Current Circuit Splits

The following pages contain brief summaries of circuit splits identified by federal court of appeals opinions announced between August 18, 2017 and December 31, 2017. This collection, written by the members of the *Seton Hall Circuit Review*, is organized into civil and criminal matters, and then by subject matter and court.

Each summary briefly describes a current circuit split, and it intended to give only the briefest synopsis of the circuit split, and not a comprehensive analysis. This compilation makes no claim to be exhaustive, but aims to serve the reader well as a referential starting point.

Preferred citation for the summaries below: *Circuit Splits*, 14 SETON HALL CIR. REV. [n] (2018).

CIVIL MATTERS

CIVIL MATTERS

ADMINISTRATIVE LAW

Standards of Review – Deference to Agency Statutory Interpretation; *Marsh v. J. Alexander's LLC*, 869 F.3d 1108 (9th Cir. 2017)

The 9th Circuit addressed whether a court owed deference to the Department of Labor's interpretation of the dual jobs regulation. *Id.* at 1116. The court noted that the 8th Circuit deferred to the Department of Labor's informal handbook interpretation reasoning that it was consistent with the dual jobs regulation. *Id.* at 1124. The 9th Circuit disagreed, and reasoned that the court "failed to consider the regulatory scheme as a whole" because the handbook was not exposed to the legislative rulemaking procedures, which directly contravenes the rule that agencies cannot create new substantive regulations through interpretation. *Id.* Thus, the 9th Circuit concluded that while "no provision with the force of law" follows the Department of Labor's informal interpretation, its holding would "not prevent the [Department of Labor] from attempting to promulgate this approach through rulemaking, nor prevent Congress from requiring such an approach through legislation." *Id.* at 1126.

ALTERNATIVE DISPUTE RESOLUTION

Arbitration – Discovery; *CVS Health Corp. v. Vividus, LLC*, 878 F.3d 703 (9th Cir. 2017)

The 9th Circuit addressed whether the Federal Arbitration Act (FAA) "allows an arbitrator to order a third party to produce documents as part of pre-hearing discovery." *Id.* at 706. The court noted that the 2nd, 3rd and 4th Circuits determined that Section 7 of the FAA "speaks unambiguously to the issue," and does not grant arbitrators the power to subpoena third-

party documents to be produced outside of the presence of the arbitrators. *Id.* at 707. The court noted that, conversely, the 8th Circuit found that although Section 7 does not "explicitly authorize" the production of documents for inspection by a party prior to a hearing, this power is "implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing." *Id.* The 9th Circuit agreed with the 2nd, 3rd and 4th Circuits, and concluded that arbitrators do not have "the full range of discovery powers a court possesses" because such a rule lessens the production burden on non-parties. *Id.* at 708. Furthermore, the court explained, an arbitrator's power under Section 7 extends to only to documentary evidence deemed material to the case. *Id.* at 708. Thus, the 9th Circuit disagreed with the 8th Circuit, and concluded that Section 7 does not grant arbitrators "implicit powers to order document discovery from third parties prior to a hearing." *Id.*

BANKRUPTCY LAW

Purpose of a Debt – **Clear Error Standard of Review;** *Aspen Skiing Co. v. Cherrett (In re Cherrett)*, 873 F.3d 1060 (9th Cir. 2017)

The 9th Circuit addressed whether a balancing of motives for incurring a housing loan is a factual or legal inquiry and what standard of review should apply. *Id.* at 1067. The court noted that the 8th Circuit held that the "purpose of a debt is a factual finding reviewed for clear error," and the 10th and 5th Circuits found an opposite conclusion. *Id.* at 1067 n.3. The 9th Circuit also noted that the 5th Circuit's decision may have differed because it "turned on whether an entire category of debt must *always* be consumer or non-consumer, a legal rather than factual question." *Id.* Thus, the 9th Circuit joined the 8th Circuit in holding that weighing the purpose of a housing loan is a factual inquiry that the court should review for clear error. *Id.* at 1067.

Judicial Estoppel – Omission of Assets; *Slater v. United States Steel Corp.*, 871 F.3d 1174 (11th Cir. 2017)

The 11th Circuit addressed what courts must consider to determine whether a plaintiff intended to make a mockery of the judicial system. *Id.* at 1189. The court noted that the 5th and 10th Circuits held that a plaintiff who omitted a pending civil claim as an asset in a bankruptcy proceeding intended to manipulate the judicial system. *Id.* at 1189. The court then noted that the 6th, 7th, and 9th Circuits held that "whether a plaintiff intended to make a mockery of the judicial system requires consideration of more than just whether the plaintiff failed to disclose a claim." *Id.* The 11th Circuit concluded that when determining whether a plaintiff intended

to make a mockery of the judicial system by omitting a pending civil claim in bankruptcy proceedings, a court should consider all the facts and circumstances in a given case, such as a plaintiff's sophistication and whether a plaintiff attempted to correct an omission. *Id.* at 1185. The 11th Circuit followed the 6th, 7th, and 9th Circuits and held that more is required than an omission to make such a determination. *Id.* at 1189.

Debtor Avoidance of Tax Payment – Sovereign Immunity; *Zazzali v. United States (In re DBSI, Inc.)*, 869 F.3d 1004 (9th Cir. 2017)

The 9th Circuit addressed "whether a bankruptcy trustee can, through an adversary proceeding, avoid a debtor's federal tax payment, or whether the Internal Revenue Service's ('IRS' or 'government') sovereign immunity prevents such relief." *Id.* at *1006. The court created a circuit split with the 7th Circuit, and noted that Bankruptcy Code Section 106(a)(1)'s abrogation of sovereign immunity with respect to Section 544(b)(1) did not "alter [Section 544(b)'s substantive requirements merely by stating that the federal government's authority was abrogated 'with respect to' that provision." *Id.* at *1014. Although the 9th Circuit agreed with the 7th Circuit's two-prong approach's general framework to determine IRS liability, the 9th Circuit disagreed with the 7th Circuit's analysis regarding the second prong—inquiring whether "the source of substantive law provides an avenue of relief"—because "the fact that Congress waived sovereign immunity with respect to Section 544(b)(1), and the derivative state law, provide a substantive cause of action against the government." *Id.* at *1013–14. The court further reasoned that "the statutory definitions of the relevant parties – debtors and creditors – further demonstrate that Section 544(b)(1), and the derivative law upon which it relies, contemplate suits against the government." *Id.* The court noted that although it was not necessary to the current case's disposition, the Bankruptcy Code's principles, purpose and policy goals support the court's decision. *Id.* at *1016. Accordingly, the 9th Circuit held that "the government could not rely on sovereign immunity to prevent the avoidance of tax payments at issue" because "Section 106(a)(1)'s abrogation of sovereign immunity with respect to Section 544(b)(1) extends to the derivative applicable law[.]" *Id.* at *1007.

CIVIL PROCEDURE

Class Certification Appeals Deadline – Tolling of Deadline*;* *Lambert v. Nutraceutical Corp.*, 870 F.3d 1170 (9th Cir. 2017)

The 9th Circuit addressed whether Federal Rule of Civil Procedure 23(f)'s deadline may be equitably tolled when a party failed to file a

motion for reconsideration within that deadline. *Id.* at 1178. The court first listed relevant factors to consider. *Id.* The court noted the 5th Circuit holding that the deadline was equitably tolled when a "litigant stated in a court filing that he would seek reconsideration of the [class] certification within 14 days." *Id.* at 1178–79. The court also noted the 7th Circuit's decision, establishing with the 5th Circuit's decision that stating an intent to file the motion tolls the fourteen-day deadline. *Id.* at 1179. Thus, the court found that equitable exceptions may warrant tolling of the deadline, and such exceptions include: (1) a party's stated intent to file a motion for reconsideration within the deadline and (2) a District Court instructing a party to file the motion for reconsideration at a date past the deadline. *Id.* The court noted that its conclusion split from the 3rd, 7th, 10th, 11th, and D.C. Circuits to the extent that they would toll the deadline only if a motion for reconsideration is timely filed. *Id.* at 1179–82. The court reasoned that because the Rule 23(f) "deadline is for filing a Rule 23(f) *petition* . . . [l]itigants have no reason to know that their deadline for filing a motion for *reconsideration* is . . . fourteen days." *Id.* (emphasis added). The court further disagreed with the 3rd, 7th, 11th and D.C. Circuits' position that all Rule 23(f) petitions disrupt the judicial process, and thereby warrant strict adherence to the deadline, because "Rule 23(f) petitions do not actually slow down litigation . . . and district courts are bound to experience delay when . . . confronted with motions for reconsideration, irrespective of any Rule 23(f) petition." *Id.* at 1180–81. Additionally, the court noted that the petitions "do not uniquely disrupt" or make litigation uncertain because Rule 23(c)(1)(C) gives a district court discretion to modify or amend class certifications at any time before final judgment. *Id.* at 1181. The court reasoned that if a district court maintains this discretion, the argument that Rule 23(f) petitions make litigation uniquely uncertain essentially loses its force. *Id.* Thus, the 9th Circuit held that equitable circumstances warrant tolling of the Rule 23(f) deadline. *Id.*

Federal Rule of Civil Procedure 41(d) – Costs of Previously Dismissed Action; *Portillo v. Cunningham*, 872 F.3d 728 (5th Cir. 2017)

The 5th Circuit addressed whether the "costs" to be reimbursed by plaintiffs to defendants, pursuant to Rule 41(d), include attorneys' fees. *Id.* at 738. The court noted that the 6th Circuit held that attorneys' fees are never available as "costs" under the rule because it does not expressly provide for them. *Id.* The court then noted that the 8th and 10th Circuits have left the decision as to the appropriateness of awarding attorneys' fees, in the discretion of the district courts. *Id.* Finally, court noted that the 4th and 7th Circuits concluded that attorneys' fees are available under the rule

only if the underlying statute provides for attorneys' fees, and reasoned that such a reading of the rule struck the proper balance between upholding the "American Rule" and deterring vexatious litigation by plaintiffs. *Id.* at 739. The 5th Circuit agreed with the 4th and 7th Circuits, and held that "[f]ee awards are permitted under Rule 41(d) only if the underlying statute defines 'costs' to include fees." *Id.*

Federal Rule of Civil Procedure 60(b)(6) – Extraordinary Circumstance Justifying Relief; *Satterfield v. DA Phila.*, 872 F.3d 152 (3d Cir. 2017)

The 3rd Circuit addressed whether a particular United States Supreme Court decision qualified as an extraordinary circumstance that would justify relief under Federal Rule of Civil Procedure 60(b)(6). *Id.* at 154. The court held that "the nature of the change in decisional law itself must be a factor in the analysis," and remanded the case to the district court to weigh the equitable factors and to decide whether to grant the defendant's 60(b)(6) motion. *Id.* at 162. The court's decision created a circuit split with the 5th Circuit, which came to the opposite decision about decisional law qualifying as an extraordinary factor. *Id.* at 161 n.9. The court was not persuaded by the 5th Circuit's stance because the 5th Circuit relied upon a case explicitly rejected by the 3rd Circuit. *Id.*

CIVIL RIGHTS

Prison Litigation Reform Act ("PLRA"), 28 U.S.C. § 1915 – Three Strikes Rule; *Parker v. Montgomery Cnty. Corr. Facility/Business Office*, 870 F.3d 144 (3d Cir. 2017)

The 3rd Circuit addressed whether an indigent prisoner may file an appeal of the imposition of his "third strike" *in forma pauperis* ("IFP") without a showing that he is in "imminent danger of serious physical injury." *Id.* at 146. The court noted that the 9th Circuit previously held prisoners are entitled to IFP status on an appeal of their third-strike determination. *Id.* at 151. The court explained the 9th Circuit's reasoning that requiring an indigent prisoner to pay filling fees to reverse an erroneous third strike was unfair and could not have been Congress's intent in drafting the PLRA. *Id.* The court additionally stated that the 9th Circuit noted such a requirement would impede appellate courts' functioning by "freezing out meritorious claims or ossify[ing] district court errors." *Id.* (alteration in original). The 3rd Circuit disagreed and, instead, examined the statute's language, providing that prisoners are ineligible for IFP status once "the prisoner has, on 3 or more prior occasions . . . brought an action or appeal in a court of the United States

that was dismissed on . . . grounds enumerated in § 1915(e)(2)(B)(i) or (ii)." *Id.* at 152 (internal citations omitted). The court noted that the PLRA contains no language creating an exception for an appeal of the imposition of a third strike, which Congress would have anticipated and included if intended. *Id.* Furthermore, the 3rd Circuit found that "the term 'prior' set a temporal parameter," which referred to strikes issued on an action or appeal prior to any subsequent fillings. *Id.* at 153. The 3rd Circuit therefore held that prisoners are not entitled to IFP status on an appeal of their third-strike determination. *Id.*

CONTRACTS LAW

Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. § 1821 – Administrative Claims Process as an Exclusive Remedy; *LNV Corp. v. Outsource Servs. Mgmt., Ltd. Liab. Co.*, 869 F.3d 662 (8th Cir. 2017)

The 8th Circuit addressed (1) whether counterclaims alleging the breach of a loan participation agreement are claims under the FIRREA and (2) whether these "post-receivership claims, including those arising after the claims-bar date, must be administratively exhausted." *Id.* at 670. On the first issue, the court noted that the 9th Circuit decided that these counterclaims were not claims under the FIRREA and "could be brought initially in federal court," because to hold otherwise would leave the receiver "free to breach any pre-receivership contract, keep the benefit of the bargain, and then escape the consequences by hiding behind the FIRREA claims process." *Id.* at 667. The court then noted that the D.C. Circuit, similarly, held that the FIRREA "does not preempt state-law contract rights and does not provide blanket preemption of valid pre-receivership contracts" and that "the receiver can avoid the obligations imposed by such agreements only by repudiating them in accord with" the FIRREA. *Id.* at 668. Ultimately, the 8th Circuit agreed with the 6th and the 11th Circuits' position that a breach of an obligation under an agreement "relates to an act or omission of the receiver." *Id.* at 699.

On the second issue—whether these "post-receivership claims, including those arising after the claims-bar date, must be administratively exhausted"—the court held in the affirmative. *Id.* at 670, 700. The court acknowledge that the 10th Circuit, in contrast, reasoned that "claims . . . arising after receivership and in the indeterminate future due to management actions of the [receiver] cannot have been contemplated when [the] deadlines for filing administrative claims were set." *Id.* The court instead followed the opinions of the 1st and 11th Circuits, which relied in part on FDIC guidance. *Id.* FDIC construes the pivotal statutory

bar-date "as permitting late filing even by claimants who were on notice of FDIC's appointment [as receiver] but could not file their claim because it did not come into existence until after the bar date." *Id.* Thus, the 8th Circuit held that the claims must be administratively exhausted under the FIRREA. *Id.*

EMPLOYMENT LAW

Tax Consequence Adjustment in Back-Pay Awards – Title VII; *Clemens v. CenturyLink Inc.*, 874 F.3d 1113 (9th Cir. 2017)

The 9th Circuit addressed whether courts have the discretion to increase awards of back-pay under Title VII to account for income-tax liability in circumstances that cause the recovery of a lump-sum award to place a plaintiff in a higher tax bracket than their previous salary. *Id.* at 1115. The court noted that the 3rd, 7th, and 10th Circuits held that Title VII grants broad equitable power to courts to form remedies that make a plaintiff whole again. The court noted that the D.C. Circuit, however, refused to expand the court's discretion in this way, due to a lack of supporting case law. *Id.* at 1116. The 9th Circuit explained that increased taxation would deny plaintiffs recovery that put them in the same position they would have been had the unlawful employment action not taken place. *Id.* The court cautioned that there "may be many cases where a gross up is not appropriate for a variety of reasons," and the determination is to be made on a case-by-case basis. *Id.* The 9th Circuit joined the majority circuits in holding that courts do have the discretion to adjust, or "gross-up," an award of back-pay when a lump sum award "push[es] a plaintiff into a higher tax bracket than he would have occupied had he received his pay incrementally over several years." *Id.*

HOUSING LAW

Funds Allocation – Entitlement to Administrative Hearing; *Modoc Lassen Indian Hous. Auth. v. United States HUD*, 878 F.3d 889 (10th Cir. 2017)

The 10th Circuit addressed whether the United States Department of Housing and Urban Development (HUD) lacked authority to recapture overpayments resulting from prior over-reporting of eligible housing units by Native American tribes, without first providing an administrative hearing. *Id.* at 895. Under § 4165 of the Native American Housing Assistance and Self-Determination Act (NAHASDA), the court explained that HUD was required to "undertake such reviews and audits as may be necessary or appropriate" to make three specific determinations. *Id.* at

896. The court noted the 9th Circuit's determination that a tribe's report of eligible housing stock falls within the first determination of § 4165—"activities" and "certifications"—and as such, affords the HUD the authority to review and entitles the tribe to an administrative hearing. *Id.* The court, however, disagreed with the 9th Circuit's determination, as the "applicable statutes unambiguously establish that the terms 'eligible activities' and 'certifications' don't encompass a tribe's report on its eligible housing units." *Id.* at 896–97. Thus, contrary to the 9th Circuit's decision, the 10th Circuit concluded that HUD was under no obligation to afford the Tribes an administrative hearing because the HUD lacked authority to review such reports under § 4165. *Id.* at 897–98.

TAX LAW

Debt/Equity – Standard of Review; *Hewlett-Packard Co. v. Comm'r*, 875 F.3d 494 (9th Cir. 2017)

The 9th Circuit addressed whether a financial arrangement "is best characterized as debt or equity" is a question of "law, fact or a mix of the two." *Id.* at 497. The court noted that the 6th Circuit maintains that it is a question of fact, the D.C. Circuit maintains that it is a mixed question, and the 11th Circuit maintains that it is a question of law. *Id.* The court stated that "the distinction between fact and law is notoriously fuzzy," but concluded that cases of debt versus equity require a question of fact analysis because of "a practical acknowledgment that the circumstances warrant great deference." *Id.*

TRADEMARK LAW

Tea Rose-Rectanus Doctrine – Good Faith Requirement; *Stone Creek, Inc. v. Omnia Italian Design, Inc.*, 875 F.3d 426 (9th Cir. 2017)

The 9th Circuit addressed whether the good faith requirement under the Tea Rose-Rectanus doctrine is destroyed when the junior user has knowledge of the "senior user's prior use of the mark," or if knowledge is "merely a factor in informing good faith." *Id.* at 437. The court noted that the 7th and 8th Circuits determined that good faith is destroyed when the junior user has knowledge of the senior user's prior use. *Id.* at 437. The court noted, in contrast, that the 5th and 10th Circuits found that the focus "is on whether the [junior] user had the intent to benefit from the reputation or goodwill of the [senior] user." *Id.* The court disagreed with 5th and 10th Circuits' position because it relies on an improper reading of the doctrine. *Id.* at 438. Instead, the court noted that the 7th and 8th Circuits' position more closely align with the doctrine. *Id.* The court found support

in the policy underlying the doctrine, operating "to protect a junior user who unwittingly adopted the same mark and invested time and resources into building a business with that mark." *Id.* at 438–39. Ultimately, the 9th Circuit held that knowledge is a "determinative factor in deciding good faith." *Id.* at 439.

CRIMINAL MATTERS

CRIMINAL LAW

Robbery – De Minimis Force; *United States v. Graves*, 877 F.3d 494 (3d Cir. 2017)

The 3rd Circuit addressed whether "generic robbery requires more than *de minimis* force." *Id.* at 503. The court noted that the 5th and 9th Circuits determined that "the generic form of robbery requires something more than *de minimis* force, which involves risk of injury to another." *Id.* The 5th and 9th Circuits reasoned that robbery requires a risk of injury to another by relying on the Model Penal Code (MPC) definition of robbery as well as "the minority of state robbery statutes that include some element of injury." *Id.* The 7th and 11th Circuits, however, maintain that "generic robbery comports with the majority of state robbery statutes in requiring only minimal force." *Id.* The 3rd Circuit agreed with the 7th and 11th Circuits in finding that generic robbery requires no more than *de minimis* force. *Id.* The 3rd Circuit reasoned that the 6th and 9th Circuits correctly interpreted United States Supreme Court precedent, in holding that "the most important factor in defining the generic version of an offense is the approach of the majority of state statutes defining the crime." *Id.* at 503–04. The 3rd Circuit agreed with this interpretation because "[a]ffording predominant weight to the majority of states best recognizes that 'Congress'[s] basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity.'" *Id.* at 504. The 3rd Circuit acknowledged that "[w]hile the MPC is a useful starting point, its definition of 'robbery' does not supersede the way in which the majority of states have defined that offense." *Id.* Thus, the 3rd Circuit concluded that "for the purposes of the Sentencing Guidelines, generic federal robbery is defined as it is in the majority of state robbery statutes, without the requirement of more than de minimis force." *Id.*

Sentencing – Fugitive Mens Rea; *United States v. Soza*, 874 F.3d 884 (5th Cir. 2017)

The 5th Circuit addressed "whether, to be a fugitive from justice [under U.S.C. § 922(g)(2)], [a defendant] had to have either intent to avoid

prosecution (or at least knowledge that he was a fugitive) or know that charges were pending against him." *Id.* at 891. The court noted that the 9th and 11th Circuits held that a defendant must have fled with the intent to avoid prosecution. *Id.* The court noted that, in contrast, the 4th and 7th Circuits rejected this approach, but have held that "a defendant must have had knowledge that charges against him are pending." *Id.* The 5th Circuit noted a past decision where it held that § 922(g) has no element of *mens rea*. *Id.* at 892. Thus, the 5th Circuit diverged from the 9th, 11th, 4th, and 7th Circuits, and held that "a defendant need not have had knowledge of his status or label as a fugitive to be guilty under § 922(g)(2)." *Id.* at 893.

CRIMINAL PROCEDURE

Fourth Amendment – Testing Keys on Locks; *United States v. Bain*, 874 F.3d 1 (1st Cir. 2017)

The 1st Circuit addressed whether an unreasonable search occurs when law enforcement tests a key found on an arrestee to determine whether it unlocks a door to a residence, and uses that information to obtain a search warrant for the residence. *Id.* at 8, 14–16. The court distinguished its case from prior cases in the 1st, 6th, and 9th Circuits, which held that no search occurred, because those cases involved storage container and vehicle locks, not residential locks. *Id.* at 15–16. The 1st Circuit disagreed with the 4th Circuit's holding without analysis that testing a residential lock did not violate the Fourth Amendment. *Id.* at 16. The 1st Circuit further disagreed with the 7th Circuit's holding that a key test was a reasonable warrantless search because the information obtained by testing the key was obtainable by other means. *Id.* at 18. The 1st Circuit noted that these circuits' reasonings over-emphasized the fact that government could have pursued non-intrusive methods of determining which lock matched the key to justify the searches' reasonableness. *Id.* at 18–19. Stated differently, the 1st Circuit did not view the availability of other means to test whether the key matched as dispositive for rendering the act of testing the key constitutionally reasonable. *Id.* at 18. Accordingly, the 1st Circuit disagreed with the 4th and 7th Circuits and held that the residential door key test constituted an unreasonable search, violative of the Fourth Amendment. *Id.* at 15, 19.

Sentencing – Standard of Proof for Predicate Acts; *United States v. Barragan*, 871 F.3d 689 (9th Cir. 2017)

The 9th Circuit addressed whether a district court should require a preponderance of the evidence or beyond-a-reasonable-doubt standard of proof when finding facts at sentencing for Racketeer Influenced and Corrupt Organization Act ("RICO") conspiracy convictions. *Id.* at 717.

The court noted that the 11th Circuit requires district courts to use a beyond-a-reasonable-doubt standard of proof; and the 11th Circuit concluded this "by analogizing to a situation where a defendant is convicted of a multi-object conspiracy," in which case each conspiratorial act is charged as a separate crime under U.S.S.G. § 1B1.2(d). *Id.* (internal citations omitted). The court noted that, in contrast, the 2nd, 7th, and 6th Circuits held that § 1B1.2(d) does not apply to RICO conspiracies. *Id.* Moreover, the court noted that the 2nd, 7th, and 6th Circuits were correct in rejecting the 11th Circuit's "analogy to a multi-object conspiracy because RICO conspiracies are of the single-object variety, with the object being to engage in racketeering," and "the predicate racketeering acts are not, in themselves, conspiratorial objects." *Id.* (internal citations omitted). Thus, the 9th Circuit held that "the district court was permitted to find facts relating to the extent of the conspiracy by a preponderance of the evidence." *Id.* at 718–19.

Sentencing Guidelines – Substantial Assistance Reduction*; United States v. D.M.*, 869 F.3d 1133 (9th Cir. 2017)

The 9th Circuit addressed the issue of whether USSG § 1B1.10(b)(2)(B) authorizes sentencing judges to consider factors other than a defendant's substantial assistance when issuing a sentence reduction pursuant to the provision. *Id.* at 1136. The court noted that the 6th Circuit interpreted § 1B1.10(b)(2)(B) "as limiting a below-guideline reduction of a sentence to the proportion directly attributable to substantial assistance." *Id.* at 1143. The court next noted that the 7th Circuit held that a court could consider reasons beyond a defendant's substantial assistance, such as other entitled reductions, when issuing a below-guideline sentence reduction pursuant to § 1B1.10(b)(2)(B). *Id.* The 9th Circuit agreed with the 7th Circuit, and held that "because the application notes [of § 1B1.10(b)(2)(B)] do not limit the definition of 'comparably less' to reductions directly attributable to substantial assistance, other reductions may be considered." *Id.* at 1143.

Federal Rules of Evidence 404(b) and 410 – Nolo Pleas and Convictions; *United States v. Green*, 873 F.3d 846 (11th Cir. 2017)

The 11th Circuit addressed whether a criminal conviction of a felon in possession of ammunition pursuant to a *nolo* plea under Fed. R. Evid. 410 can be admitted to prove a prior act under Fed. R. Evid. 404(b). *Id.* at 859. The court noted that the 8th Circuit admitted a defendant's prior *nolo* conviction for making a false bomb threat under Rule 404(b). *Id.* at 863. The court noted that the 9th Circuit, however, concluded that admission of the *nolo* conviction should be precluded because the

"inevitable judgment of conviction resulting from the plea" cannot be pointed to as proof the defendant actually committed the crime. *Id.* The court further recognized the 1st Circuit ruled that "[o]nly the nolo *plea* itself is barred by the relevant language of [Rule 410]." *Id.* at 863. Moreover, the 3rd and 10th Circuits "permitted admission of a *nolo* conviction where the proponent seeks admission of the judgment to show the fact of conviction or to show something other than that the defendant was actually guilty of the crime to which he entered a *nolo* plea." *Id.* at 863. The 11th Circuit used a different basis for its decision that is distinct from all other circuits. *Id.* at 865. Specifically, the court reasoned that Rule 803(22) "provides stronger support for an argument that a conviction based on a *nolo* plea should not, as a general matter, be considered for the truth of the matter asserted," and that it "precludes use of the . . . *nolo* conviction . . . to prove that Defendant actually possessed ammunition . . . . Instead, the Government should have introduced evidence proving that Defendant so possessed ammunition on the date in question." *Id.*

Sentencing Guidelines – Obstruction Enhancement; *United States v. Iverson*, 874 F.3d 855 (5th Cir. 2017)

The 5th Circuit addressed whether lying to a judicial officer about assets in order to appear indigent and obtain free counsel qualifies as "obstruction" under USSG § 3C1.1, and thereby subjects the party to the statute's sentence enhancement penalty for obstruction. *Id.* at 857–58. The court noted that the 2nd Circuit held that lying to a judicial officer in order to obtain free counsel does not qualify as obstruction under the provision. *Id.* at 859. The court noted that, in contrast, the 9th and 11th Circuits held that lying to a judicial officer to obtain free counsel qualifies as obstruction under the provision. *Id.* The 5th Circuit agreed with the 9th and 11th Circuits, and held that lying to a judicial officer in order to obtain free counsel constitutes obstruction under the provision. *Id.* at 860. The 5th Circuit reasoned that the provision's commentary explicitly references lying to a judge as an example of obstruction, and therefore, the analogous act of lying on a court application to obtain free counsel ought to similarly constitute obstruction. *Id.* at 858–60.

Federal Rule of Criminal Procedure 35(b) – Notice and Hearing Requirements; *United States v. McMahan*, 872 F.3d 717 (5th Cir. 2017)

The 5th Circuit addressed whether a criminal defendant is entitled to notice and a hearing after the government files a post-sentence Federal Rule of Criminal Procedure 35(b) motion to reduce the defendant's

sentence for his substantial assistance in the investigation and prosecution of another individual. *Id.* at 718. The court noted the 2nd Circuit held that "a district court commits reversible error if it does not provide a defendant notice and an opportunity to be heard before ruling upon a Rule 35(b) motion." *Id.* at 718. The court explained, however, that Rule 35(b) has since been revised to eliminate "the main textual hook for tying Rule 35 and § 5K1.1 together." *Id.* at 719. The 5th Circuit reasoned that "Rule 35(b) is now devoid of any textual reference to the Sentencing Guidelines, and absent such a reference, this Court will not read Rule 35(b) as requiring an application of § 5K1.1's rules." *Id.* at 720. Thus, the 5th Circuit held that defendants are not entitled to notice and a hearing after a court rejects the Government's Rule 35(b) motion. *Id.* at 721.

Fourth Amendment Searches and Seizures – Search Warrants;
United States v. Sealed Search Warrants, 868 F.3d 385 (5th Cir. 2017)

The 5th Circuit addressed the issue of whether "the law recognized a common law qualified right of access to . . . pre-indictment warrants." *Id.* at 385. The court noted that the 9th Circuit adopted a "bright line position" on the issue—the law "simply does not extend to pre-indictment warrant materials." *Id.* at 391. The court noted that, in contrast, the 4th Circuit adopted a case-by-case approach, extending that right to individuals who have requested access to pre-indictment search warrant materials, and where keeping the record sealed is not "essential to preserve higher values." *Id.* at 392 (internal quotation marks omitted). The court further noted that although it had not spoken to the precise question addressed, it has "spoken to different questions implicating that qualified right in other situations." *Id.* at 393. Those decisions have focused on the importance of judicial transparency and affording district courts discretion in balancing the needs of law enforcement against the needs of defendants. Thus, the 5th Circuit adopted the 4th Circuit's case-by-case balancing approach. *Id.* at 398.

IMMIGRATION & NATURALIZATION LAW

Due Process – Disclosure of Eligibility for Discretionary Relief;
United States v. Estrada, 876 F.3d 885 (6th Cir. 2017)

The 6th Circuit addressed whether the failure to advise a deportee of his eligibility for discretionary relief from removal under 8 U.S.C. § 1182(h) constitutes a due process violation. *Id.* at 886–87. The 6th Circuit noted that "an individual has no constitutionally-protected liberty interest in obtaining discretionary relief from deportation." *Id.* At 887 (internal quotation marks and citation omitted). The 6th Circuit also noted

that the 3rd, 4th, 5th, 6th, 7th, 8th, 10th, and 11th Circuits have all held that due process does not require disclosure of eligibility for discretionary relief. *Id.* at 888. The court noted that, in contrast, the 2nd and 9th Circuits have held that failure to disclose eligibility does constitute a due process violation. *Id.* Ultimately, the 6th Circuit joined the 3rd, 4th, 5th, 6th, 7th, 8th, 10th, and 11th Circuits in holding that a deportee has no constitutional due process right to be advised of his eligibility for discretionary relief. *Id.* at 888–89.

Misprision of a Felony – Crimes Involving Moral Turpitude; *Villegas-Sarabia v. Duke*, 874 F.3d 871 (5th Cir. 2017)

The 5th Circuit addressed whether a conviction for misprision of a felony is a crime involving moral turpitude ("CIMT"). *Id.* at 878. The court noted that the 11th Circuit determined that misprision of a felony is a categorical CIMT and, in contrast, the 9th Circuit found misprision of a felony is not a CIMT. *Id.* at 879–80. The 5th Circuit agreed with the 11th Circuit to find that taking affirmative steps to conceal a felony "necessarily entails the act of intentionally giving a false impression, which requires deceitful conduct and is therefore a CIMT. *Id.* at 880–81. The court disagreed with 9th Circuit, and instead adopted the 11th Circuit's approach. *Id.* at 881. Thus, the 5th Circuit concluded that misprision of a felony is categorically a CIMT. *Id.*

MORTGAGES AND LIENS LAW

False Claims Act – **Causation Test;** *United States v. Luce*, 873 F.3d 999 (7th Cir. 2017)

The 7th Circuit addressed whether the "but for" test is the proper standard to evaluate causation in False Claims Act ("FCA") cases. *Id.* at 1011. The 7th Circuit noted that its precedent employing the "but for" standard has not been endorsed by any other circuit. *Id.* In contrast, an increasing number of circuits, including the 3rd, 5th, and 10th Circuits, have adopted the proximate cause standard as part of the analysis of liabilities and damages under the FCA. *Id.* at 1013. The 7th Circuit also considered the United States Supreme Court's recent guidance on how congressional enactments dealing with fraud should be interpreted. *Id.* at 1014. After recognizing that a common law understanding of proximate causation is more compatible with the statute's language and purpose, the 7th Circuit adopted the proximate cause standard for evaluating FCA cases. *Id.*