonstrating eligibility for relief from removal." *Id.* at *21.

Sentencing – Armed Career Criminal Act: *United States v. Prater*, 2014 U.S. App. LEXIS 16889 (6th Cir. 2014)

The 6th Circuit addressed "whether a conviction for third-degree burglary under New York law is categorically a violent felony for armed-career-criminal purposes." *Id.* at *39. The court noted that the 2nd and 3rd Circuits determined that a third-degree burglary under New York law was a categorically violent felony under the residual clause. *Id.* at *37–*38. The 6th Circuit disagreed with the 2nd and 3rd Circuits because those courts "failed to apply the modified categorical approach, to treat the offense as a divisible one, and even to acknowledge that the offense encompassed alternative forms other than generic burglary." *Id.* at *37. Thus, the 6th Circuit concluded that in order to determine whether a conviction for third-degree burglary under New York law is a violent felony for armed criminal purposes, a court must apply the modified categorical approach in order to determine a violent felony under the Armed Career Criminal Act. *Id.* at *1–*2.

Sentencing – Resentencing Hearings: *United States v. Alvarez*, No. 13-40812, 2014 U.S. App. LEXIS 13938 (5th Cir. 2014)

The 5th Circuit addressed whether "resentencing hearings following a remand are to be conducted *de novo* unless expressly limited by the court in its order of remand" even when said remand was designed to fix a "specific and defined sentencing error." *Id.* at *9–*10. The 5th Circuit noted that the D.C. and 7th Circuits determined resentencing hearings which follow a remand need not adhere to this requirement. *Id.* The 5th Circuit agreed with the D.C. and 7th Circuits' position that resentencing hearings on remand do not always have to be conducted *de novo*. *Id* at *10. In following these circuits, the 5th Circuit acknowledged that it adopts the minority position on the matter. *Id* at *9. Nevertheless, since the *Matthews* factors, which would otherwise demand that a court conduct *de novo* resentencing, do not appear in this case, the 5th Circuit found that the general rule on sentencing controls, and concluded "that *de novo* resentencing is improper following a remand for correction of a specific and defined sentencing error." *Id.*

Sentencing – Restitution: *United States v. Farano*, 749 F.3d 658 (7th Cir. 2014)

The 7th Circuit addressed the method of calculating restitution when the victims were refinancing banks under 18 U.S.C. § 3663A(b)(1)(B)(i)(II). *Id.* at 666. Under the statute, the victim is entitled to "the value of the [victim's] property on the date of sentencing, less the value (as of the date the property is returned) of any part of the property that is returned." *Id*. The 7th Circuit noted that the 1st, 3rd, 8th, 10th, and possibly the 5th Circuits determined that under 18 U.S.C. § 3663A(b)(1)(B)(i)(II) the date the property sold is the proper calculation for restitution, while the 5th and 9th Circuits held that the foreclosure date is determinative. *Id*. The 7th Circuit agreed with the majority of the Circuits and concluded that the date of foreclosure or later as the "choice of the transaction date to use to measure the restitution." *Id.* at 667. The 7th Circuit, however, found that "refinancing banks probably were not victims" so the date to calculate restitution was irrelevant. *Id*. Thus the 7th Circuit concluded that the owners of the original mortgages, but not the refinancing banks were entitled to restitution. *Id*.

Sex Trafficking of Children – Sentencing Enhancement: *United States v. Pringler*, 2014 U.S. App. LEXIS 16481 (5th Cir. 2014)

The 5th Circuit addressed "whether the computer use enhancement U.S.S.G. § 2G1.3(b)(3) applies to uses of the computer beyond the scenarios mentioned in application note 4." *Id.* at *14. The court noted that the 4th and 11th Circuits "have found application note 4 inapplicable and relied on the plain meaning of the Guideline alone in upholding computer use sentencing enhancements under Subsection (3)(B)," while the 3rd and 7th Circuits have "each applied application note 4" to the subsection. *Id.* at *15–*17. The 5th Circuit agreed with the 4th and 11th Circuits, finding that application note 4 "'ignores the plain meaning' of the Guideline." *Id.* at *16. The court disagreed with the 3rd and 7th Circuits that application note 4 is authoritative. *Id.* at *17. Thus, the 5th Circuit concluded that "application note 4 is inconsistent with Subsection 3(B)," and if they were to give "application note 4 controlling weight, it would render Subsection 3(b) inoperable in all but a narrow subset of cases under only one of the numerous criminal statutes the Guideline covers." *Id.* at *18.

CRIMINAL STATUTES

Hobbs Act – Overt Act Requirement: *United States v. Salahuddin*, 2014 U.S. App. LEXIS 17000 (3rd Cir. 2014)

The 3rd Circuit addressed the issue of "whether an overt act is a required element of Hobbs Act conspiracy." *Id*. at *12. The court noted that the 1st, 2nd, and 11th Circuits determined that "an overt act is not a required element of Hobbs Act conspiracy," while the 5th Circuit "requires an overt act for Hobbs Act conspiracy." *Id*. at *17–*18. The 3rd Circuit joined the 1st, 2nd and 11th Circuits, which do not require proof of an overt act for a conviction in a Hobbs Act conspiracy. *Id*. at *19. The 3rd Circuit additionally stated that since the Hobbs Act conspiracy makes no mention of a required overt act, the 3rd Circuit decline to read in such requirement. *Id*. at *16. Thus, the 3rd Circuit held that an overt act is not a required element under a Hobbs Act conspiracy. *Id*. at *19.

FEDERAL RULES OF EVIDENCE

Witness – Lay Witness Testimony: *United States v. Gadson*, 2014 U.S. App. LEXIS 15969 (9th Cir. 2014)

The 9th Circuit addressed Federal Rule of Evidence 701, which gives guidance on what testimony by a layperson is admissible. The court noted that both the D.C. and 2nd Circuits have applied this rule "much more narrowly[,] and barred officers from interpreting intercepted communications based on their review of the recordings and personal involvement in an investigation." *Id*. at *37–*38. The 9th Circuit disagreed and found that "a lay witness's opinion testimony necessarily draws on the witness's own understanding, including wealth of personal information, experience, and education that cannot be placed before the jury", and that "if witnesses cannot draw on their experience and knowledge, they are effectively limited to presenting factual information." *Id.* at *38–*39. The 9th Circuit joined the 1st Circuit and concluded that "rule 701 did not impose such a limitation." *Id*. at *39.

INTELLECTUAL PROPERTY LAW

Jurisdictional Dispute – Pre-Patent Inventorship: *Camsoft Data Sys., Inc. v. S. Elec. Supply, Inc.*, 756 F.3d 327 (5th Cir. 2014)

The 5th Circuit addressed "whether a district court has jurisdiction over an inventorship dispute where the contested patent has not yet issued." *Id.* at 330. The court noted that the Federal Circuit determined that the "district court[s] . . . have jurisdiction over pre-patent inventorship disputes but must dismiss until a patent has issued. *Id.* at 336. The 5th Circuit disagreed with the Federal Circuit's interpretation, reasoning instead that "Congress has explicitly vested the Patent and Trademark Office with sole discretion over the 'granting and issuing of patents.'" *Id.* at 334. The 5th Circuit noted, "[i]t seems like splitting jurisdictional hairs to suggest that the federal courts entertain some kind of pending jurisdiction over a dispute whose immediate resolution Congress delegated to another forum." *Id.* at 336. Thus, the 5th Circuit concluded that, "district courts have no jurisdiction over an inventorship dispute until the disputed patent has issued." *Id.* at 333.

SEARCH AND SEIZURE

Fourth Amendment – Third Party Consent to Searches: *United States v. Peyton*, 745 F. 3d 546 (D.C. Cir. 2014)

The D.C. Circuit addressed whether ambiguity as to a third party's apparent authority to consent to searches should be viewed in a light most favorable to the police or to the defendant. *Id.* at 555. The court noted that the 6th Circuit determined that a third party does not have apparent authority to consent to searches where there is an ambiguity as to whether the area is one of mutual use. *Id*. at 554. The court recognized that the 2nd and 7th Circuits found that the defendant bears the risk of uncertainty in situations like these because a third party with common authority over the premises is presumed to have authority over closed containers, unless the police are positive that the third party does not. *Id.* The D.C. Circuit agreed with the 6th Circuit in finding that ambiguity regarding mutual use is enough to defeat apparent authority of third parties. *Id.* The court disagreed with the 2nd and 7th Circuits as there was both ambiguity and positive evidence that the third party had apparent authority to grant a search. *Id.* Thus the D.C. Circuit concluded that evidence seized with the permission of a third party must be suppressed. *Id.* at 556.

SENTENCING

Enhancement Applications – 18 U.S.C. § 924(e): *United States v. Barbour*, 750 F.3d 535, 537 (6th Cir. 2014)

The 6th Circuit addressed the meaning of "committed on occasions different from one another" within the statute. *Id.* at 539. The court noted that the 7th Circuit has addressed this issue and determined that there was no subjective element in the determination, and that the burden falls to the government to show that one crime began before the conclusion of the other. *Id.* at 542. The 11th Circuit also supported this proposition. *Id.* at 544. This approach differed, however, from that of the 9th and the 5th Circuits, which each held that the burden was instead on the defendant. *Id.* at 545 Thus, the 6th Circuit concluded that the burden of determining whether two crimes were committed on different occasions for purposes of sentencing falls on the government, relying on the reasoning of the 7th Circuit's analysis. *Id.* at 543.

Enhancement Applications – Causation Standard for Death Occurring During Commission of a Crime: *United States v. Ramos-Delgado*, No. 13-40367, 2014 U.S. App. LEXIS 12359 (5th Cir. 2014)

The 5th Circuit addressed "what causation is required under [United States Sentencing Guidelines] § 2L1.1(b)(7) when an injury or death occurs during the commission of a crime." *Id.* at *4. While the 5th Circuit had not dealt with the issue before, the 8th and 9th Circuits held that the Guidelines require "direct or proximate causation. *Id*. The 10th and 11th Circuits, on the other hand, have rejected a requirement of proximate causation because "[t]he guideline contains no causation requirement and we have no license to impose one." *Id.* at *4–*5. The 5th Circuit agreed with the 10th and 11th Circuits, and determined that "the only causation requirement is that contained in § 1B1.3, which describes the general relevant conduct that may be considered in determining the guideline range." *Id.* at *5. The 5th Circuit noted that "relevant conduct includes "all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions." *Id.* The 5th Circuit concluded that "[b]ecause the ordinary meaning of 'resulted from' imposes a requirement of actual or but-for causation and textual and contextual reasons do not justify the use of an alternative causation, we conclude that—unless otherwise specified—the defendant's relevant conduct must be a but-for cause of a harm for that harm to be considered in assigning the guideline range." *Id.* at *5, *7.

Probation Dispositions – Revoking Supervised Release: *United States v. Vandergrift*, 754 F.3d 1303 (11th Cir. 2014)

The 11th Circuit addressed "whether it is error to consider a factor listed in 18 U.S.C. § 3553(a)(2)(A) when imposing a sentence after revoking supervised release." *Id.* at 1308. The court noted that the 1st, 2nd, 3rd, and 6th Circuits held it is not error, while the 4th, 5th, and 9th Circuits held that it is error. *Id.* at 1309. The 11th Circuit agreed with the 4th, 5th, and 9th Circuits, stating that "because it is impermissible to consider rehabilitation, a court errs by relying on or considering rehabilitation in any way when sentencing a defendant to prison." *Id.* at 1311. When rejecting the 1st, 2nd, and 3rd Circuit's reasoning, the 11th Circuit stated "we believe our sister Circuits have taken an unnecessary narrow view." *Id.* Thus, the 11th Circuit concluded, "a district court errs when it considers rehabilitation when imposing or lengthening a sentence of imprisonment." *Id.* at 1310.

Restitution – Calculation: *United States v. Holmich*, 563 F. App'x 483 (7th Cir. 2014)

The 7th Circuit addressed whether restitution is to be considered a civil or criminal penalty. *Id.* at 485. The court noted that the majority of Circuits have determined that restitution is a criminal penalty, while only the 8th and 10th Circuits have found it is civil in nature. *Id.* The 7th Circuit agreed with the 8th and 10th Circuits in finding that the amount of restitution ordered did not need to be proven beyond a reasonable doubt after being charged in the indictment *Id.* at 485. The court disagreed with the majority of the Circuits, pointing to its holding in *U.S. v. Wolfe* 701 F.3d 1206 (7th Cir. 2012), where the court rejected the argument that the Supreme Court's holding in *Southern Union Co. v. United States*, 132 S.Ct. 2344 (2012) had established restitution as criminal in nature. *Id.* Thus, the 7th Circuit concluded restitution is civil in nature, and therefore amounts determined and ordered are not required to be proven beyond a reasonable doubt. *Id*. at 485.

SENTENCING JUVENILES

Review of Writ of Habeas Corpus Denial for Imposed Adult Criminal Sentences on Juveniles – AEDPA: *Goins v. Smith*, 556 F. App'x 434 (6th Cir. 2014)

The 6th Circuit addressed whether sentencing a juvenile as an adult for 84-years for a non-homicidal crime constitutes cruel and unusual punishment that violates the Eighth Amendment and whether the reversal of a denial of a writ of habeas corpus is warranted. *Id*. at 436–37. The Court noted that the 9th Circuit held that a 254 year sentence imposed on a juvenile non-homicide offender was improper because such a sentence was "materially indistinguishable" from a life sentence without parole. *Id*. at 437. In contrast, the 5th Circuit decided that a 45 year sentence for a juvenile convicted of conspiracy to use a firearm in relation to a crime of violence that resulted in death was not an Eighth Amendment violation and permissible. *Id*. The 6th Circuit held, consistent with the 5th Circuit, that an 84-year sentence imposed on a juvenile was not cruel or unusual punishment under the Eighth Amendment based on the circumstances of the juvenile's actions and that the Eighth Amendment's proportionality requirement does not demand consideration of juvenile status. *Id*. 434.

STATUTORY INTERPRETATION

Prior Convictions Constituting Violent Felonies – ACCA Sentencing:
United States v. Chandler, 743 F.3d 648 (9th Cir. 2014)

The 9th Circuit addressed whether a conviction for conspiracy is considered a violent felony when sentencing under the Armed Career Criminal Act ("ACCA") for an individual who enters a guilty plea for possession of a firearm. *Id*. at 649. The Court recognized that the 1st, 3rd, 4th, 5th, and 8th Circuits have held that conspiracy may qualify as a violent felony. *Id*. at 661. While the 10th and 11th Circuits have stated that conspiracy does not qualify as a violent felony reasoning that the overt act required to be found guilty of conspiracy, does not alone, provide evidence that a violent crime has yet to occur. *Id*. at 662. The 9th Circuit joined the 1st, 3rd, 4th, 5th, and 8th Circuits in holding that conspiracy is considered a violent felony for the purposes of enhanced sentencing under the ACCA. *Id*.