Current Circuit Splits

The following pages contain brief summaries, drafted by the members of the *Seton Hall Circuit Review*, of circuit splits identified by federal court of appeals opinions between March 1, 2010 and September 17, 2010. This collection is organized by civil and criminal matters, then by subject matter.

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

CIVIL MATTERS

CRIMINAL MATTERS

CIVIL MATTERS

ADMINISTRATIVE LAW

Administrative Procedure Act (APA) – Notice and Comment: *United States v. Magnesium Corp. of Am.*, 616 F.3d 1129 (10th Cir. 2010)

The 10th Circuit considered whether an agency may alter "its original interpretation of [a] regulation without following the [notice and comment] procedural requirements of the [APA][.]" *Id*. at 1136 (internal quotation marks omitted). The 10th Circuit noted that defendants relied on the D.C. Circuit's holding that "[o]nce an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking." *Id.* at 1138 (internal quotation marks omitted). The 3rd, 5th, and 6th Circuits have adopted the D.C. Circuit's view and the 1st and 9th Circuits have taken the contrary position. *Id.* at 1139. The 3rd Circuit has held that when "an agency's present interpretation of a regulation is a fundamental modification of a previous interpretation, the modification can only be made in accordance with the notice and comment requirements of the APA." *Id*. at 1139 n.9. The 5th and 6th Circuits agreed that "once an agency gives a regulation an interpretation, [the APA requires] notice and comment . . . before the interpretation of that regulation can be changed." *Id*. The 1st and 9th Circuits have stated, however, that "[n]o notice and comment rulemaking is required to amend a previous interpretive rule." *Id*. The 10th Circuit found guidance in the language of 5 U.S.C. § 553, "which makes perfectly clear that notice and comment procedures required for substantive (or legislative) rules . . . [do not] apply to 'interpretive rules[,]'" and further stated that the common holding of the 3rd, 5th and 6th Circuits "flouts the APA's clear distinction between interpretive and substantive rules." *Id*. at 1139, 1140. The 10th Circuit therefore joined the 1st and 9th Circuits, holding that an interpretive rule need not "undergo notice and comment before taking effect." *Id*. at 1140.

BANKRUPTCY

Practice and Proceedings – Conversion and Dismissal: *Jacobsen v. Moser (In re Jacobsen)*, 609 F.3d 647 (5th Cir. 2010)

The 5th Circuit addressed "whether a debtor's right to dismiss under [11 U.S.C.] § 1307(b) [is] absolute or [is] qualified by an exception for bad faith or abuse of process." *Id.* at 653. The court noted that the 9th Circuit initially determined that "the right to dismiss was absolute," and the 2nd Circuit agreed, "no such exception existed." *Id.* at 653, 655. By contrast, the 8th Circuit found that § 1307(b) is "subject to an exception where a Chapter 13 debtor acts in bad faith or abuses the bankruptcy process." *Id*. at 654. In a later decision, however, the 9th Circuit reasoned that a Supreme Court holding on a similar provision "supported an exception to § 1307(b) . . . ." *Id.* at 669. The 5th Circuit ultimately agreed with both the 8th and 9th Circuits, rejecting the debtor's absolute right to dismiss under §1307(b) and limiting that right to a finding of bad faith. *Id.* at 660. The court disagreed with the 2nd Circuit's finding that the debtor's right to dismiss under §1307(b) is absolute and unqualified, characterizing this holding as an "escape hatch" for abusive debtors. *Id*. Thus, the 5th Circuit concluded that a debtor's right to dismiss under 11 U.S.C. § 1307(b) is not absolute and is limited to a finding of bad faith. *Id*.

Purchase Money Security Interest – Negative Equity: *AmeriCredit Fin. Servs. v. Penrod (In re Penrod)*, 611 F.3d 1158 (9th Cir. 2010)

The 9th Circuit created a circuit split in addressing "whether a creditor has a purchase money security interest in the 'negative equity' of a vehicle traded in at the time of a new vehicle purchase." *Id.* at 1159. The court declined to adopt the reasoning of the 2nd, 4th, 5th, 6th, 7th, 8th, 10th, and 11th Circuits, all holding that "a creditor has a purchase money security interest in the negative equity of a debtor's trade-in vehicle." *Id.* at 1160. Considering whether the negative equity in a trade-in vehicle constituted a "price," the 9th Circuit first explained that the payment of remaining debt on a prior vehicle cannot qualify as an "expense" because "[i]t is the payment of an antecedent debt, not an expense incurred in buying the new vehicle." *Id.* at 1162. The court further reasoned that the negative equity of the trade-in vehicle is not "closely connected" enough to the purchase of the new vehicle to meet the requirements of U.C.C. § 9-103 cmt. 3, even though the transactions often occur simultaneously. *Id.* Finally, the court found that "negative equity cannot fall under the 'other similar obligations' category because negative equity is unlike the examples listed in Comment 3." *Id.* The 9th

Circuit held "a creditor does not have a purchase money security interest in the 'negative equity' of a vehicle traded in during a new vehicle purchase." *Id.* at 1164.

Selling Causes of Action – Judicial Approval of Settlement in a Bankruptcy Proceeding: *Cadle Co. v. Mims (In re Moore)*, 608 F.3d 253 (5th Cir. 2010)

The 5th Circuit ruled on two issues that currently split the courts of appeals. First, the 5th Circuit addressed "[w]hether [a creditor's] overbid require[s] the bankruptcy court to scrutinize the proposed compromise under § 363 and rule 6004, in addition to rule 9019(a) [of the Federal Rules of Bankruptcy Procedure]," in other words, "whether the settlement of a claim that the estate owns is a sale (that is, disposition) of property of the estate." *Id.* 263–64. On this issue, the court noted that the 1st Circuit has held that the settlement of a claim is not a sale, while the 3rd, 6th, 7th Circuits and the Bankruptcy Appellate Panel of the 9th Circuit have held that "settlement of a cause of action held by the estate is plainly the equivalent of a sale of that claim." *Id.* at 264 (citations omitted). The 5th Circuit agreed with the 9th Circuit's holding that "[t]he proposed settlement was a disposition of estate assets." *Id.* at 266. Next, the 5th Circuit addressed "whether the trustee may sell causes of action that arise from his avoidance powers." *Id.* at 261. The court noted that the 9th Circuit "permits such actions to be sold or transferred" while the 3rd Circuit does not. *Id.* at 261 n.13 (internal quotation marks omitted). The 5th Circuit reasoned "[t]he right to re coup a fraudulent conveyance, which outside of bankruptcy may be invoked by a creditor, is property of the estate that only a trustee or debtor in possession may pursue once a bankruptcy is under way" and such claims become part of the estate once bankruptcy is underway by virtue of trustee successor rights. *Id.* at 261 (internal quotation marks omitted). Therefore, the 5th Circuit agreed with the 7th and 9th Circuits, holding that a "trustee may . . . sell . . . state law fraudulent conveyance actions back to [the appellant]." *Id.*

CIVIL PROCEDURE

Class Action – Opting In, Post Class Certification: *Bright v. United States*, 603 F.3d 1273 (Fed. Cir. 2010)

The Federal Circuit addressed whether putative class members may opt into litigation under U.S. Court of Federal Claims Rule 23 after the expiration of the limitations period when a class action complaint was within the six-year limitations period under 28 U.S.C. § 2501 and "class

certification was sought prior to expiration of the limitations period, but the complaint was not amended to add other named plaintiffs as putative class members until after expiration of the limitations period." *Id.* at 1281. The court noted that the "[3rd] Circuit applied tolling to opt-in class actions" while the 11th Circuit "reasoned that tolling should not apply to plaintiffs in civil class actions." *Id.* at 1285. The Federal Circuit agreed with the 3rd Circuit, finding that maintaining the availability of the opt-in scheme for class action "is most consistent with the objectives which class action procedures are meant to achieve." *Id.* The court disagreed with the 11th Circuit's reasoning that a plaintiff does not commence a class action when the complaint is filed, but rather when the "putative plaintiff files a written consent to opt into the class action." *Id.* Thus, the Federal Circuit concluded that U.S. Court of Federal Claims Rule 23 permits putative class members to opt into litigation "when class certification is sought prior to expiration of the period, but the complaint is not amended to add other named plaintiffs as putative class members until after the expiration period." *Id.* at 1290.

Court Fees – Sequential or Cumulative Under 28 U.S.C. § 1915:
Christensen v. Big Horn County Bd. Of County Comm'rs, 374 Fed. App'x 821 (10th Cir. 2010)

The 10th Circuit addressed whether 28 U.S.C. § 1915 allows filing fees for multiple appeals to be deducted from a prisoner's account sequentially rather than cumulatively. *Id.* at 829. The court noted that the 5th, 7th and 8th Circuits determined that the fees for multiple cases should be deducted in total, while the 2nd Circuit found that they should be sequential. *Id.* at 830. The 10th Circuit agreed with the 5th, 7th and 8th Circuits in finding that "the overarching purpose of the statute, to restrain runaway prison litigation with some pay-as-you-go constraint, would be diluted if not defeated by permitting prisoners with one ongoing case to postpone all successive filing fee obligations." *Id*. The court disagreed with the 2nd Circuit's position on sequential or per prisoner payment, which the 2nd Circuit espoused "to avoid potential constitutional concerns over the burden simultaneous collection of multiple fee obligations could place on a prisoner's right of access to the courts." *Id.* Thus, the 10th Circuit concluded, "§ 1952(b)(2) authorizes cumulative deductions of twenty percent for each civil action or appellate filing fee incurred by a prisoner." *Id.* at 833.

District Court Discretion – Federal Magistrate Act: *Glidden Co. v. Kinsella*, 386 Fed. App'x 535 (6th Cir. 2010)

The 6th Circuit addressed "whether a party may raise new arguments before a district judge that were not presented to the magistrate judge." *Id.* at 544 n.2. The court noted that the 1st, 5th, 8th, and 10th Circuits determined that a party waives arguments if it does not raise them before a magistrate judge, while the 4th Circuit found that district courts must address all arguments regardless of whether parties raised them before the magistrate judge. *Id.* The 6th Circuit also noted that the 9th and 11th Circuits held that district courts have discretion not to consider an argument if a party did not present it to the magistrate judge. *Id.* The 6th Circuit joined the 1st, 5th, 8th, and 10th Circuits in holding that a party waives an argument if it does not raise it before a magistrate judge. *Id.*

Fraud Class Action – Presumption of Reliance: *Malack v. BDO Seidman, LLP*, 617 F.3d 743 (3d Cir. 2010)

The 3rd Circuit considered whether a "fraud-created-the-market" theory may establish a presumption of reliance as required by Federal Rule of Civil Procedure 10(b), which will satisfy the predominance requirement of Federal Rule of Civil Procedure 23(b)(3). *Id*. at 744–45. The 3rd Circuit noted that the Supreme Court has "held that a presumption of reliance exists in two circumstances": failure to disclose material facts, and fraud-on-the-market. *Id*. at 747. The 5th and 7th Circuits have also included a third theory, fraud-created-the-market, which establishes a presumption of reliance when a plaintiff "prove[s] that the defendants conspired to bring to market securities that were not entitled to be marketed." *Id*. at 747–48 (internal quotation marks omitted). The 3rd Circuit noted that "considerations of fairness, public policy, and probability, as well as judicial economy, often underlie the creation of presumptions[.]" *Id.* at 749 (internal quotation marks omitted). It also observed that courts use presumptions to manage circumstances in which direct proof is difficult to acquire. *Id*. The 3rd Circuit further commented that the notion of probability is "the most important consideration in the creation of presumptions" because "[m]ost presumptions have come into existence primarily because judges have believed that proof of fact B renders the inference of the existence of fact A so probable that it is sensible and timesaving to assume the truth of fact A until the adversary disproves it." *Id.* The 3rd Circuit found that these considerations "counsel for rejection of the fraud-created-the-market theory[,]" reasoning that the new theory would encourage frivolous litigation that would ultimately cause harm. *Id*. at 749, 755. The

3rd Circuit therefore joined the 7th Circuit in rejecting "fraud-created-the-market" as a plausible theory for establishing a presumption of reliance to satisfy Rule 23(b)(3)'s predominance requirement. *Id*. at 745.

Preliminary Injunctions – Judicial Test: *Alliance for the Wild Rockies v. Cottrell*, 613 F.3d 960 (9th Cir. 2010)

The 9th Circuit addressed whether it was valid to continue using the "sliding scale" approach to preliminary injunctions. *Id.* at 965. The court noted that the 4th Circuit determined that the "sliding scale approach is now invalid," while the 2nd and 7th Circuits found the approach valid. *Id.* at 966. The 9th Circuit agreed with the 2nd and 7th Circuits, finding the sliding scale approach allows courts to apply a flexible, case-by-case analysis of whether to grant a preliminary injunction. *Id.* at 966–68. Thus, the 9th Circuit concluded that the sliding scale approach continues to be a valid approach to the issue of preliminary injunctions. *Id.* at 968.

ESTATE LAW

Restitution Order – Abatement ab initio Doctrine: *United States v. Rich*, 603 F.3d 722 (9th Cir. 2010)

The 9th Circuit addressed "[w]hether a restitution order abates." *Id.* at 728. The court noted that the 3rd, 4th, and 6th Circuits held that restitution orders are not abated, while the 5th and 11th Circuits hold that restitution orders are abated. *Id*. The 9th Circuit agreed with the 5th and 11th Circuits, finding that the statute imposing restitution "require[d] that the defendant first must be 'convicted of an offense' . . . to support an order of restitution[,]" and "[a]batement of the convictions for those offenses . . . nullifies the accompanying restitution order." *Id.* Furthermore, the court noted that "[t]he common law doctrine of abatement *ab initio* confirms our interpretation of the statute." *Id.* at 729. Thus, the 9th Circuit concluded that "[t]he Restitution Order must be abated." *Id.*

IMMIGRATION

Jurisdiction – Review of Board of Immigration Appeals (BIA) Decision: *Lopez-Dubon v. Holder*, 609 F.3d 642 (5th Cir. 2010)

The 5th Circuit addressed the question of whether an issue not properly raised by a petitioner in immigration proceedings, but nevertheless addressed on the merits by the BIA, may be considered by a

federal court of appeals. *Id.* at 644. The court noted that almost every court of appeals will address an issue on the merits when the BIA has done so, even if the petitioner did not properly present the issue to the BIA. *Id.* The court observed that only the 11th Circuit bars review when a petitioner has not properly raised the issue in immigration proceedings. *Id.* at 645 n.1. The 5th Circuit agreed with the majority of circuits, finding "the purpose of the statutory exhaustion requirement is to allow the Board of Immigration Appeals the opportunity to apply its specialized knowledge and experience to the matter and to resolve a controversy or correct its own errors before judicial intervention." *Id.* at 644. Thus, the 5th Circuit concluded that "[i]f the BIA deems an issue sufficiently presented to consider it on the merits, such action by the BIA exhausts the issue as far as the agency is concerned and that is all that [is statutorily] require[ed] to confer [court of appeals] jurisdiction." *Id.*

Removability – Board of Immigration Appeals (BIA): *Claudio v. Holder*, 601 F.3d 316 (5th Cir. 2010)

The 5th Circuit addressed "whether a petitioner exhausts his claims by raising all of them in a notice of appeal to the [BIA], but addressing only some in a supporting brief." *Id*. at 318. The court noted that the 3rd Circuit has held "that exhaustion of an issue does not require an appellant before the BIA, who has clearly identified an issue in his notice of appeal, to reiterate and to address that same issue in an optional brief." *Id*. (internal quotation marks omitted). Conversely, the 9th Circuit stated that "when a petitioner files a brief, he will be deemed to have exhausted only those issues he raised and argued in his brief before the BIA." *Id*. (internal quotation marks omitted). Similarly, the 6th Circuit noted that "all issues not raised in an appellant's brief[] [are waived], even if the issue has been raised in the notice of appeal." *Id*. (internal quotation marks omitted). The 5th Circuit agreed with the 6th and 9th Circuits' reasoning, finding that "once a petitioner elects in his notice of appeal to file a brief, that brief becomes the operative document through which any issues that a petitioner wishes to have considered must be raised." *Id.* at 319. Thus, the 5th Circuit held that a petitioner does not exhaust his claims "when [he] indicates on his notice of appeal that he will file a brief and then fails to do so . . . ." *Id*. at 318.

INTELLECTUAL PROPERTY

Infringement – Copyright Act: *Cosmetic Ideas, Inc. v. IAC/InteractiveCorp*, 606 F.3d 612 (9th Cir. 2010)

The 9th Circuit addressed the issue of whether "a copyright [is] registered at the time the copyright holder's application is received by the Copyright Office (the 'application approach'), or at the time that the Office acts on the application and issues a certificate of registration (the 'registration approach')[.]" *Id*. at 615. The court noted that the 5th and 7th Circuits have adopted the application approach while the 10th and 11th Circuits have adopted the registration approach. *Id*. at 616. The 9th Circuit agreed with the 5th and 7th Circuits and adopted the application approach. *Id*. at 619. First, the court noted that the ambiguity of the Copyright Act made it "necessary to go beyond the Act's plain language to determine which approach better carries out the purpose of the statute." *Id.* at 618. The court then found that "the application approach better fulfills Congress's purpose of providing broad copyright protection while maintaining a robust federal register." *Id*. at 619. Therefore, the 9th Circuit concluded "that receipt by the Copyright Office of a complete application satisfies the registration requirement of § 411(a)." *Id*. at 621.

LABOR AND EMPLOYMENT LAW

Employment Retirement Income Security Act (ERISA) – Retaliation: *Edwards v. A.H. Cornell & Son*, 610 F.3d 217 (3rd Cir. 2010)

The 3rd Circuit addressed "whether the anti-retaliation provision of [§] 510 of ERISA, 29 U.S.C. § 1140, protects an employee's unsolicited internal complaints to management." *Id.* at 218. The court noted that the 5th and 9th Circuits have determined that the statute's anti-retaliation provision protects an employee's unsolicited internal complaints to management, while the 2nd and 4th Circuits have held that it does not. *Id.* The 3rd Circuit disagreed with the reasoning of the 5th and 9th Circuits that excluding internal complaints from § 510's protection would "inhibit the effectiveness of the anti-retaliation provision[,]" noting that neither circuit closely examined the statutory language in arriving at either decision. *Id.* at 221, 223. Instead, the 3rd Circuit agreed with the 2nd and 4th Circuits and concluded that a narrow reading of the plain language of § 510's anti-retaliation provision was appropriate. *Id.* at 221–22. Thus, the 3rd Circuit held that the anti-retaliation provision of

§ 510 of ERISA does not protect an employee's unsolicited internal complaints to management. *Id.* at 218.

Workers Compensation – Injury on Job: *Valladolid v. Pac. Operations Offshore, LLP*, 604 F.3d 1126 (9th Cir. 2010)

The 9th Circuit addressed whether "an employee must be injured on the outer continental shelf to be eligible for workers' compensation benefits under the Outer Continental Shelf Lands Act (OCSLA)[.]" *Id.* at 1129. The court noted that the 3rd Circuit has "rejected the situs-of-injury test and held that a claimant need only satisfy a 'but for' test in establishing that the injury occurred as the result of operations on the outer continental shelf." *Id.* at 1130 (internal quotation marks omitted). Conversely, the 5th Circuit has adopted the situs-of-injury test and has required a claimant to "show that the injury occurred on an outer continental shelf platform or on the waters above the outer continental shelf, in addition to satisfying the 'but for' test." *Id.* at 1130–31. The court disagreed with the 5th Circuit because the "results of an operation may regularly extend beyond its immediate physical location." *Id.* at 1134. Further, the court disagreed with the 3rd Circuit, and noted that Congress could not have intended to promulgate the simple "but for" test. *Id.* at 1139. Thus, the 9th Circuit adopted a new test and concluded that "the claimant must establish a substantial nexus between the injury and extractive operations on the shelf[,]" and "[t]o meet the standard, the claimant must show that the work performed directly furthers outer continental shelf operations and is in the regular course of such operations." *Id.*

STATUTORY INTERPRETATION

Americans with Disabilities Act (ADA) – Services, Programs, or Activities: *Frame v. City of Arlington*, 616 F.3d 476 (5th Cir. 2010*)*

The 5th Circuit addressed whether sidewalks, curbs and parking lots are deemed "services, programs, or activities" under Title II of the ADA. *Id*. at 484–85. The 2nd, 3rd, 6th and 9th Circuits each interpreted the phrase "services, programs, or activities broadly . . . allow[ing] private claims to force cities to update their systems of pedestrian walkways in compliance with Department of Justice regulations." *Id.* at 485 n.10 (internal quotation marks omitted). The 9th Circuit concluded that Title II includes sidewalks because they are "normal function[s] of a government entity." *Id*. Similarly, the 3rd and 6th Circuits have held that "the phrase 'services, programs, or activities' encompasses virtually

everything that a public entity does." *Id*. (internal quotation marks omitted). The 2nd Circuit "called the language a catch-all phrase that prohibits all discrimination by a public entity, regardless of context," counseling against "hair-splitting arguments over what falls within its reach." *Id*. (internal quotation marks omitted). Disagreeing with these circuits, the 5th Circuit first noted that "the statute's 'qualified individual with a disability' definition suggests a distinction between certain physical infrastructure on the one hand and services, programs, and activities on the other." *Id.* at 486. The 5th Circuit acknowledged that "services" could nevertheless be broadly construed to include at least some infrastructure, thereby finding that the statutory language is ambiguous. *Id*. An examination of the regulations promulgated by the Department of Justice revealed that sidewalks, curbs and parking lots are facilities that must necessarily be distinct from services, programs, or activities, in order to avoid superfluous statutory language and meaning. *Id*. at 487–88. Thus, the 5th Circuit concluded that "sidewalks, curbs, and parking lots" are not "services, programs, or activities" under Title II. *Id*.

Declaratory Relief – Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA): *City of Colton v. Am. Promotional Events, Inc. - West*, 614 F.3d 998 (9th Cir. 2010)

The 9th Circuit addressed "[w]hether a CERCLA plaintiff's failure to establish liability for its past costs necessarily dooms its bid to obtain a declaratory judgment as to liability for its future costs." *Id.* at 1006. The court noted that the 2nd, 3rd, and 8th Circuits determined that "recoverable past costs are a sine qua non for declaratory relief under CERCLA[,]" while the 1st and 10th Circuits "suggested that declaratory relief may be available even in the absence of recoverable past costs." *Id.* at 1006–07. The 9th Circuit agreed with the 2nd, 3rd, and 8th Circuits, viewing the plain language of the statute as indicating that Congress did not intend "for a declaration of future liability to be available . . . ." *Id.* at 1007–08. The court also found persuasive the argument that "[p]roviding declaratory relief based on mere assurances of future compliance with the [national contingency plan] would create little incentive for parties to ensure that their initial cleanup efforts are on the right track." *Id*. at 1008. Thus, the 9th Circuit concluded, when "the plaintiff fails to establish . . . liability in its initial cost-recovery action, no declaratory relief is available as a matter of law." *Id.*

Fair Credit Reporting Act (FCRA) – Compensatory Damages: *Cortez v. Trans Union, LLC*, 617 F.3d 688 (3d Cir. 2010)

The 3rd Circuit considered whether "a degree of specificity which may include corroborating testimony or medical or psychological evidence . . ." is necessary to support a compensatory damage award. *Id*. at 720 (internal quotation marks omitted). The 3rd Circuit acknowledged that the 2nd and 5th Circuits had rejected evidence similar to that offered in this case as "insufficient to support compensatory damage awards[]" to support claims that negligent violations of the FCRA caused humiliation, embarrassment or mental distress, effectively creating a higher standard of proof. *Id*. at 719–20. The court stated that "corroboration goes only to the weight of evidence of injury, not the existence of it." *Id*. at 720. The court noted that humiliation, embarrassment and mental distress are "precisely the kind[s] of injur[ies] that Congress must have known would result from violations of the FCRA." *Id*. The court reasoned that "[i]f a jury accepts testimony of a plaintiff that establishes an injury . . . the plaintiff should be allowed to recover . . . . The fact that the plaintiff's injuries relate to stress and anxiety caused by the defendant's conduct does not change that." *Id*. The 3rd Circuit therefore refused to adopt the 5th Circuit's view, which required "a degree of specificity which may include corroborating testimony or medical or psychological evidence in support of [a compensatory] damage award." *Id*.

State and Territorial Governments – Sovereign Immunity: *Iowa Tribe v. Salazar*, 607 F.3d 1225 (10th Cir. 2010)

The 10th Circuit addressed the proper construction of a federal waiver of sovereign immunity. *Id.* at 1236–37. The court noted that the 2nd, 3rd, 5th, and 9th Circuits "applied a time of filing rule to assess the United States' waiver of sovereign immunity under 28 U.S.C. § 2410," while the 1st Circuit took the view that it should construe waivers of sovereign immunity narrowly based on congressional intent. *Id.* The 10th Circuit agreed with the 1st Circuit in finding that federal waivers of sovereign immunity should be construed narrowly in order to provide proper deference to congressional intent. *Id.* at 1237. The court disagreed with the 2nd, 3rd, 5th, and 9th Circuits' determination that sovereign immunity should be "based on the existence of a waiver at the time of filing." *Id*. Thus, the 10th Circuit concluded that "sovereign immunity is an ongoing inquiry rather than a determination to be made based on the existence of a waiver at the time of filing." *Id*.

CRIMINAL MATTERS

CRIMINAL LAW

Child Pornography – 18 U.S.C. § 2251(a): *United States v. Humphrey*, 608 F.3d 955 (6th Cir. 2010)

The 6th Circuit addressed the issue of whether "scienter with respect to the victim's age is an element of the offense under [18 U.S.C.] § 2251(a), and whether a mistake of age defense is available under the statute . . . ." *Id.* at 958. The court noted that the 9th Circuit stands alone in finding that "§ 2251(a) does not contain a scienter requirement" but that "the First Amendment requires a reasonable mistake-of-age defense" under the same statute. *Id*. at 958–59. Conversely, the 2nd, 4th, 5th, 7th, and 8th Circuits have rejected the view of the 9th Circuit, holding that "a defendant's knowledge of the minor's age is not an element of the offense[]" and rejecting "the notion espoused [by the 9th Circuit] of a constitutionally mandated mistake-of-age defense." *Id*. at 960. The 6th Circuit also rejected the 9th Circuit and instead followed the majority approach. *Id*. at 962. Therefore, the 6th Circuit concluded that "the statutory text, legislative history, and judicial interpretation compel the conclusion that knowledge of the victim's age is neither an element of the offense nor textually available as an affirmative defense[]" and that "First Amendment concerns, when balanced against the 'surpassing importance of the government's interest in safeguarding the physical and psychological wellbeing of children' do not oblige us to engraft a reasonable mistake-of-age defense onto § 2251(a)." *Id*.

Due Process and Ex Post Facto Clauses – Application in the Sex Offender Registration and Notification Act (SORNA): *United States v. Utesch*, 596 F.3d 302 (6th Cir. 2010)

The 6th Circuit addressed whether "SORNA by its own terms applies to sex offenders who were convicted prior to SORNA's enactment." *Id.* at 307. The 6th Circuit noted that the 8th and 10th Circuits have determined that SORNA applies retroactively, and § 16913(d) of SORNA only gives the Attorney General limited power to prescribe the procedure for convicted offenders to follow. *Id.* In contrast, the 6th Circuit observed that the 4th, 5th, 7th, 9th, and 11th Circuits found that "[SORNA] itself only applies going forward until the Attorney General prescribes otherwise." *Id.* The 6th Circuit acknowledged that it had previously issued a panel decision holding "that SORNA was not retroactive as of the date of its enactment and that §

16913(d) vested the retroactivity decision with the Attorney General." *Id.* at 308. The panel decision considered the applicability of an interim rule promulgated by the Attorney General, and it held that the "rule did not apply SORNA to the defendant . . . where the defendant was indicted . . . prior to the comments deadline . . . and less than thirty days after publication." *Id.* at 310. In the instant case, the 6th Circuit extended the panel decision and held that the interim rule could not apply SORNA retroactively to "an indictment charging a defendant after the close of the comment period and more than thirty days after publication of the rule." *Id.* The 6th Circuit reasoned that the Attorney General "solicited comments, but the interim rule became effective immediately, before receipt and review of any public feedback"; therefore, "the interim rule did not make SORNA effective against [defendant] or any other defendants convicted before SORNA's enactment." *Id.*

Filing Fee Collection – Prison Litigation Reform Act of 1995: *Torres v. O'Quinn*, 612 F.3d 237 (4th Cir. 2010)

The 4th Circuit addressed "whether [28 U.S.C.] § 1915(b)(2) allows only a maximum of twenty percent to be taken from a prisoner's monthly income regardless of the number of cases or appeals filed, or [whether] the statute require[s] (or permit[s]) twenty percent be taken each month for *each case* or *appeal* that the prisoner files . . . ." *Id.* at 241–42. The court noted that the 5th, 7th, and 8th Circuits determined that § 1915(b)(2) requires prisoners to pay "twenty percent of their funds towards filing fees *per case and per appeal*[,]" while the 2nd Circuit found that § 1915(b)(2) "cap[s] the payment of fees at twenty percent of the prisoner's income, regardless of the number of cases or appeals for which the prisoner is indebted." *Id.* at 242. The 4th Circuit agreed with the 2nd Circuit, finding that Congress's intent, according to the legislative history and structure of the statute, was to limit the collection of all court fees to twenty percent of an inmate's income. *Id.* at 245–46. The 4th Circuit also agreed with the 2nd Circuit that the alternative "per case" interpretation would raise a constitutional question of equal access in cases where an inmate's entire income was subject to garnishment for filing fees. *Id.* at 245. The court disagreed with the 5th, 7th, and 8th Circuits in their holding that "per inmate" interpretation would open a "floodgate" of prison litigation. *Id.* at 246. Thus, the 4th Circuit concluded that under 28 U.S.C. § 1915(b)(2), the court may garnish an inmate's income up to twenty percent for the payment of court filing fees regardless of how many cases or appeals an inmate has filed. *Id.* at 252.

Retroactive Application – Good Cause Promulgation and the Sex Offender Registration and Notification Act (SORNA): *United States v. Dean*, 604 F.3d 1275 (11th Cir. 2010)

The 11th Circuit addressed whether the Attorney General's public safety justification qualified as good cause to "promulgate a rule making [SORNA] retroactive without notice and comment as required by the Administrative Procedure Act." *Id.* at 1276. The court noted that two other circuits had previously addressed this issue. *Id.* at 1279. The 4th Circuit held that "[t]here was a need for legal certainty about SORNA's 'retroactive' application to sex offenders convicted before SORNA and a concern for public safety that these offenders be registered in accordance with SORNA as quickly as possible." *Id.* Further, the 4th Circuit maintained that "[d]elaying implementation of the regulation to accommodate notice and comment could reasonably be found to put the public safety at greater risk." *Id.* In contrast, the 6th Circuit found that the Attorney General did not have cause to bypass those requirements in a case with similar facts. *Id.* at 1280. The 11th Circuit agreed with the 4th Circuit, finding that concerns over public safety justified the Attorney General's actions. *Id.* at 1281. The 11th Circuit concluded that "[r]etroactive application of the rule allowed the federal government to immediately start prosecuting sex offenders who failed to register in state registries . . . [and] reduced the risk of additional sexual assaults and sexual abuse by sex offenders . . . ." *Id.*

Underlying Assault – 18 U.S.C. § 111(a)(1): *United States v. Williams*, 602 F.3d 313 (5th Cir. 2010)

The 5th Circuit addressed whether a defendant can "be convicted of forcible resistance under [§ 111(a)(1)] without having committed an underlying assault[.]" *Id*. at 316. The court noted that the 9th Circuit found that convictions under the statute "require at least some form of assault," and that "without requiring some sort of underlying assault, it would be impossible to distinguish non-assaultive misdemeanor resistance cases from felonious resistance cases . . . ." *Id.* at 316–17. Conversely, the 6th Circuit determined that interpreting the statute as "requiring an underlying assault for a defendant to be convicted would render meaningless the five forms of non-assaultive conduct that are plainly proscribed by the statute." *Id*. at 317. The 5th Circuit agreed with the 6th Circuit that this interpretation promoted the dual purposes of the statute, namely: "protect[ing] federal officers by punishing assault . . ." and "deter[ring] interference with federal law enforcement activities . . . by punishing obstruction and other forms of resistance." *Id*. (internal quotation marks omitted). Thus, the 5th Circuit concluded, "a

misdemeanor conviction under § 111(a)(1) does not require underlying assaultive conduct." *Id.* at 318.

CRIMINAL PROCEDURE

Fourth Amendment Protection – Probable Cause: *Aldini v. Johnson*, 609 F.3d 858 (6th Cir. 2010)

The 6th Circuit addressed the issue of "whether the Fourth Amendment continues to provide protection against deliberate use of excessive force beyond the point at which arrest ends and pretrial detention begins[,]" and specifically whether it is the Fourth Amendment or the Fourteenth Amendment that "protect[s] those arrested without a warrant between the time of arrest and arraignment." *Id.* at 864. The 6th Circuit noted that the 2nd, 6th, 8th, 9th, and 10th Circuits have found "that the Fourth Amendment applies until an individual arrested without a warrant appears before a neutral magistrate for arraignment or for a probable cause hearing, or until the arrestee leaves the joint or sole custody of the arresting officer or officers." *Id.* at 865 n.6. The court also noted the 5th Circuit's conclusion "that the relevant constitutional provisions overlap and blur in certain factual contexts." *Id.* In contrast, the court noted that the 4th, 7th, and 11th Circuits have held that "after the act of arrest, substantive due process is the proper constitutional provision because the Fourth Amendment is no longer relevant." *Id.* The 6th Circuit agreed with the 2nd, 6th, 8th, 9th, and 10th Circuits in finding that the "reasonableness standard governs throughout the seizure of a person . . . ." *Id.* at 865. The 6th Circuit disagreed with the 4th, 7th, and 11th Circuits' findings that the plaintiff was not in a situation where his rights were governed by either the Fourth or the Eighth Amendments. *Id*. Thus, the 6th Circuit concluded that where "the plaintiff was a free person at the time of the incident, and the use of force occurred in the course of an arrest or other seizure of the plaintiff, the plaintiff's claim is governed by the Fourth Amendment's reasonableness standard[]" until the time of the probable cause hearing, when his legal status changes to make the plaintiff a pretrial detainee. *Id.* at 865–67.

Time Limitations – Antiterrorism & Effective Death Penalty Act: *Lee v. Lampert*, 610 F.3d 1125 (9th Cir. 2010)

The 9th Circuit addressed whether there is a "gateway" actual innocence exception through the statute of limitations for original Antiterrorism & Effective Death Penalty Act petitions. *Id.* at 1128. The court noted that the 1st, 5th, 7th, and 8th Circuits determined that there is

no such "gateway" actual innocence exception, while the 6th Circuit found that this exception to the statute of limitations is valid. *Id.* The 9th Circuit agreed with the 1st, 5th, 7th, and 8th Circuits in finding that "the omission of 'actual innocence' from the enumerated list of exceptions in the statutory text is significant . . . ." *Id.* at 1129. Thus, the 9th Circuit concluded that the Antiterrorism & Effective Death Penalty Act does not permit a "gateway" actual innocence exception to the statute of limitations. *Id.* at 1130–31.

SENTENCING

Enforcement of Plea Agreements – Reductions Based on Amended Sentencing Ranges: *United States v. Rivera-Martinez*, 607 F.3d 283 (1st Cir. 2010)

The 1st Circuit addressed whether "a defendant who [is] sentenced pursuant to a binding C-type plea agreement . . ." is "entitled to a sentence reduction by reason of retroactive amendments to the sentencing guidelines designed to lower sentences for crack cocaine offenses[.]" *Id.* at 284. The court noted that the 2nd, 3rd, and 6th Circuits have determined that a district court, under 18 U.S.C. § 3582(c)(2), lacks authority to modify a sentence imposed pursuant to a C-type plea agreement when the agreement was negotiated according to subsequently amended sentencing guidelines. *Id*. at 285–86. The court also noted that the 5th and 7th Circuits have approached the issue on a case-by-case basis to determine "whether a particular sentence, when rendered, could fairly be said to have been based on the guidelines." *Id*. at 286. Finally, the court noted that the 10th Circuit had held "a district court has authority to reduce a sentence imposed pursuant to a C-type plea agreement." *Id*. The 1st Circuit disagreed with the 2nd and 6th Circuits as to district courts' power to modify sentences imposed pursuant to a C-type plea agreement under § 3582. *Id.* at 288. Instead, the 1st Circuit based its holding in contract theory and concluded that "in the absence of explicit countervailing language in the plea agreement, 18 U.S.C. § 3582(c)(2) does not apply . . . " and defendants who are sentenced pursuant to C-type plea agreements are ineligible for sentence reductions. *Id.* at 284.

Jurisdictional Variation – Fast-Track Reductions: *United States v. Camacho-Arellano,* 614 F.3d 244 (6th Cir. 2010)

The 6th Circuit considered "whether to impose a lower sentence [for defendant] based on the disparities created by the existence of 'fast-

track' early-disposition programs for illegal-reentry cases in other jurisdictions," following the reasoning in *Kimbrough v. United States*, 552 U.S. 85 (2007). *Id.* at 245. The circuits disagree over the effect of "fast-track" reduction for defendants, a congressional policy in border jurisdictions allowing for a downward departure from the Sentencing Guidelines in exchange for a defendant's agreement not to file pretrial motions or contest issues. *Id.* at 247–48. *Kimbrough* allows district courts to depart from the Sentencing Guidelines based on disagreement with the Guidelines' policies. *Id.* at 249. After *Kimbrough*, the 5th, 9th, and 11th Circuits re-affirmed their fast-track precedents, interpreting *Kimbrough* to allow variance only on disagreement with Guidelines' policy, and not with congressional policy. *Id.* Conversely, the 1st and 3rd Circuits read *Kimbrough* as allowing district courts to depart from the Guidelines if the court finds such a departure is "not unwarranted." *Id.* (internal quotation marks omitted). The 6th Circuit agreed with the 1st and 3rd Circuits, noting that Congress did not prohibit district court judges in non-fast-track jurisdictions from treating defendants as if they were in a fast-track jurisdiction. *Id.* The 6th Circuit further rejected the argument that Congress endorsed the disparities that would occur among defendants in differing jurisdictions, and further, even if such disparity was intended, "it has not endorsed the further disparity that is created by charge bargaining . . ." among jurisdictions. *Id.* at 249–50. Thus, the 6th Circuit held that "*Kimbrough* requires that [courts] repudiate any prior hint that district judges could not grant variances based on the fast-track disparity." *Id.* at 250.

Sentencing Enhancements – Double Counting: *United States v. Bell, 598 F.3d 366* (7th Cir. 2010)

The 7th Circuit addressed the issue of "applying a two-level enhancement for violating a court order . . . ." *Id.* at 371. The court noted that the 11th and 2nd Circuits determined that two-level enhancements are permissible if they punish a defendant for separate, distinct harms. *Id.* The court disagreed with the 11th and 2nd Circuits, noting that the 2nd Circuit "may define double counting differently than [the 7th Circuit]." *Id.* at 373. The 7th Circuit refused to embrace the "separate harms theory of double counting," and it focused instead "on the conduct that supports the enhancements." *Id.* (internal quotation marks omitted). The court noted that "conduct that *always* inflicts multiple distinct harms may validly receive a punishment enhanced on account of one of the harms." *Id.* Thus, the 7th Circuit held that applying "both the cross-reference . . . and the enhancement for violation of a court or administrative order is impermissible double counting." *Id.*

U.S. Sentencing Guidelines Manual – Discretion of the Courts in Sentencing: *United States v. Lewis,* 606 F.3d 193 (4th Cir. 2010)

The 4th Circuit addressed the issue of whether applying the U.S. Sentencing Guidelines Manual § 2K2.1(a)(4)(B)(i) (2008) contravenes the Ex Post Facto Clause of the Constitution, which "prohibits retroactive laws that create a 'significant risk' of increased punishment for a crime." *Id.* at 197–99. After a Supreme Court decision deeming the Guidelines to be advisory, the circuits "disagreed on whether the Ex Post Facto Clause prohibits a sentencing court from retroactively applying severity-enhancing Guidelines amendments." *Id.* at 199. The D.C. Circuit held that retroactively applying the "severity-enhancing" Guidelines contravenes the Ex Post Facto Clause, while the 7th Circuit decided that the Ex Post Facto Clause allows the retroactive application of the "severity-increasing" Guidelines. *Id.* The 4th Circuit agreed with the D.C. Circuit because the D.C. Circuit's decision better comports with the precedent in the 4th Circuit and because it characterizes the Guidelines as an "anchor" for a sentencing judge. *Id.* at 200–02. The 4th Circuit disagreed with the 7th Circuit's reasoning that the "Ex Post Facto Clause 'should apply only to laws and regulations that bind rather than advise' . . .[and that] sentencing judges . . . have 'unfettered' discretion to sentence outside of the Guidelines range . . . ." *Id.* at 202. The 4th Circuit also disagreed with the 7th Circuit because: (1) "the question is not whether the sentencing courts retain discretion under the Guidelines . . . [rather,] the proper approach is to assess how the sentencing courts exercise their 'discretion in practice,' and whether that exercise of discretion creates a 'significant risk' of prolonged punishment," and (2) in the 7th Circuit, sentencing outside of the Guidelines range is subject "only to a 'light appellate review,'" whereas, in the 4th Circuit, "failure to properly calculate the advisory sentencing range is a significant procedural error that requires [the court] to vacate the ultimate sentence." *Id.* at 203. Thus, the 4th Circuit concluded that applying the U.S. Sentencing Guidelines Manual § 2K2.1(a)(4)(B)(i) contravened the Ex Post Facto Clause of the Constitution. *Id.*

U.S. Sentencing Guidelines Manual – Sentence Reduction: *United States v. Flemming,* 617 F.3d 252 (3d Cir. 2010)

The 3rd Circuit addressed "whether a career offender who receives a U.S. Sentencing Guidelines Manual § 4A1.3 downward departure under a pre-2003 edition of the Sentencing Guidelines to the Guidelines range for crack cocaine offenses is eligible for a sentence reduction under § 3582(c)(2)." *Id.* at 254. The court noted that the 1st, 2nd, and 4th Circuits determined that a defendant qualifies for a reduced sentence,

while the 6th, 8th, and 10th Circuits have held that a defendant does not. *Id.* The 3rd Circuit agreed with the 1st, 2nd, and 4th Circuits in finding that the defendant's first sentence must have been based on a range that has since been lowered and that the reduction must follow sentencing policy statements in order to qualify for further sentence reduction. *Id.* at 257. The court disagreed with the 6th, 8th, and 10th Circuits findings that prior "downward departure has no effect on a defendant's applicable guideline range." *Id.* at 266. Thus, the 3rd Circuit concluded that "a career offender who is granted downward departure to the Crack Cocaine Guidelines range is eligible for a sentence reduction under § 3582(c)(2)." *Id.* at 272.

Supervised Release – Fugitive Status: *United States v. Hernandez-Ferrer, 599 F.3d 63* (1st Cir. 2010)

The 1st Circuit addressed whether a term of supervised release is tolled under 18 U.S.C. § 3624(e) "during any period in which an offender has absconded from supervision[,]" or, more simply, whether an offender's "fugitive status tolls the running of a term of supervised release." *Id.* at 67. The court noted that the 9th Circuit has agreed with the government's position that "an offender's fugitive status tolls the running of a supervised release." *Id.* Though no other court of appeals has addressed the same issue, the 2nd, 3rd, 6th, 8th, and 11th circuits have answered an analogous question by "citing the *expressio unius* maxim" and holding that "the pertinent statutes do not authorize tolling a term of supervised release during the period in which an offender is absent by reason of his deportation." *Id.* at 68. The 1st Circuit agreed with this reasoning, noting that "when Congress explicitly allows for tolling in a particular circumstance, there is a strong presumption that Congress did not intend to allow tolling in other circumstances." *Id.* Therefore, the 1st Circuit disagreed with the 9th Circuit and held that "the fact that Congress provided for tolling a period of supervised release only when an offender is imprisoned for a different crime is a decisive argument for the proposition that Congress did not intend to toll a period of supervised release for any other reason (including an offender's fugitive status)." *Id.*