

BRIDGE THE GAP OUTLINE UPDATE

I. CIVIL LITIGATION AND PROCEDURE

A. Jurisdiction

Rowe v. New Hampshire Motor Transport Ass'n, ___ U.S. ___, 128 S. Ct. 989 (2008). Maine's laws requiring a licensed tobacco shipper to utilize a delivery company providing recipient-verification services that buyers are of legal age and presuming knowledge a package contains tobacco if marked as originating from a Maine-licensed or unlicensed retailer were pre-empted by federal law which forbid states to enact laws related to prices, routes, or service of any motor carrier.

Anderson v. CNH U.S. Pension Plan, 515 F.3d 823 (8th Cir. 2008). A voluntary settlement between plaintiffs and defendants (entities administering pension and retirement plans) before the district court's ruling on plaintiffs' class certification motion acted to end the named plaintiffs' interest in the litigation, therefore an appeal from the court's order denying class certification was moot.

Waterson v. Hall, 515 F.3d 852 (8th Cir. 2008). District court's order granting defendant's motion to stay a medical malpractice case against him on the grounds plaintiff's claim was discharged in defendant's bankruptcy case was not an appealable final order. The order did "not clearly and unequivocally" end plaintiff's case and left open the possibility plaintiff could amend her complaint to raise the claim that her claim was undisclosed in the bankruptcy case and the liability policy which applied to her claim an undisclosed asset.

Jenkins v. Kansas City Missouri School District, 516 F.3d 1074 (8th Cir. 2008). Even though school district had been judicially declared unitary and a segregation case closed, the court still retained ancillary jurisdiction to manage and effectuate the previous orders entered, including a settlement agreement which was incorporated into the court's orders. State was enjoined from requiring school district to divert to charter schools tax levy funds which had traditionally been dedicated to repayment of desegregation bonds.

B. Procedure

Express Scripts, Inc. v. Aegon Direct Marketing Services, Inc., 516 F.3d 695 (8th Cir. 2008). District court did not abuse its discretion in denying defendant's motion to dismiss or stay pending arbitration in order to resolve an arbitrability issue where a prior written agreement between the parties which contained an arbitration provision did not expressly state the parties intended to arbitrate questions of arbitrability.

Newton v. Clinical Reference Laboratory, Inc., 517 F.3d 554 (8th Cir. 2008). Plaintiff's negligence action for medical injury (lab allegedly negligently performed random drug test for plaintiff's employer, reporting positive drug results, resulting in the termination of plaintiff's employment) was dismissed for failing to comply with a state statute requiring expert affidavit within thirty days of filing a complaint. After plaintiff's notice of appeal and opening brief were filed with the circuit, the state supreme court held the statute was inconsistent with the state's rules of civil procedure and with the supreme court's "constitutional authority to prescribe those rules." Although the intervening decision and argument regarding the constitutionality of the state law was not made by plaintiff until her reply brief in the court of appeals, the circuit considered it appropriate to consider the intervening decision, particularly since defendant had addressed it in its briefing. Case reversed and remanded for further consideration by the district court in view of the intervening change in law.

Schaaf v. Residential Funding Corp., 517 F.3d 544 (8th Cir. 2008). Complaint by plaintiff-investors did not allege sufficient facts to satisfy the loss causation standard (causal connection between material misrepresentations and loss): standing alone allegations that risk of default and default were concealed were insufficient in the absence of allegations that lenders acted in a way harmful to corporation or debenture-holders.

Steinbuch v. Cutler, 518 F.3d 580 (8th Cir. 2008). Plaintiff should have been allowed to conduct discovery tailored to develop a record concerning defendant publisher's contacts with the state of Arkansas (where plaintiff had moved shortly before publication of a book he claimed invaded his privacy) in order to assess the court's personal jurisdiction over the publisher. However, there was no justification for exercise of specific jurisdiction over the claims against the publisher's parent company, Disney, as plaintiff offered only speculative and conclusory allegations about Disney's contacts with Arkansas.

Cornelia I. Crowell GST Trust v. Possis Medical, Inc., 519 F.3d 778 (8th Cir. 2008). Plaintiff's complaint alleging securities fraud was insufficient under the heightened pleading standards for such cases: alleged false or misleading statements were not specifically attributed to executives of defendant company, insufficient facts were alleged from which scienter could be inferred such as involvement by company executives in design or administration of study which was the basis of statements concerning potential positive impact of product; and stock sales by company insiders were not placed in context by which they could be found suspicious.

Thompson v. Southern Farm Bureau Cas. Ins. Co., 2008 WL 819138 (8th Cir. 3/28/2008). Offer of judgment which excluded costs was invalid under Rule 68; although see Judge Riley's dissent that since the offer was made without reference to Rule 68, it should be treated as a valid and complete settlement offer and agreement.

Brannon v. Luco Mop Co., 2008 WL 878289 (8th Cir. 4/3/2008). Nothing in local rules required defendant's citations to depositions in summary judgment statement of uncontroverted material facts to be line-specific, therefore district court did not err in denying plaintiff's motion to strike the statement nor was court required to strike a post-deposition affidavit by plaintiff's supervisor clarifying his reasons for terminating plaintiff's employment; the affidavit contained his personal knowledge of the his reasons and to the extent there were inconsistencies with his prior testimony, the inconsistencies were not determinative of the motion.

D. Evidence

In re Prempro Products Liability Litigation, 514 F.3d 825 (8th Cir. 2008). Trial court did not abuse its discretion in excluding testimony by plaintiff's expert that would contradict his previous testimony and also did not abuse its discretion in excluding a second expert's testimony offered by plaintiff on the same subject *after* the court's ruling on the first expert. The deadline for raising *Daubert* issues had passed and the testimony was new and previously undisclosed.

II. CRIMINAL LAW

A. Criminal Acts

Boulware v. United States, __ U.S. __, 128 S. Ct. 1168 (2008). In defense of criminal tax evasion charges, a distributee of property from a corporation may claim return-of-capital treatment without production of evidence of intent to return capital.

United States v. Love, 516 F.3d 683 (8th Cir. 2008). In a case involving larceny charges, defendant's intent to steal funds from a union was proven circumstantially by evidence she was trained on management of the union's finances yet took actions contrary to that training, she took per diem above the amounts to which she was entitled and additionally used union funds to pay for travel by a friend, she took funds without authorization, she deposited checks designated for specific union purposes into her personal account and made admissions to Department of Labor investigators.

United States v. Tipton, 518 F.3d 591 (8th Cir. 2008). Evidence was adequate to support defendants' convictions on charges of hiring illegal aliens: defendants hired three without requiring a job application, form of ID or employment verification forms; they treated six employees differently than those employees who were legally in the United States by withholding no federal income tax, making no unemployment insurance contributions and paying them in cash at a rate below minimum wage; drove them to and from work and maintained an apartment for them.

United States v. Robertson, 519 F.3d 452 (8th Cir. 2008). Evidence was sufficient to establish defendant possessed or constructively possessed 682 pounds of marijuana being transported from Arizona to Minnesota : he provided the funds to purchase a Suburban used for transport, took it away empty and returned with it filled with marijuana; he directed who would ride in the Suburban, when it should stop and the route to Minnesota, and directed the driver to continue after defendant's vehicle traveling tandem with the Suburban was pulled off the interstate by investigating officers.

United States v. Marston, 517 F.3d 996 (8th Cir. 2008). Indictment did not allege defendant filed "tax returns" as legally defined; rather it charged filing of documents intended to serve as a tax return falsely stating the amount of income earned by defendant or his employees.

United States v. Close, 518 F.3d 617 (8th Cir. 2008). Evidence that three guns were found in defendant's bedroom, along with methamphetamine packaged for sale, digital scales and complex surveillance equipment to monitor outside the house, was sufficient to sustain a conviction for possession of firearms in furtherance of drug trafficking.

United States v. Hayes, 518 F.3d 989 (8th Cir. 2008). Defendant did more than just lie to officers about not knowing her stepson's location; she was observed walking "stealthily" with him to the basement door (her stepson was later found in the basement) after hearing agents knocking on the door and she did not open the door for over an hour and a half after agents arrived, thus she provided her stepson a place to hide within the meaning of the statute prohibiting concealment of persons wanted for arrest.

United States v. Negrete Santana, 2008 WL 819075 (8th Cir. 3/28/2008). Evidence was sufficient to sustain a conviction for aiding and abetting with intent to distribute methamphetamine. Defendant was not merely present in car containing methamphetamine -- he knew the driver was a drug dealer, knew the purpose of their trip was to collect drug money and that he would be paid for the trip, had accompanied the driver on two other occasions and been paid, lied to arresting officers at the request of the driver and had methamphetamine in his sock.

United States v. Mendoza-Gonzalez, 2008 WL 819161 (8th Cir. 3/28/2008). Aggravated identity theft statute does not require the government to prove defendant knew the social security number he used to gain employment belonged to a real person.

B. Procedure

Danforth v. Minnesota, __ U.S. __, 128 S. Ct. 1029 (2008). The *Teague* rule concerning retroactive application of new constitutional rules of criminal rules does not prevent state courts from giving broader effect to new rules of criminal procedure.

Snyder v. Louisiana, __ U.S. __, 128 S. Ct. 1203 (2008). In rejecting defendant's *Batson* objection to the prosecutor's use of peremptory strikes to eliminate black prospective jurors surviving challenges for cause, trial court committed clear error in allowing challenge of a student teacher without explanation; the subsequent explanation for exercising the strike, that the juror's student-teaching obligations would be interfered with, was insufficient in the face of the fact many members of the venire had work, school, family or other similar obligations.

United States v. Taylor, 515 F.3d 845 (8th Cir. 2008). District court did not abuse its discretion in denying defendant's motions to withdraw his guilty plea: although he tested positive for marijuana use the morning of his plea, he stated at the hearing he was only under the influence of lithium as a treatment for his depression. Further, he waited until after the presentence report, which recommended denying acceptance of responsibility reductions, or more than four months to challenge the plea.

United States v. Santoyo-Torres, 518 F.3d 620 (8th Cir. 2008). District court's refusal to give defendant's proffered instruction on lesser included offense of simple possession of methamphetamine (in case charging him with possession with intent to distribute over 50 grams) was not an abuse of discretion as there was no evidence of personal use and the quantity found, 138.5 grams or more, was too large for personal use, according to the government's expert.

United States v. Mathison, 518 F.3d 935 (8th Cir. 2008). Court did not err in denying defendant's motion for mistrial on the basis jurors were exposed to news that defendant had absconded during trial: the court polled the jurors individually, excused one who indicated he would not be able to follow the court's instructions and cautioned the others, who said they could still follow instructions -- there is "no authority granting [defendant] an automatic right to a new trial because he ran away."

United States v. Burnette, 518 F.3d 942 (8th Cir. 2008). Judge who found defendant's testimony at the sentencing of a co-conspirator was not truthful was not required to recuse himself from sentencing defendant; in fact it was proper for the judge to note he had previously found defendant not credible. A sentence at the low end of the advisory guideline range did not demonstrate the judge was antagonistic based on defendant's previous appearance before him.

United States v. Heppner, 519 F.3d 744 (8th Cir. 2008). In the absence of evidence that the truth of defendants' asserted religious beliefs, or those of the members of the fraudulent investment group run by defendants, were at issue, trial court did not abuse its discretion in refusing to give defendants' proposed instruction on materiality: "if the materiality decision as to any count turned on the genuineness of the religious beliefs of an investor or either defendant, defendant should not be found guilty" on that count.

United States v. Refert, 519 F.3d 752 (8th Cir. 2008). No plain error was committed by the absence of a jury instruction on whether defendant was "regarded as an Indian by the community" when she failed to raise its omission at trial. Defendant was charged with making false statements (that she was of Native American descent) to obtain free medical services.

United States v. Rojas, 2008 WL 819080 (8th Cir. 3/28/2008). Defendant was entitled to evidentiary hearing on the issue whether after conviction a child witness recanted her testimony concerning sexual abuse by defendant because his conviction was based solely on child's testimony, there was no corroborating physical evidence and the purported recantation occurred only days after trial .

United States v. Nieman, 2008 WL 860781 (8th Cir. 4/2/2008). Government's failure to terminate informant's cooperation agreement on the basis of a single unauthorized use of drugs was not outrageous conduct sufficient to justify dismissal of the indictment against defendant; the informant's conduct was not encouraged or directed by the government.

United States v. Todd, 2008 WL 900238 (8th Cir. 4/4/2008). Defendant's guilty plea waived any challenge to the count of the indictment to which he pled, which conflated alternative offenses under 924(c); any Rule 11 violations during the plea did not affect his substantial rights as he was advised of the nature of the charges to which he pled by the prosecutor and was clearly advised his sentence could be harsher than the five years imprisonment the parties had discussed.

United States v. Green, 2008 WL 927578 (8th Cir. 4/8/2008). Defendant failed to show a "fair and just reason" for withdrawal of his guilty plea to a charge of use of a firearm in connection with a crime of violence: while the kidnapping charge in another count, the underlying crime of violence in the use of firearm count, was dismissed as part of the plea, it was not necessary for a defendant to be convicted of the underlying crime nor did defendant's failure to agree he transported the victim against her will undermine the factual basis for his plea to the use of firearm charge -- the victim's testimony regarding involuntary transportation was sufficient.

C. Fourth Amendment

United States v. Pruneda, 518 F.3d 597 (8th Cir.2008). Officers who had a valid arrest warrant for defendant were legally authorized to enter the basement of a house where he resided and, upon entering the basement, to conduct a protective sweep based on the facts the officers were in a confined space, the basement was not well lit, it was divided into two areas, reportedly other individuals lived in the residence and defendant reportedly stored weapons in the basement. Evidence of firearms and drug paraphernalia observed in plain view during that protective sweep supported issuance of a further search warrant.

United States v. Hughes, 517 F.3d 1013 (8th Cir. 2008). After being called to a high crime area on a report of suspicious parties trespassing at an apartment complex, officers' *Terry* stop and frisk of defendant, who matched the description of one of the parties but was across the street from the area, was not justified: while defendant was present in a high crime area, he was only standing by a bus stop and not engaged in any suspicious activity.

United States v. Hudspeth, 518 F.3d 954 (8th Cir.2008). Fourth Amendment did not require officers to inform wife that her husband, who had already been arrested and jailed for possession of child pornography, had refused to consent to a search of his home computer.

United States v. Castellanos, 518 F.3d 965 (8th Cir. 2008). Defendant who was undisputedly intoxicated was too inebriated to consent to a search of his bedroom, particularly in the face of evidence that he twice had refused officers' requests to search; flipping his hand in the direction of his bedroom in response to a question where his identification was located was not implied consent to search that room under these circumstances.

United States v. Taylor, 519 F.3d 832 (8th Cir. 2008). Officers had probable cause to arrest defendant based on information provided by an informant whose past reliability had been confirmed by another officer, defendant matched the physical description the informant had given before a controlled buy, and defendant was observed placing a call on his cell phone at the same time as the informant received a call from his supplier.

United States v. Shields, 519 F.3d 836 (8th Cir. 2008). Officers made a valid stop of defendant's truck in the course of attempting to execute an arrest warrant for his brother: they had information defendant was assisting his brother in trafficking crack cocaine and evading arrest and knew defendant did not have a valid driver's license, therefore, discovery of crack cocaine in plain view in a dashboard cupholder at the time of the stop was not tainted by an illegal stop.

United States v. Gilliam, 2008 WL 861369 (8th Cir. 4/2/2008). *Terry* stop and frisk of defendant was proper where in the course of officers attempting to execute an arrest warrant for another individual on a drug trafficking charge, defendant was present at the residence listed, became engaged in a confrontation with the officers and the sought-after individual regarding that individual's identity, and ignored officer's requests to stay out of unsecured areas of the residence while they were dealing with the individual sought -- it was reasonable under the circumstances for officers to briefly detain defendant until they sorted out identifications and to conduct a protective frisk.

United States v. Stachowiak, 2008 WL 878403 (8th Cir. 4/3/2008). Defendant's minor traffic violation, failing to signal 100 feet before turning into a parking lot, provided probable cause for a traffic stop; defendant's furtive gesture under the seat gave officer reasonable, articulable suspicion defendant might be armed sufficient to justify a protective search of his vehicle before allowing defendant to return to his vehicle; subsequent discovery of methamphetamine during that search justified defendant's arrest.

United States v. Williams, 2008 WL 918719 (8th Cir. 4/7/2008). Although it was not totally clear that defendant had an expectation of privacy in a hotel room rented by someone else, the actual registered guest had the capacity to consent to a search of the room. However, that consent was invalidated by defendant slamming the door and locking it with a deadbolt in response to officers' attempt to enter. That response, coupled with the discovery of an assault rifle in another room rented by the registered guest and the sound of a slide of a handgun in the room where defendant was located, was sufficient evidence of exigent circumstances justifying officers' entry into the room.

D. *Miranda*

United States v. Liddell, 517 F.3d 1007 (8th Cir. 2008). In-custody questioning by arresting officers fell within public safety exception to *Miranda*. Defendant was stopped for a traffic violation and arrested when it turned out he was barred from driving. During a search-incident-to-arrest of his vehicle, officers found an unloaded gun under the driver's seat. Before he had been administered *Miranda* warning, officers asked defendant if there was anything else in his car that would hurt anyone, to which defendant said he knew the gun was there, denied it was his and said there were no other weapons in the car. His statement admitting to knowledge of the gun's presence was admissible under the public safety exception, which recognizes the risk to officers if unknown firearms or drug paraphernalia are present.

United States v. Walker, 518 F.3d 983 (8th Cir. 2008). When in the course of arresting defendant on outstanding warrants officers observed a bag of marijuana in plain view on a kitchen counter at defendant's residence, officers' un-*Mirandized* question to defendant about whose it was did not require suppression of defendant's subsequent statements admitting ownership of firearms and marijuana found during a subsequent search pursuant to a search warrant, given a day later at the police station after he had been advised of his *Miranda* rights. The statements were given at different times and locations, and were unrelated -- officers did not ask defendant about firearms previously and questions about marijuana related to items found during search.

E. Due Process/Evidence

United States v. Jumping Eagle, 515 F.3d 794 (8th Cir. 2008). In child sexual abuse case, because expert's testimony comparing the characteristics of sexually abused children generally with the characteristics of the victim in this case was not offered to prove the alleged sexual abuse caused the victim to experience encopresis, its admission was within the trial court's discretion. Defendant's questions on cross-examination of witnesses opened the door to hearsay statements, first between the victim and his mother and then the victim's statement to a forensic investigator, who in turn related it to the investigating agent.

United States v. Johnson, 519 F.3d 816 (8th Cir. 2008). Trial court did not abuse its discretion in permitting the government to ask leading questions of child witnesses/victims of alleged sexual abuse.

United States v. Lucas, 2008 WL 899834 (8th Cir. 4/4/2008). In case involving charges of attempt to manufacture methamphetamine, felon in possession and possession of a firearm in furtherance of a drug trafficking offense, evidence of defendant's other criminal conduct involving drugs was admissible to show defendant's knowledge and intent: the evidence was similar in kind and close enough in time to the charged crimes.

United States v. Hyles, 2008 WL 927610 (8th Cir. 4/8/2008). Proffer letter which provided that government would negotiate "specific concessions" in exchange for "truthful, candid and meritorious" cooperation from defendant was not a non-prosecution agreement; the government did not believe defendant was truthful, therefore use of her grand jury testimony against her at trial also did not violate any Fifth Amendment rights.

H. Sentencing

Baze v. Rees, __ S. Ct. __, 2008 WL 1733259 (4/16/2008). Execution by lethal injection does not violate the Constitution.

Begay v. United States, __ S. Ct. __, 2008 WL 1733270 (4/16/2008). Drunk driving is not a "violent felony" for purposes of applying the Armed Career Criminal Act sentencing enhancements.

Burgess v. United States, __ S. Ct. __, 2008 WL 1733267 (4/16/2008). However, conviction of a drug crime which is punishable by more than a year in prison qualifies as a "felony drug offense" even if classified as a misdemeanor under state law.

United States v. Foster, 514 F.3d 821 (8th Cir. 2008). District court could not legally suspend defendant's sentence in the absence of statutory authority.

United States v. Wyson, 516 F.3d 666 (8th Cir. 2008). District court did not have statutory authority to suspend sentence, therefore case remanded for resentencing.

United States v. Roberson, 517 F.3d 990 (8th Cir. 2008). Although district court was empowered to impose a sentence considering judicially found facts, so long as the sentence did not exceed life imprisonment, the failure to consider defendants' arguments concerning the 100:1 crack and powder cocaine sentencing disparities required remand because it was not clear whether the court was unaware of the effect of *Kimbrough* or simply declined to use its discretion based on existing circuit precedent.

United States v. Birdine, 515 F.3d 842 (8th Cir. 2008). Sentencing court did not err in finding defendant had two prior felony drug convictions in order to impose mandatory life sentence: authenticated copies of the court files of his prior convictions were presented and a fingerprint examiner testified an authenticated fingerprint card of defendant's prints from those convictions matched the fingerprints taken of defendant when he was arrested in 2006 for the criminal activity which led to the present conviction.

United States v. Kling, 516 F.3d 702 (8th Cir. 2008). Plea agreements under Fed. R. Crim. P. 11(c)(1)(C), which are "binding on the court *after* the court accepts the agreement," are still permissible post-*Booker*.

United States v. Robinson, 516 F.3d 716 (8th Cir. 2008). Former deputy sheriff was convicted of conspiracy to commit bribery concerning federally funded programs and was sentenced to 33 months in prison, which was within the guidelines range; presumption of reasonableness here was not based on court's perception that it was bound by circuit precedent in order to vary from the guidelines recommendation. Court's articulation of the relevant 3553(a) sentencing factors was adequate.

United States v. Johnson, 517 F.3d 1020 (8th Cir. 2008). District court did not indicate its belief that it lacked authority to depart downward on defendant's weapons charge, only chose instead to focus a below-minimum departure on a drug charge against defendant; *Kimbrough* and *Gall* did not apply to defendant's sentence as they involved deviations from guideline range instead of departures from statutory mandatory minimums, which was only authorized because the government filed a substantial assistance motion.

United States v. Weems, 517 F.3d 1027 (8th Cir. 2008). District court should have applied a three-level enhancement for commission of a hate crime based on the jury's finding that defendant selected the victim of a cross-burning incident based on his race; the race of the victim was not incorporated in the applicable base offense level and the enhancement was applied to a co-defendant who pled guilty to the same charge.

United States v. Mousseau, 517 F.3d 1044 (8th Cir. 2008). In case involving charge of distribution of a controlled substance to a minor, defendant waived her claim that court erred in denying her acceptance of responsibility credit because her plea agreement contained a provision waiving any appeal unless a miscarriage of justice occurred; sentence which did not exceed the permissible statutory range was not a miscarriage of justice.

United States v. Guarino, 517 F.3d 1067 (8th Cir. 2008). Although sentencing court was not required to give exhaustive record concerning its consideration of section 3553(a) factors, after defendant's presentation of his severe medical problems and their impact on sentencing, court's record acknowledging defendant's confinement to a wheelchair and generic reference to serious medical problems was vague, but did not affect defendant's substantial rights because he did not show the probability he would have received a more favorable sentence.

United States v. Igbokwe, 518 F.3d 550 (8th Cir. 2008). Loss for health care fraud conviction based on grouping of currency structuring convictions, the offense levels of which exceeded the level for the other counts charged, was not incorrect as under guideline grouping rules the other offense levels became irrelevant.

United States v. Vincent, 519 F.3d 732 (8th Cir. 2008). Defendant's conviction for use of a sawed-off shotgun, one of three felony convictions under consideration for application of an ACCA sentencing enhancement after defendant pled guilty to being a felon in possession, was a violent felony as it had as an element of proof that the weapon could inflict serious physical injury or death and served no lawful purpose.

United States v. Austad, 519 F.3d 431 (8th Cir. 2008). After pleading guilty to a charge of mailing a threatening communication to a federal judge, although defendant's sentence was not enhanced by six levels for a specific offense characteristic, a variance based on defendant's post-offense statement that he had a murder-for-hire plan in place to carry out the threat, coupled with his prison disciplinary history, resulted in a sentence in the same range, which were sufficient and proportionate justifications for the upward variance after *Gall*.

United States v. King, 518 F.3d 571 (8th Cir. 2008). Sentencing court's drug quantity calculation based on amount of money found in apartment where defendant was arrested was not clearly erroneous: testimony of witnesses concerning the source of the money found lacked credibility (girlfriend claimed part of it was from tax refund and that she had no checking account, yet her tax return showed direct deposit of her refund; money was found with drugs) and defendant admitted ownership of the money.

United States v. Moore, 518 F.3d 577 (8th Cir. 2008). Sentencing court did not make a *Kimbrough* error of law in refusing to grant a downward departure or variance from the guidelines range after defendant was convicted of possession with intent to distribute crack cocaine: the guidelines range included an obstruction of justice enhancement based on defendant's repeated perjury at trial and at his sentencing hearing, defendant had a long criminal history and had not worked steadily even though he had the ability to do so, and sentencing court did not claim it lacked discretion to take defendant's argued crack/powder disparity into account.

United States v. Hernandez, 518 F.3d 613 (8th Cir. 2008). It was not impermissible for court to presume reasonableness of low-end of guidelines range sentence; sentencing transcript demonstrated court adequately considered § 3553(a) factors by discussing some of the subsections and referencing objectives of other subsections.

United States v. Pepper, 518 F.3d 949 (8th Cir. 2008). After two judges entered the same sentence against defendant, both on remand, remand for resentencing by yet a third judge was required because the court failed to adequately provide sufficient justification for a 59% variance after a 50% downward departure: the court's reference to defendant's lack of violent history was not a ground for downward variance; the reference to avoiding unwarranted sentencing disparity was not met as defendant's sentence actually created a disparity with the sentences of his co-conspirators, and post-sentence rehabilitation was irrelevant, even after *Gall*.

United States v. Pate, 518 F.3d 972 (8th Cir. 2008). Antique firearm exception to sentencing enhancement based on number of firearms in defendant's possession was an affirmative defense which defendant should have raised at sentencing; his failure to argue that a muzzle loader was an antique firearm did not shift any burden to the government to prove otherwise, therefore it was not plain error to apply enhancement.

United States v. Vaughn, 519 F.3d 802 (8th Cir. 2008). Even though trial court committed plain error in concluding it could not find the "presumptively reasonable guidelines" unreasonable, defendant could not show he would have received a more favorable sentence; court's rejection of defendant's rehabilitation efforts and lack of recent criminal conduct was not an abuse of discretion where court based sentence on need for deterrence and defendant's "significant violent criminal history."

United States v. Lewis, 519 F.3d 822 (8th Cir. 2008). District court could impose 18-month prison term on a second revocation of defendant's supervised release, even though he had already served 2 years on the first revocation, as the statute had been amended to abolish aggregation of revocation prison terms.

United States v. Peroceski, 2008 WL 819082 (8th Cir. 3/28/2008). With respect to a two-level sentencing enhancement for possession of a dangerous weapon in connection with a drug crime, the circuit holds the government has the burden of showing "it is not clearly improbable that the weapon was connected to" a drug offense, which does not require a showing the defendant used or even touched the weapon in question.

United States v. Abdullahi, 2008 WL 819085 (8th Cir. 3/28/2008). Forty-one month sentence of imprisonment for operation of an unlicensed money transmitting business was not unreasonable -- the sentence was within guidelines range; court was not required to explicitly quote or cite § 3553(a) factors in stating the basis for its sentence but mentioned other facts which were included in § 3553(a).

United States v. Alvizo-Trujillo, 2008 WL 833939 (8th Cir. 3/31/2008). Sentencing court's application of a presumption of reasonableness to a within-guidelines sentence was error, but did not affect defendant's substantial rights as he could not show his sentence would have been more favorable; the sentencing court considered defendant's significant criminal history and the need to reflect the seriousness of the illegal reentry offense, deter, protect the public and other § 3553(a) factors.

United States v. Jorge-Salgado, 2008 WL 860832 (8th Cir. 4/2/2008). Condition of defendant's supervised release that he register as a sex offender (based on previous conviction -- this conviction was for drugs and firearms charges) was not an abuse of the court's discretion even though the sex offender registration requirement was not mandated until nearly two weeks after he was sentenced; district court was required to specify that defendant not commit any crimes during term of supervision and since defendant would have been required to re-register as a sex offender under the law of the state to which he would be released, the "specific pronouncement" of the crime he should not commit not an abuse of discretion.

United States v. Sigala, 2008 WL 878348 (8th Cir. 4/3/2008). Sentencing court's statement that "[t]o assist your attorney and the government and me . . . to determine what a reasonable sentence is, we use the Federal Sentencing Guidelines" did not constitute an impermissible presumption of reasonableness to the guidelines, only an explanation of sentencing procedure. Court thereafter stated it would use the guidelines as advisory.

United States v. Tyndall, 2008 WL 899947 (8th Cir. 4/4/2008). Obstruction of justice sentencing enhancement based on court's finding defendant had not testified credibly and prosecuting witnesses had on the subject of defendant's alleged sexual contact with a minor was not erroneous based on specific findings the court made concerning the minor having acquired a sexually transmitted bacteria in spite of never having engaged in sexual activity before and the presence of her DNA on defendant's underwear.

United States v. Merrival, 2008 WL 900102 (8th Cir. 4/4/2008). Defendant's history of recidivism, ineffective prior attempts at rehabilitation and his pre-revocation attempt to provide a false UA for a drug test were adequate reasons for the court's revocation sentence of 24 months' imprisonment.

United States v. Bear Robe, 2008 WL 918722 (8th Cir. 4/7/2008). Sentence of statutory maximum term of imprisonment followed by an additional term of supervised release was not an abuse of discretion on revocation of supervised release : defendant's offense on supervised release was similar to the original offense of which he had been convicted and deterrence was the court's purpose; his repeated drinking on supervised release showed defendant was unlikely to complete rehabilitation and he did not accept responsibility for his previous crime and deceived and manipulated his supervision officer.

United States v. Brandon, 2008 WL 918715 (8th Cir. 4/7/2008). Mandatory minimum life sentence based on defendant's prior state court felony convictions under § 841(b)(1)(A) was not unconstitutionally violative of the Equal Protection guarantees of the Fifth Amendment . Even though his state court felony convictions for what were "user amounts" of cocaine base would not have been felonies under federal law, the heavier penalty had a deterrent purpose.

I. Habeas

Medellin v. Texas, __ U.S. __, 128 S. Ct. 1346 (2008). Neither a judgment by the International Court of Justice nor a Presidential Memorandum constituted "directly enforceable federal law" which would pre-empt state law limitations on filing successive habeas petitions.

Malcom v. Houston, 518 F.3d 624 (8th Cir. 2008). Trial counsel's error in representing defendant as if consent and mistake of age were valid defenses to charge of first degree sexual assault of a minor was not prejudicial to defendant as two state witnesses testified defendant reported having sex with the victim.

Revels v. Sanders, 519 F.3d 734 (8th Cir. 2008). After being found not guilty by reason of insanity after killing three family members (first and second degree murder was charged) and granted conditional releases from resultant state psychiatric commitment on two occasions, petitioner sought unconditional release from commitment. Circuit holds state may not apply a standard for unconditional release based on future dangerousness alone.

Chang v. Minnesota, 2008 WL 850210 (8th Cir. 4/1/2008). Admission of hearsay statements from fourth victim of defendant's promotion of prostitution when witness was not present and did not testify at trial was not a *Brecht* error as the statements did not add anything to the prosecution's evidence and only corroborated the testimony of the three victims who did appear and testify.

Runyan v. Burt, 2008 WL 927601 (8th Cir. 4/8/2008). Petitioner's state PCR application was not "properly filed" until he met the state's filing requirements of verified signature and payment of the required percentage of the filing fee, even though he put his application in the mail almost a month before the date it was stamped as filed by the state court. Also, state court's consideration of petitioner's application on the merits did not change the conclusion that his § 2254 petition was untimely under AEDPA.

III. EMPLOYMENT LAW

A. General Issues

Federal Express Corp. v. Holowecki, __ U.S. __, 128 S. Ct. 1147 (2008). Employee's submission of an "intake questionnaire" and detailed affidavit in support of her contention that certain FedEx programs discriminated against older workers was properly considered a "charge" under EEOC's rules and regulations, even though remedial relief was not specifically requested and EEOC failed to take any action; the right to sue is conditioned on filing a charge, not on agency action on the charge.

Sprint/United Management Co. v. Mendelsohn, __ U.S. __, 128 S. Ct. 1140 (2008). Evidence of other claims against an employer is not subject to exclusion *per se*, but only after analysis of the factors under Fed. R. Evid. 401, 402 and 403; a trial court's analysis is entitled to deference by the reviewing court.

Jessie v. Potter, 516 F.3d 709 (8th Cir.2008). Circuit holds that a plaintiff seeking tolling of the 45-day deadline for contacting an EEO counselor must show that his/her claimed mental incapacity prevented him/her "from understanding and managing his[/her] affairs generally and from complying with the deadline."

B. Age

Riley v. Lance, 518 F.3d 996 (8th Cir. 2008). Although trial court erred in requiring plaintiff show a genuine issue of fact regarding whether he was performing his job at a level meeting his employer's legitimate expectations, instead of only that he was "otherwise qualified," the error did not require reversal as plaintiff could not show that defendant's articulated reason for terminating his employment, failure to meet goals set in a performance development program, was a pretext for illegal discrimination based on plaintiff's age (he was 58 at the time his employment was terminated and had worked for defendant nearly 30 years).

D. Race/Gender/Retaliation

Culton v. Missouri Dep't of Corrections, 515 F.3d 828 (8th Cir. 2008). Plaintiff's claim that he was reassigned to a lower status position in retaliation for his efforts to stop harassment of a co-worker failed as his prima facie case lacked proof of causation. Plaintiff's supervisor made the transfer decision before learning plaintiff had engaged in protected activity and plaintiff did not dispute the factual accuracy of the information which served as the basis for his demotion.

Skare v. Extendicare Health Services, Inc., 515 F.3d 836 (8th Cir. 2008). Although plaintiff was not required to report violations in writing to satisfy a state whistleblower statute, since her job duties required her to ensure legal compliance she was not protected by the statute; therefore she did not make out the first element of her prima facie case, that she was engaged in protected conduct.

King v. Hardesty, 517 F.3d 1049 (8th Cir. 2008). In § 1983 case claiming racial discrimination when a school district terminated plaintiff from employment as a substitute teacher and failed to assign her homebound instruction hours in spite of her qualifications, district court erred in failing to analyze plaintiff's claims under the *Price Waterhouse* approach in the face of offensive racial remarks from a decisionmaker.

Brannum v. Missouri Dept. of Corrections, 518 F.3d 542 (8th Cir. 2008). Plaintiff was not engaging in protected activity when she assisted a male correctional officer in reporting a female supervisor's comment that women did not need training for assignment to the special needs unit because of their nurturing nature; single comment did not violate Title VII.

Fields v. Shelter Mut. Ins. Co. 2008 WL 763017 (8th Cir. 3/25/2008). In a case alleging racial discrimination in paying wages, plaintiff failed to show that other employees were similarly situated "in all relevant aspects" as part of the fourth prong of her prima facie case. Two of the individuals were direct hires from a competitor paid in accordance with the company policy of paying outside hires higher to attract talent; plaintiff was hired before the policy was adopted and was promoted from within the company; two others had been working for the company for a longer time and had more experience than plaintiff; another had a different supervisor and the last was actually paid less than plaintiff in the same position.

Soto v. Core-Mark International, Inc., 2008 WL 850237 (8th Cir. 4/1/2008). While plaintiff may have presented sufficient evidence to show he was not sleeping during an incident which resulted in termination of his employment, that evidence did not "equate to sufficient evidence of pretext," here whether the employer had a good faith belief that plaintiff was sleeping on the job -- the employer had statements from two witnesses and the supervisor.

Smith v. International Paper Co., 2008 WL 899949 (8th Cir. 4/4/2008). Plaintiff's complaints about workplace civility -- that his supervisor was yelling and cussing at him -- was not protected conduct, therefore his retaliation claim failed.

Recio v. Creighton University, 2008 WL 927598 (8th Cir. 4/8/2008). In retaliation case, plaintiff Spanish professor failed to demonstrate materially adverse actions arose from a change in her teaching schedule, which did not change her salary or benefits, "shunning" or silent treatment by other faculty members, or from failure to give her the opportunity to teach advanced classes, which complaint predated any protected activity by plaintiff.

E. Hostile Work Environment

Anda v. Wickes Furniture Co., 517 F.3d 526 (8th Cir. 2008). Isolated comments from co-worker, only a few of which had any sexual content/innuendo, did not constitute a hostile work environment and even if they did, the employer took prompt and effective remedial action by issuing a written reprimand to the co-worker, informing plaintiff the process of investigating and disciplining the co-worker was ongoing and the co-worker was terminated two weeks after plaintiff resigned.

G. Miscellaneous Employment Cases

Doe v. Dep't of Veteran Affairs, 519 F.3d 456 (8th Cir. 2008). Doctor's act in revealing plaintiff's HIV-positive status and use of marijuana in the presence of plaintiff's union representative did not violate the Privacy Act; doctor obtained information from plaintiff himself rather than from medical records; the fact that doctor also placed the information in plaintiff's medical records did not transform doctor's knowledge from personal knowledge to knowledge obtained from a government record.

Copeland v. ABB, Inc., 2008 WL 795060 (8th Cir. 3/27/2008). Employer's third-party claims administrator which directed plaintiff to follow-up medical appointment for her workers' compensation claim was acting as employer's agent at the time and employer was required to compensate employee for time spent at doctors under the FLSA; plaintiff did not waive her right to compensation by electing to take an unpaid excused absence to attend the appointment.

Fitzgerald v. Action, Inc., 2008 WL 899888 (8th Cir. 4/4/2008). Employer's varying explanations for terminating plaintiff's employment -- first that plaintiff was being laid off for lack of work, then claiming plaintiff had engaged in employee misconduct (abuse of restroom privileges and break time), coupled with the company's failure to follow its disciplinary policy and treatment of a similarly situated employee more leniently -- raised an issue whether the reason given for terminating his employment was a pretext for discrimination because of plaintiff's anticipated medical claims.

IV. CONSTITUTIONAL LAW

A. First Amendment

Entertainment Software Ass'n v. Swanson, 519 F.3d 768 (8th Cir. 2008). Based on the circuit's prior holding that "violent video games are protected free speech," Minnesota statute prohibiting sale or rental of games with an AO or M rating to persons under age 17 did not serve a compelling state interest nor was it narrowly tailored to achieve that interest. Although the state has a "compelling interest in the psychological well-being of" minors and there was evidence violent video games had a "deleterious effect" on that interest, there was insubstantial evidence of causation between exposure to violent games and subsequent behavior to support a finding the act was constitutional.

B. Fourth Amendment

Seymour v. City of Des Moines, 519 F.3d 790 (8th Cir. 2008). In the course of responding to a 911 call concerning a baby not breathing, while officers may have been mistaken as to the legality of their actions in making the baby's father stay at home until the investigating officer arrived to talk to him, they were entitled to qualified immunity because father first said he was going to stay at home with his other child, the officer planned on arriving promptly and reasonably could have believed the father would not be detained from going to the hospital for long; furthermore, the length of time the father was detained was not unduly prolonged as no one told the investigating officer the father wanted to go to the hospital.

Stufflebeam v. Harris, 2008 WL 900046 (8th Cir. 4/4/2008). Officer's demand that a passenger in a vehicle stopped for a license plate violation identify himself was improper under state law, therefore the passenger's refusal to provide identification was not obstructive conduct and the officer did not have probable cause to arrest the passenger and therefore did not have qualified immunity from suit on plaintiff's Fourth Amendment claim for illegal arrest

C. Due Process/Equal Protection

White v. McKinley, 519 F.3d 806 (8th Cir. 2008). Defendant was not entitled to qualified immunity on plaintiff's procedural due process claim arising from defendant's participation in investigation of child molestation charges against plaintiff when defendant was romantically involved with plaintiff's wife while they were getting divorced. Defendant deliberately withheld the extent of his relationship with plaintiff's wife from prosecutors and failed to preserve a diary from the alleged victim which did not corroborate the allegations of molestation, showing bad faith on the part of the investigating officer.

Executive Air Taxi Corp. v. City of Bismarck, ND, 518 F.3d 562 (8th Cir. 2008). Assuming plaintiff was similarly situated to other service providers at the municipal airport, city showed rational basis for its refusal to tow plaintiff's aircraft and referring customers to seek hangar space or maintenance services at another provider as doing otherwise would encourage aircraft owners to use plaintiff's fueling service instead of the city's fueling service.

Nolan v. Thompson, 2008 WL 623608 (8th Cir. 3/10/2008). Parole board's application of changed parole laws to plaintiff, who was sentenced to life imprisonment with the possibility of parole, by scheduling reconsideration hearings at three-year intervals instead of every two years as before did not violate ex post facto clause as the three-year scheduling did not create a sufficient risk of increasing the length of plaintiff's incarceration.

Amrine v. Brooks, 2008 WL 927607 (8th Cir. 4/8/2008). After plaintiff was cleared of murder charges from an incident arising while he was in prison, he sued the prison investigators and prosecutor, alleging violations of procedural due process. Prison investigators were entitled to qualified immunity with respect to plaintiff's placement in restrictive confinement during the investigation as they had arguable probable cause to do so: plaintiff had a motive for killing the other inmate, a confidential informant pointed to plaintiff as the murderer and there were blood spots on his clothing.

D. Miscellaneous Constitutional Claims

Washington State Grange v. Washington State Republican Party, __ U.S. __, 128 S. Ct. 1184 (2008). State primary law which provided that candidates for public office be identified on primary ballot by "self-designated party preference," allowed voters to vote for any candidate and advancing the two top votegetters, irrespective of party preference, to the general election was facially constitutional and did not severely burden associational rights of political parties.

V. ERISA

LaRue v. DeWolff, Boberg & Assoc., Inc., __ U.S. __, 128 S. Ct. 1020 (2008). In the context of defined contribution plans, ERISA § 502(a)(2) authorizes recovery for breach of fiduciary duties that impair the value of plan assets in an individual account. *Russell's* "entire plan" rule applied to defined benefit plans.

Trustees of the GCIUUM Local IM Health and Welfare Plan v. Bjorkedal, 516 F.3d 719 (8th Cir. 2008). Welfare plan amendments signed by an employee, not partner, of a rental operation related to corporation did not bind the rental partnership to cover corporation's contribution deficiencies as might occur if the entities were under common control.

Hamilton v. Standard Ins. Co., 516 F.3d 1069 (8th Cir. 2008). Missouri statute barring suicide defenses for insurance policies issued to citizens of Missouri did not apply to group life insurance policy issued to non-Missouri citizen (here decedent's employer which was headquartered in Idaho) in Idaho, even though decedent for whom death claim was made was a Missouri citizen.

Menz v. Procter & Gamble Health Care Plan, 2008 WL 795112 (8th Cir. 3/27/2008). Plan's denial of plaintiff's request for coverage of a back-up prosthetic arm was not an abuse of discretion nor did a procedural irregularity occur based on "excessive" levels of review -- while some procedural mistakes were made in processing plaintiff's claim and there was confusion concerning which entity should handle the claim, the additional appeal process permitted was an attempt to remedy those errors and confusion.

VI. PRISONERS' RIGHTS

B. Eighth Amendment

Brown v. Fortner, 518 F.3d 552 (8th Cir. 2008). Defendant correctional officers who failed to secure handcuffed inmates in transport vehicle after inmates requested seatbelts were not entitled to qualified immunity from plaintiff's Eighth Amendment cruel and unusual punishment claim as defendants knew of and disregarded the substantial risk of harm (vehicles were involved in accident with each other after correctional officers drove in excess of speed limit, followed too closely, crossed over double-yellow lines and passed non-convoy vehicles where prohibited).

Irving v. Dormire, 519 F.3d 441 (8th Cir. 2008). Court properly denied qualified immunity to correctional officers who opened a cell door to allow an inmate to attack plaintiff inmate in retaliation for plaintiff's lawsuit against the officers, the circuit finding that a blow to the face resulting in difficulty breathing for two months was more than *de minimis* injury, which must be shown before an inmate could receive compensation for a § 1983 claim.

D. RLUIPA

Patel v. Bureau of Prisons, 515 F.3d 807 (8th Cir. 2008). Because plaintiff had an option to purchase *halal* commissary meals, and did not show that the financial burden placed on him was substantial, his ability to practice his Muslim faith was not substantially burdened under the Free Exercise Clause, RFRA or RLUIPA.

VII. MISCELLANEOUS

Preston v. Ferrer, __ U.S. __, 128 S. Ct. 978 (2008). In the face of a contract provision agreeing to arbitrate all questions arising thereunder, the Federal Arbitration Act supersedes state laws which might lodge primary jurisdiction in a state judicial or administrative forum; therefore California Labor Commissioner did not have exclusive original jurisdiction over fee dispute.

Riegel v. Medtronic, Inc., __ U.S. __, 128 S. Ct. 999 (2008). The pre-emption clause of the Medical Device Amendments of 1976 bars common-law claims which challenge the safety or effectiveness of devices which received premarket approval from the FDA, therefore state law claims against manufacturer of a balloon catheter used in plaintiff's angioplasty were preempted.

Hall Street Assoc. L.L.C. v. Mattel, Inc., __ U.S. __, 128 S. Ct. 1396 (2008). Parties cannot draft an arbitration provision which provides for broader review by a judicial body than permitted by the FAA.

MeadWestvaco Corp. v. Illinois Dept. of Revenue, __ U.S. __, __ S. Ct. __, 2008 WL 1721524 (4/15/2008). An opinion exploring limitations on state taxation of multistate business enterprises.

United States v. Clintwood Elkhorn Mining Co., ___ U.S. ___, ___ S. Ct. ___, 2008 WL 1721530 (4/15/2008). A taxpayer must timely file an administrative refund claim for a tax assessed in violation of the Export Clause before suit against the government may be brought.

Hinsley v. Standing Rock Child Protective Services, 516 F.3d 668 (8th Cir. 2008). Acts of tribal agency acting under self-determination contract with the government fell with the discretionary function exception of the FTCA: the agency did not have any statutory, public or regulatory duty to warn about "the sexually abusive proclivities" of a person being discharged from the agency's custody and the decision to release that person to a home filled with children without that warning involved balancing competing concerns of public safety and the confidentiality of juvenile records.

Corn Plus Cooperative v. Continental Cas. Co., 516 F.3d 674 (8th Cir.2008). After a mechanical contractor's work for plaintiff coop turned out to be defective, the parties entered into a settlement agreement based on Minnesota law by which plaintiff's recovery was limited to the amount it could obtain from the mechanical contractor's insurers (who denied coverage and did not participate in the mediation) and plaintiff's claims against the contractor were released. Because the agreement did not allocate between covered and uncovered (costs of welding repairs and associated loss of use of facility) damages under applicable insurance policies it was held to be unreasonable and could not be enforced in the coop's declaratory judgment action against the insurers; addendum to the agreement providing for judicial determination of a "fair and reasonable" settlement amount failed under Minnesota law which would not impose liability on a nonparticipant in settlement negotiations. However, the contractual waiver of the right to pursue further litigation against the contractor was still valid, thus plaintiff's claims against the contractor could not be reinstated and plaintiff was left without a remedy except for the reduction in its liability to the contractor on a mechanics lien, which was also part of the agreement.

Estate of Blume v. Marian Health Center, 516 F.3d 705 (8th Cir. 2008). Treating hospital bylaws as a contract between defendant hospital and plaintiff physician was not obvious error where the parties agreed in court the bylaws created a contract and Iowa law did not provide for a "hard-and-fast rule" on the issue. However, hospital was entitled to immunity for alleged due process errors based on clause in the bylaws which extended absolute immunity to hospital relating to proceedings for suspension or revocation of clinical privileges.

The Shaw Group, Inc. v. Marcum, 516 F.3d 1061 (8th Cir. 2008). Army contractor had contractual duty to repair and maintain metal latrine on firing range until such time as it was demolished and knew or should have known there was a safety risk involving electricity and the latrine as the evidence showed there were three orders for electrical work at three other latrines before plaintiff's decedent's death and the work on those latrines was completed before his death.

Dowell v. Wells Fargo Bank, NA, 517 F.3d 1024 (8th Cir. 2008). Plaintiff debtors could not show actual damages, therefore their claim that FCRA was negligently violated by defendant's debt reporting failed.

Stan Koch & Sons Trucking, Inc. v. Great West Casualty Co., 517 F.3d 1032 (8th Cir. 2008). Plaintiff-insured was obligated to reimburse its insurance company \$500,000 under a policy retention provision as the "permissible operators" who leased plaintiff's trailer, which was involved in a serious traffic accident, were insureds under plaintiff's policy and not subject to a "trucker" exclusion.

Wilhelm v. Credico, Inc., 519 F.3d 416 (8th Cir. 2008). In the absence of evidence that plaintiff was initially provided notice of his right to dispute a debt and request verification, defendant's threat to sue letter was an action that could not be legally taken, nor did the notice of lawsuit disclose that timely dispute of the debt and request for validation would cause collection activities to cease.

Medical Liability Mut. Ins. Co. v. Alan Curtis LLC, 519 F.3d 466 (8th Cir. 2008). Trial court correctly determined a three-year limitations period applied to estate's claim under Arkansas' Long Term Care Resident's Rights Act and it was not necessary to certify the issue to the Arkansas Supreme Court as certification would cause undue delay.

PHL Variable Ins. Co. v. Fulbright McNeill, Inc., 519 F.3d 825 (8th Cir. 2008). Insured had a duty between the time he applied for a life insurance policy and the date it was issued to inform the company of a substantial change in his health condition assessment; his failure to provide this information constituted a material misrepresentation of fact which prohibited recovery under the policy.

Spirtas Co. v. Federal Ins. Co., 2008 WL 850230 (8th Cir. 4/1/2008). Insurer had no obligation to defend or indemnify insured in a lawsuit alleging insured breached a demolition subcontract; D&O policy specifically excluded from coverage suits arising from contract, including any tort claims arising from a contract.

Integrity Floorcovering, Inc. v. Broan-Nutone, 2008 WL 918745 (8th Cir. 4/7/2008). In diversity products liability case involving real property damage, Minnesota ten-year statute of repose applied to claims against manufacturer of bathroom ventilation fan. Because it was required by building codes, the fan was properly considered a permanent addition to property as well as ordinary building material and thus an improvement to real property, not equipment or machinery installed on real property.