COMMITTEE NEWS

Federal Practice Committee Presents CLE at PBA Midyear Meeting

On Friday, Jan. 29, the PBA Federal Practice Committee presented a CLE program, “The Impact of the 2014-15 Term of the Supreme Court of the United States on Federal Practice and a Preview of the Top Cases for 2015-16,” during the PBA Midyear Meeting in St. Maarten.

Panelists provided a lively discussion of some of the most interesting cases in the U.S. Supreme Court in the past term and shared a preview of some of the issues to be addressed by the Court in the coming year. Significant changes to the Federal Rules of Procedure, which took effect Dec. 1, 2015, were also discussed.

Recommendation on Judicial Vacancies Approved

At the Nov. 19, 2015 FPC meeting, Tom Wilkinson moved that the Executive Council act to deliver a recommendation to the Board of Governors that the PBA urge prompt action by the Senate to fill the federal court vacancies with particular attention to the confirmation of Judge Restrepo and the Western District vacancies. On Dec. 14, 2015, Hon. D. Michael Fisher presented to the PBA Board of Governors the FPC’s recommendation that the PBA “urge the members of the United States Senate, the U.S. Senate Committee on the Judiciary and the general public that the pending federal judicial nominees to fill pending vacancies on the U.S. Court of Appeals for the Third Circuit and the U.S. District Courts in Pennsylvania be heard and confirmed promptly.” The Board unanimously approved that recommendation.
Executive Council Named

Among other business, additional members to the FPC Executive Council were named during the FPC’s meeting on Nov. 19, 2015. Those joining Chair Hon. D. Michael Fisher and Co-Vice Chairs Nancy Conrad and Melinda Ghilardi include:

Three at-large members:
• Anne John, Fayette County, John&John, anj@johnandjohnlaw.com.
• Tom Wilkinson, Philadelphia, Cozen O’Conner, twilkinson@cozen.com.

Chairs of the FPC’s six subcommittees:
• Nominations Subcommittee Chair - Brett G. Sweitzer, Philadelphia, Defender Association of Philadelphia, brett_sweitzer@fd.org.
• Educational Programs Subcommittee Chair - Kathleen Wilkinson, Philadelphia, Wilson Elser Moskowitz Edelman & Dicker LLP, kathleen.wilkinson@wilsonelser.com.
• Legislative Subcommittee Chair – Professor Arthur Hellman, Pittsburgh, University of Pittsburgh School of Law, hellman@pitt.edu.
• Outreach and Diversity Subcommittee Chair – Jennifer Menichini, Lackawanna, Greco Law Associates PC, jmenichini@callGLA.com.
• Newsletter Subcommittee Chair - Susan Schwochau, Pittsburgh, s.schwochau@comcast.net.
• Local Rules Subcommittee Chair – Mark Zucker, Philadelphia, Weir & Partners LLP, mzucker@weirpartners.com.

If you are interested in serving on any of the above subcommittees, please contact the chair(s) of those committees.

The Executive Council will meet quarterly at 4:30 p.m. by conference call on the following days:
Feb. 15
May 16
Aug. 15
Nov. 17, during the scheduled PBA Committee Section Day, time to be determined.

Welcome New Members!

The FPC continues to grow! On behalf of the FPC, Chair Hon. D. Michael Fisher sends a warm welcome to the following new members:
• Colin O’Boyle, Montgomery County, Elliott Greenleaf & Siedzikowski PC
• Steven Gibbs, Allegheny County
• Brock Bevan, Montgomery County, Law Firm of Marcia Binder Ibrahim LLC
• Erin Grewe, Philadelphia, Koller Law PC
• Stephen Basiaga, New Jersey, WithumSmith+Brown PC
• Michelle Streifthau-Livizos, out of state
• Marc Zucker, Philadelphia, Weir & Partners LLP

We are delighted that you have joined this vibrant and active committee! We hope that you will enjoy the benefits of FPC membership, which include automatic receipt of four quarterly e-newsletters. You are also encouraged to consider participating in any of the FPC’s subcommittees (see above), and to reach out to Executive Council members with any ideas you may have on how the FPC can best pursue its mission to promote communication and cooperation among members of the federal judiciary and lawyers who practice in federal courts, and enhance the knowledge and professional capabilities of lawyers who practice law in the United States District Courts in Pennsylvania.
FEDERAL PRACTICE NEWS

Rules Changes

On Dec. 1, 2015, the first changes to the Federal Rules of Civil Procedure since 2010 went into effect. Professor Steven Baicker-McKee describes and discusses those changes.

Ch-Ch-Ch-Ch Changes:
Turn and Face the Strange…2015 Amendments to the FRCP

By Steven Baicker-McKee

On Dec. 1, 2015, a set of amendments to the Federal Rules of Civil Procedure took effect. These amendments were extremely controversial, drawing over 2,000 comments during the public comment periods. Plaintiffs’ lawyers believe the amendments are just the latest move by the Supreme Court to protect big corporate defendants and limit plaintiffs’ access to the courts. Defendants’ lawyers believe the amendments do not go far enough in curbing disproportionate and abusive discovery. As is so often the case, the truth probably lies somewhere in the middle. Only time will tell, however, as we wait to see how the courts interpret these new provisions.

This article will provide a summary of the most controversial of the amendments, as well as some of the provisions that did not draw as much attention, but yet have the potential for significant change in federal court practice. It is not intended to be an exhaustive catalog of each amended provision—but you can find the text of each amended rule together with detailed commentary in the 2016 Edition of the Federal Civil Rules Handbook, published by Thomson Reuters. Additionally, I and a co-author of that treatise have written some blog posts on the amendments, which you can find here.

Rule 1

Let’s start at the very beginning, with the amendment to Rule 1. Rule 1 contains the iconic, and largely aspirational, language requiring that the rules be construed to secure the “just, speedy, and inexpensive determination of every action and proceeding.” The amendment expressly imposes that duty on the parties, whereas the prior language could be read to apply only to the courts.

This change may turn out to be minor, and readers may wonder why it is on this list of important changes. Sanctions, or at least the potential for sanctions, is the reason. Although the Advisory Committee Notes—not binding, but persuasive authority for construing the amendments—suggest that the committee did not intend to create a new source of sanctions, such as a Motion for Sanctions for Violations of Rule 1, it would not be surprising to see motions for sanctions under other rules reference violations of Rule 1. For example, a party might move for involuntary dismissal under Rule 41(b)—which lists failure to follow the rules as one basis for involuntary dismissal—asserting that the opposing party had repeatedly violated Rule 1 by acting in a way that frustrated the speedy or inexpensive determination of the case.

Let’s Get this Party Started

The 2015 amendments contain a couple of changes designed to get the litigation process moving more quickly at the outset. The first is an acceleration in the time for service of the complaint and summons. Rule 4 used to allow up to 120 days from the date of filing to effectuate service, and that period is now reduced to 90 days. While 90 days is typically more than enough time to serve the defendants, it might become a challenge if the plaintiff attempts the
waiver of service process and the defendant declines. That process could consume a meaningful portion of the 90-day period, leaving the plaintiff squeezed for time. Anticipating this, the amendment also adds language allowing the court to expand the time for service for “good cause.”

The second is in Rule 16, and it decreases the time for the court to hold the initial status conference from 120 days to 90 days after a defendant has been served. This amendment not only advances the time for the initial status conference, it has the collateral effect of accelerating discovery as well. Parties may not serve discovery until they have conducted their Rule 26(f) discovery conference, which typically occurs approximately 14 days before the court’s initial Rule 16 conference. Thus, discovery is likely to commence earlier under the amended rules.

The final acceleration occurs in amendments to Rules 26 and 34 allowing for early service of document requests. In order to make the Rule 26(f) discovery conference and the initial Rule 16 conference more productive, parties may now serve Rule 34 document requests before the Rule 26(f) conference, as long as more than 21 days have elapsed since service of the summons and complaint on the defendant. The purpose of this early discovery is to allow parties to identify potential problems with document production (and particularly production of Electronically Stored Information, or ESI) and address those problems earlier in the process. Note, however, that the response is not accelerated—it is still due 30 days after the Rule 26(f) conference.

**What’s All this Fuss About Proportionality?**

One of the amendments that drew the most fire from those submitting comments was the revision addressing proportionality—the balancing of the benefits and burdens of discovery. The concept of proportionality has been in the rules since 1983, but the amendment changes proportionality from a limitation on discovery to part of the core definition of the scope of discovery.

Prior to the amendments, the scope of discovery, found in Rule 26(b)(1), was “nonprivileged matter relevant to any party’s claim or defense.” A separate provision required the court to limit discovery if the burden or expense of the proposed discovery outweighs its likely benefit. Worried that courts were not giving sufficient consideration to proportionality, the 2015 amendment changed the definition of the scope of discovery to be “nonprivileged matter that is relevant to any party’s claim or defense and is proportional to the needs of the case …”

Besides moving the proportionality language, the amendment also flips the order of two of the listed factors for evaluating proportionality. Prior to the amendment, the “amount in controversy” was the first listed factor. The amendment puts “the importance of the issues at stake in the action” first, to underscore that the amount in controversy is not the only or driving consideration.

Again, readers might be tempted to ask why all the angst about this amendment—it merely moves a concept already found in Rule 26(b) to a different subsection of Rule 26(b), retaining the same factors in a slightly different order. The difference, one might argue, is that before the amendments, the core definition of the scope of discovery was very broad, and parties then had to work to limit it. After the amendment, the core definition has become more narrow.

Plaintiffs’ lawyers worry that proportionality will become a new tool that defendants increasingly use to avoid discovery. The fear is that parties responding to discovery will routinely object to requests based on proportionality considerations, and the burden will then shift to the requesting party to file a motion to compel (and perhaps the burden of proving proportionality will shift from the responding party to the requesting party as well). This will lead to more motion practice, which translates to more cost and delay—the exact opposite of the articulated aim of the amendments.

Further narrowing of the scope of discovery occurred when the amendments eliminated another provision of Rule 26(b)(1). The old rule allowed the court to expand the scope of discovery from matter relevant to “a party’s claim or defense” to matter relevant to “the subject matter involved in the action;” in other words, relevant to a claim or...
defense that a party is seeking to develop but that is not yet pleaded. The Advisory Committee Notes suggest that this provision was seldom invoked, so they decided to eliminate it.  

**Ask and Ye Shall Pay**

Those seeing an alarming restriction on discovery were also concerned about an amendment to Rule 26(c) covering protective orders. Since the Supreme Court’s *Oppenheimer Fund* case in 1979, it has been settled that a court may shift the costs of discovery from the responding party to the requesting party. The 2015 amendment to Rule 26(c) simply codified this case law, making that authority explicit (and explicitly authorizing parties to seek protective orders shifting those costs). A contingent of the bar—primarily plaintiffs’ lawyers—believe that this express authority will spur more motions to shift costs and make courts more likely to grant those motions. However, the Advisory Committee Notes emphasize that the amendment “does not imply that cost-shifting should become a common practice.”

**I Object. But I Might Not Really Mean It.**

One amendment that has not drawn as much attention as some of the more controversial amendments, but which has the potential to be extremely disruptive, is an amendment to Rule 34. Rule 34 received a number of amendments, some not particularly significant. For example, prior to December 1, 2015, there was a curious lack of parallel language between the provisions governing objections to interrogatories and objections to document requests. Objections to interrogatories were required to be stated with specificity under Rule 33, but Rule 34 did not impose that requirement expressly for objections to document requests. Courts had long construed both rules similarly in terms of the manner of stating objections, however. That disparity has been remedied, and Rule 34 now also requires that objections to document requests be stated with specificity. Likewise, Rule 34 technically requires the responding party to make responsive documents available for inspection, but in practice parties often simply provide copies of the responsive documents. That practice is now officially sanctioned.

The more significant change is found in a new sentence added to Rule 34(b)(2)(C), which reads, “An objection must state whether any responsive materials are being withheld on the basis of that objection.” The purpose of the rule amendment is laudable—to let the requesting party know whether it is worth the cost of contesting the objection. If the responding party did not withhold any documents on the basis of an objection, it may not make sense to challenge the objection. Unnecessary motion practice can thus be avoided, reducing cost and delay.

Note that the rule does not require a listing of the documents that a party is withholding—the equivalent of a privilege log. Rather, a simple statement or description of the documents withheld will suffice. For example, a responding party might object to a request that has no time parameters as overly broad and burdensome, then advise the requesting party that the responding party is withholding documents more than ten years old. In that circumstance, the rule is straightforward, fair, and easy to apply.

In other circumstances, however, the rule might prove thorny. For example, if a request is vague or ambiguous, and susceptible to multiple meanings, the responding party may have to attempt to discern the various potential meanings of the request and conduct a document review or analysis to determine if it has documents responsive to one of the alternative meanings that it is withholding on the basis of the objection. This could be a difficult, time-consuming, and expensive.

**Oops! I Just Deleted All the Emails**

One of the more dramatic changes occurred in Rule 37(e). Prior to Dec. 1, 2015, Rule 37(e) contained a narrow safe harbor for the destruction of ESI through the routine operation of a computer system. Courts addressed general questions of spoliation either through their general powers over cases on their dockets or, if they had entered a
preservation order, through their contempt powers.\textsuperscript{38} None of the Federal Rules of Civil Procedure expressly addressed spoliation sanctions. As a consequence, the cases were not consistent on the standards for spoliation sanctions, with some courts imposing them for mere negligence and others requiring a heightened degree of misconduct.

With respect to ESI, “that was then, and this is now.” New Rule 37(e) creates a national, uniform standard for imposition of spoliation sanctions for failure to preserve ESI.\textsuperscript{39} As a starting point, the rule establishes three prerequisites for any sanctions. A judge may not impose any sanctions at all related to spoliation of ESI unless: 1) there was a duty to preserve the evidence (which can arise before litigation is filed so long as it was reasonably anticipated); 2) the party failed to take reasonable steps to preserve the evidence (the comments indicate that perfection is not the expected standard, and that loss through an accident might not be sanctionable); and 3) the information cannot be restored or replaced through additional discovery.\textsuperscript{40}

If those three prerequisites are satisfied, there are two levels of sanctions available to the judge. If the judge finds prejudice to the other party, the judge may impose measures “no greater than necessary to cure the prejudice.”\textsuperscript{41} Such measures might include precluding the guilty party from using certain of its evidence or making certain arguments.\textsuperscript{42} It might also include certain instructions to the jury, but explicitly may not include the very harsh sanction of an adverse inference instruction to the jury—telling the jury that they may, or must, conclude that the lost evidence would have been harmful to the party failing to preserve it.\textsuperscript{43}

The most draconian sanctions, such as the adverse inference instruction sanction or dispositive sanctions like dismissal or judgment, are reserved for the most culpable conduct. If the court finds that the party failed to preserve ESI for the specific purpose of depriving another party of the use of that information in the litigation, then the court may impose those severe sanctions.\textsuperscript{44}

**Goodbye Forms**

Lastly, the 2015 amendments abrogated Rule 84, which was the rule that established and blessed the federal forms. Rule 84 previously stated, in its entirety, “The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.”\textsuperscript{45}

Thus, the forms in the Appendix were deemed sufficient under the rules—anyone using the forms could rest assured that they were unassailable in terms of the sufficiency of the form itself (leaving aside the content, of course).\textsuperscript{46} Now, while the forms are still available online as a resource, and while many district and appellate courts sponsor their own websites with additional exemplar forms, these forms no longer have any assurance of sufficiency.

The Advisory Committee Notes state that the forms are unnecessary, that their original purpose—namely, illustrating the type of simplicity and brevity the Rules envisioned for federal practice—has long since been fulfilled.\textsuperscript{47} Others attribute a different explanation for the forms’ impending departure: frustration with the perceived dissonance between the austerity of the official pleading forms and the U.S. Supreme Court’s opinions in *Twombly* and *Iqbal*.\textsuperscript{48}

Following abrogation, only two official forms survived, both repositioned to Rule 4 (namely, a form that requests, and a form that consents to, a waiver of service of a summons).\textsuperscript{49}

**Only Time Will Tell**

Will the amendment moving proportionality from Rule 26(b)(2) into Rule 26(b)(1) effect a substantial change on the frequency and vigor with which the parties and the courts apply proportionality? Will the codification of the authorization to shift fees to the requesting party increase the number of applications for fee shifting or the frequency with which the courts grant such applications? Will the change to Rule 1 spur motions for sanctions invoking the new language?

Only time will tell. As of January 21—approximately 52 days after the effective date of the amendments, a quick Westlaw search suggests that there are already 24 opinions addressing the amendments. Remember that the
amendments affect not only newly filed cases, but pending cases as well, unless the court “determines that applying them in a particular action would be infeasible or work an injustice.”

A cursory survey of those cases suggests that proportionality and the amendments to Rule 26(b)(1) are drawing the most motion practice. Of the 24 cases, 20 focused on the amendments to Rule 26(b)(1), 3 focused on the amendments to Rule 1, 1 addressed the amendments to Rule 37(e), and 1 addressed the amendments to Rule 4(m).

Interestingly, a search of the same date range, but one year earlier, turned up 20 cases citing to the proportionality provision then located in Rule 26(b)(2)—precisely the same number citing to the proportionality provision in the amended rule. Thus, based on this non-scientific survey lacking any statistical significance, the volume of cases does not appear to have increased as a result of the amendments. Now, whether the courts are granting these motions with any greater frequency is a different question, but that will have to wait for another article.

Mr. Baicker-McKee is an Assistant Professor of Law, Duquesne University School of Law, following a complex litigation practice of almost 25 years at Babst Calland, where he remains of counsel. Professor Baicker-McKee is co-author of the Federal Civil Rules Handbook, a leading work for lawyers in federal court, and A Student’s Guide to the Federal Rules of Civil Procedure, used in US law schools across the country. He is also co-author of Learning Civil Procedure, a law school text book, and Mastering Multiple Choice—Federal Civil Procedure, a study aid for the bar examination and for law students, and is a co-author/editor of the Federal Litigator, a monthly publication summarizing developments in federal practice. Professor Baicker-McKee is “AV”-rated by Martindale-Hubbell, named a “Key Author” by West Publishing Company, regularly selected as a Pennsylvania “Super Lawyer,” elected to the Academy of Trial Lawyers, and recognized in The Best Lawyers of America, and was voted Professor of the Year by the students at Duquesne.

5. Id.
7. FED. R. CIV. P. 1 advisory comm. notes to 2015 amendments.
10. Id.
21. Id.
22. Id.
25. See, e.g., Moore, supra note 2, at 1121-22.
27. Fio. R. Civ. P. 34.
30. Id.
31. Id.
35. Id.
36. Id.
39. Fio. R. Civ. P. 37(e) advisory comm. notes to 2015 amendments. Note that the original proposed amendment applied to spoliation of all forms of information, ESI, paper, or otherwise. Based on public comments, the Advisory Committee narrowed the scope to ESI, observing that public comments suggested that the existing approach was working adequately for paper documents.
43. Id.
44. Fio. R. Civ. P. 37(e)(2).
51. Note that these add up to 25 because one case spent considerable time on the amendments to both Rule 26(b)(1) and Rule 1.
Rules Changes (continued)


Hon. L. Felipe Restrepo, U.S. Court of Appeals

By a vote of 82-6 the U.S. Senate on Jan. 11, 2016 confirmed Judge Restrepo’s appointment. The roll call vote results are posted here: http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_votecfm.cfm?congress=114&session=2&vote=00001. He received his commission on Jan. 13, 2016.

Status of Judicial Vacancies

U.S. Court of Appeals, Third Circuit

• There is one vacancy.

U.S. District Court, Western District of PA

• On July 30, 2015, President Obama nominated Judge Susan P. Baxter, Judge Robert J. Colville and Judge Marilyn J. Horan to fill the three vacancies in the United States District Court for the Western District of Pennsylvania. A Senate Judiciary Committee hearing on these nominees was held Dec. 9, 2015. Although the Judiciary Committee on January 28 approved Judge Baxter and Judge Horan for a full Senate vote, the Committee did not place Judge Colville on that week’s agenda.

U.S. District Court, Eastern District of PA

• On July 30, 2015, President Obama nominated Judge John M. Younge to fill the vacancy in the United States District Court for the Eastern District of Pennsylvania. A Senate Judiciary Committee hearing was held Dec. 9, 2015.

• There is one vacancy (due to Judge Restrepo’s elevation to the Court of Appeals).

CASE SUMMARIES

Summaries of notable Third Circuit and Pennsylvania district court decisions issued between October and December 2015 that involved issues of federal practice or provided a particularly thorough discussion of applicable law. All cases are linked to Casemaker.

Third Circuit Precedential Opinions

Witasick v. Minnesota Mutual Life Ins. Co., 803 F.3d 184 (3d Cir. 2015) (Insurance/Jurisdiction) – After discussing whether certain types of docket entries made via the CM/ECF system can satisfy Rule 58’s “separate document” requirement (text entries-usually; others-no) and whether the “contingent” notice of appeal filed by the pro se appellant conferred appellate jurisdiction (yes), the Court of Appeals affirmed the district court’s Rule 12(b)(6) dismissal of Witasick’s claims against his insurer because a prior settlement agreement between the parties unambiguously released all claims and contained a covenant not to sue.

U.S. v. Foy, 803 F.3d 128 (3d Cir. 2015) (Criminal Law & Procedure) – The Eastern District of Pennsylvania denied Foy’s Rule 60(d)(3) motion seeking to vacate an order of civil commitment issued by the U.S. District Court for the Western District of Missouri. The Court of Appeals evaluated whether the district court had jurisdiction under (1) 18 U.S.C. § 4247(h); (2) Fed. R. Civ. P. 60(b); (3) Fed. R. Civ. P. 60(d); (4) 28 U.S.C. § 2255; or (5) 28 U.S.C. § 2241. Because none of these bases gave the district court jurisdiction to determine if it should grant the motion (because the district court did not issue the original commitment order and because petitioner was not serving a sentence), the Court of Appeals vacated the district court’s denial and remanded for a determination of whether the district court should transfer the case to Western District of Missouri pursuant to 28 U.S.C. § 1631.

Hassan v. City of New York, 804 F.3d 277 (3d Cir. 2015) (Constitution) – Plaintiffs sued the City of New York, asserting that through the NYPD, the City conducted since January 2002 a wide-ranging surveillance program that singled out, on the basis of religion, those in the Muslim community “to monitor the lives of Muslims, their
businesses, houses of worship, organizations, and schools in New York City and surrounding states, particularly New Jersey.” Reviewing the district court’s dismissal under Rules 12(b)(1) and (6), the Court of Appeals – referring often to analogous discriminatory efforts taken in times of war, turmoil, or rampant fear – reversed, concluding that the plaintiffs (1) had standing to pursue their Equal Protection and First Amendment claims; and (2) pleaded sufficient facts to survive a motion to dismiss. The Court joined other courts in holding that intentional discrimination based on religious affiliation must survive heightened equal-protection review.

**Leyse v. Bank of America NA**, 804 F.3d 316 (3d Cir. 2015) (Statutes [TCPA] / Civil Procedure [Rule 12(g)]) – Concluding that Leyse lacked statutory standing because he was not the defendant’s intended recipient of a pre-recorded telemarketing call, the district court granted Bank of America’s Rule 12(b)(6) motion and dismissed Leyse’s action brought under the Telephone Consumer Protection Act. The Court of Appeals first ruled that the district court had erred in considering a second pre-answer Rule 12(b) (6) motion that was barred by Rule 12(g)(2), but found the error was harmless. Reaching the merits, the Court rejected the “called party” approach taken by the district court and held that Leyse had statutory standing because he was a regular user of the phone line and an occupant of the residence that was called, which brought him within the TCPA’s language and the zone of interests that law protects.

**In re: Google Inc. Cookie Placement Consumer Privacy Litig.**, 806 F.3d 125 (3d Cir. 2015) (Statutes [Electronic Communication]) – In this putative class action, plaintiffs alleged that defendants put tracking cookies on the plaintiffs’ web browsers in contravention of their browsers’ cookie blockers and defendant Google’s own public statements. After rejecting defendants’ argument that plaintiff-appellants lacked Article III standing because of insufficient allegations of pecuniary harm, the Court of Appeals vacated in part the district court’s Rule 12(b)(6) dismissal of all of plaintiffs’ federal- and state-law claims. As to the federal claims, the Court concluded that (1) because the defendants were the intended recipients of the GET requests that the plaintiffs’ browsers sent directly to the defendants’ servers, plaintiffs’ Wiretap Act claim failed; (2) because a home computer is not “a facility through which an electronic communication service is provided,” plaintiffs’ Stored Communication Act claim failed; and (3) because the complaint alleged no “damage” or “loss” as those terms were defined by the Computer Fraud and Abuse Act, the claim that that Act was violated failed. The Court vacated the Rule 12(b)(6) dismissal of plaintiffs’ claims against Google alone under the California Constitution and California tort law, but affirmed the dismissal of all other state-law claims.

**Hanover 3201 Realty LLC v. Village Supermarkets, Inc.**, 806 F.3d 162 (3d Cir. 2015) (Antitrust) – In an opinion notable for the fact that more than a third of its pages were devoted to discussing whether appellate judges should vote by outcome or by issue, (1) one judge concluded that the district court erred in dismissing some of plaintiff’s antitrust claims on the ground that plaintiff lacked antitrust standing, and, reaching an issue unaddressed by the district court, also concluded that plaintiff could make use of the sham exception to defendant’s Noerr-Pennington immunity defense; (2) one judge concluded that the plaintiff lacked antitrust standing (and thus that the district court did not err), but agreed with the first judge on the Noerr-Pennington sham exception question; and (3) one judge agreed that the district court erroneously concluded that the plaintiff lacked antitrust standing with respect to some claims, but disagreed with both of the other judges on the Noerr-Pennington issue. The result: the district court’s judgment was affirmed in part and vacated in part because the second judge concluded that it was better to vote by issue than by outcome (a conclusion with which the first judge agreed, but with which the third judge disagreed).

**Faush v. Tuesday Morning, Inc.**, 808 F.3d 208 (3d Cir. 2015) (Labor & Employment [Discrimination]) – The district court granted summary judgment in favor of Tuesday Morning on the ground that Faush was not its employee, and was instead the employee of a staffing firm that provided temporary workers to the defendant (among others). The Court of Appeals vacated in part, concluding that given the facts presented, a rational jury applying the
factors set forth in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992), could find that Tuesday Morning was Faush's employer for purposes of Title VII. The Court also concluded that Section 1981 claims were properly dismissed because the record did not reveal that Faush had entered into a contract with Tuesday Morning or had ever attempted to do so.

**Eastern District of PA Opinions**

**U.S. v. Mitchell**, 2015 WL 5886198 (EDPA, 10/7/15) (Criminal Law & Procedure / Suppression-hearing testimony) – The government moved to use Mitchell’s prior, voluntarily given testimony during a suppression hearing to impeach Mitchell in the event that he gave contradictory testimony at his trial on drug trafficking charges. The government conceded that the suppression-hearing testimony could not be used as substantive evidence in its case in chief. Without guidance from the Third Circuit, Judge P. Diamond noted that every circuit court that had addressed the issue raised by the government’s motion in limine had allowed the use of suppression-hearing testimony for impeachment purposes. Finding the reasoning behind such decisions compelling – that prohibiting the use of prior, voluntarily given testimony for impeachment purposes would allow the defendant to lie with impunity – the district court granted the government’s motion.

**Reser’s Fine Foods v. Van Bennett Food Co., Inc.**, 2015 WL 6103637 (EDPA, 10/16/15) (Statutes [Perishable Agricultural Commodities Act] / Default Judgment) – Seller of fresh potatoes filed suit asserting that it supplied agricultural commodities covered by PACA, that it had not received payment from the buyer, and that the buyer failed to maintain the trust assets required by PACA. Seller sought entry of default judgment against the corporate buyer and two owner/officers, as well as interest and attorney fees. After concluding that seller had stated valid PACA claims against both the corporate buyer and the two officers, Judge J. Leeson ruled that default judgment was warranted based on the three factors listed in *Chamberlain v. Giampapa*, 210 F.3d 154 (3d Cir. 2000). Although the court entered judgment in the amount of the unpaid invoices, it declined to award interest (finding nothing to show that interest was part of the parties’ contract) and denied without prejudice the request for attorney fees so that more complete documentation supporting a claim for such fees could be submitted.

**The Roskamp Inst., Inc. v. Alzheimer’s Inst. Of America, Inc.**, 2015 WL 6438093 (EDPA, 10/23/15) (Intentional Torts / Fraudulent Joiner) – Contending that the district court lacked subject matter jurisdiction, plaintiffs sought to remand to state court a case asserting that defendants combined and conspired to falsely represent their ownership of patents in order to induce plaintiffs to enter into a royalty agreement. Defendants urged that the sole defendant that destroyed complete diversity had been fraudulently joined. Senior Judge R. Buckwalter denied plaintiffs’ motion, concluding upon review of each claim against the non-diverse defendant asserted in plaintiffs’ amended complaint that there was no reasonable basis in fact or colorable ground supporting those claims. Key considerations were (1) the operation of the parol evidence rule, which barred plaintiffs’ fraud-based claims and (2) the fact that the non-diverse defendant did not exist at the time of the alleged wrongdoing.

**Abella v. Student Aid Center, Inc.**, 2015 WL 6599747 (EDPA, 10/30/15) (Statutes [Telephone Consumer Protection Act] / Rule 68 / Class Action) – Abella filed a putative class action alleging that defendants sent text messages to cell phones using an automatic telephone dialing system (ATDS) without consent of the texted party. Judge S. Dalzell denied Student Aid Center’s Rule 12(b)(1), Rule 12(b)(6), Rule 12(f) and Rule 12(e) motions, concluding among other things that (1) the Third Circuit would follow other circuit courts in holding that rejection of a Rule 68 offer of judgment fully satisfying plaintiff’s demands would not render a case moot (Rule 12(b)(1) motion), and (2) plaintiff’s class definition did not constitute a fail-safe class because it did not make reference to the use of an ATDS, and it was not clear from the face of the complaint that class treatment was inappropriate (Rule 12(f) motion).

defendant manufacturer/distributor for unpaid royalties, which the designer claimed were due under an oral contract. After removal, defendants sought dismissal of the complaint under Rule 12(b)(6). Judge T. Savage granted the motion in part, concluding that (1) the designer’s Lanham Act reverse-passing off and false advertising claims failed because he was not a producer of the products; (2) the Copyright Act preempted the designer’s unjust enrichment claim and his conversion claim to the extent that it sought relief for conversion of royalty payments (but not to the extent that it sought relief for conversion of personal property). The district court rejected defendant’s arguments that (1) the gist-of-the-action doctrine barred claims (because defendants denied the existence of a contract); (2) all claims were time-barred (because fact issues existed surrounding the applicability of equitable tolling and the discovery rule); (3) the designer failed to adequately plead assignment of rights from CRE8; and (4) the designer failed to attach copyright registrations to his complaint, making injunctive relief unavailable.

**Robinson v Family Dollar, Inc., 2015 WL 6689850 (EDPA, 11/2/15) – (Civil Rights-§1983) –** Husband and wife sued Family Dollar Stores, the City of Philadelphia, the Philadelphia police commissioner and other city employees, raising claims arising out of husband’s alleged beating by Family Dollar Stores’ employees and their falsely reporting to police that husband had engaged in numerous crimes. Family Dollar moved to dismiss under Rule 12(b)(6) all claims against it in plaintiffs’ second amended complaint. Judge G. Pappert noted that despite numerous problems that led to dismissal of the first amended complaint, plaintiffs added only six new allegations, none of them providing the factual allegations necessary to rectify the specific problems the court had previously identified and some them simply repeating the court’s reasoning and examples. Plaintiffs also added a defendant that they had previously agreed to dismiss. In addition to dismissing the claims – with prejudice this time – the district court explained why it was issuing an Order to Show Cause as to why Rule 11 sanctions should not be imposed.

**U.S. v. Janqdhari, 2015 WL 6751075 (EDPA, 11/5/15) (Fifth Amendment / Suppression motion) –** In separate motions, Janqdhari sought to suppress his identification based on a photo array (on the ground that the police’s procedures were unduly suggestive), and his confession (on the ground that it was involuntarily made as a result of the morphine he was on at the time of the police officers’ interview). Judge M. Baylson denied both motions. The district court concluded that (1) the photo array and the totality of circumstances did not show that the identification was inherently unreliable; and (2) the government met its burden of showing that the confession was voluntarily given, based on the testimony of nurses who treated Janqdhari, the records they made on the day of the interview, testimony of a police detective, and the reasoning of other circuit courts’ decisions in analogous cases.

**In re: Comcast Corp. Set-Top Cable Television Box Antitrust Litig., ___ F.R.D. ___, 2015 WL 6757611 (EDPA, 11/5/15) – (Antitrust / Class Action) –** Plaintiffs in this multi-district litigation, who alleged that Comcast unlawfully tied the sale of Premium Cable to the rental of a Set-Top Box from Comcast, moved for Certification of a Settlement Class and Preliminary Approval of Class Action Settlement. Judge A. Brody concluded that the proposal (1) failed to provide any methodology for screening out unreliable sworn statements submitted by individuals seeking compensation, and (2) the proposed method for dealing with the absence of complete records for persons who ceased being Comcast subscribers allowed submission of a sworn statement without any objective records, contrary to *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013). As a result, the district court concluded that the settlement class was not ascertainable and refused to either certify it or to give preliminary approval to the Settlement Agreement.

**CardioNet, LLC v. Mednet Healthcare Technologies, Inc., ___ F.Supp.3d ___, 2015 WL 7428491 (EDPA, 11/23/15) (Patent / Contempt) –** CardioNet sought (1) a finding that a defendant was in contempt of a consent judgment that the parties had entered to resolve their patent infringement dispute; (2) damages associated with the contempt, including attorney fees; and (3) sanctions. Applying Third Circuit (rather than patent) law, Judge J. Sanchez found that defendant had disobeyed the Consent Judgment in two of the three ways that CardioNet had
asserted, concluding that doubt existed as to whether the defendant had disobeyed the Consent Judgment when it provided CardioNet’s source code and other materials to an Israeli company. Finding no Third Circuit opinion squarely addressing the issue, the district court followed the weight of federal appellate authority and decided that contempt damages must be proved by a preponderance of evidence. Applying that standard, the district court awarded a portion of the lost profit damages sought, and reasonable attorney fees (to be decided later). The district court denied CardioNet’s motion for sanctions under Rule 11 or 28 U.S.C. § 1927.

Middle District of PA Opinions

**Wirt v. Bon-Ton Stores, Inc.** ___ F.Supp.3d ___, 2015 WL 5738006 (MDPA, 10/1/15) (Statutes [FCRA] / Class Action) – After Wirt filed an amended complaint, defendant moved to dismiss her new claim that defendant violated the Fair Credit Reporting Act by procuring a consumer report for employment purposes without first providing a clear and conspicuous disclosure and in the alternative, to strike Wirt’s revision to her class definition. Judge J. Jones III denied the motion, concluding that (1) because the new claim related back to the claim in the original complaint, the new claim was not barred by the two-year statute of limitations, and (2) although Bon-Ton was correct in that the claims of some persons falling into the revised class definition would be barred by the statute of limitations (because Wirt asserted no claim on behalf of those persons in her original complaint), this was not sufficient reason to strike the revision to the class definition. The potential failure of some subset of claims did not show that one of the requirements for maintaining class action could not be met.

**York International Corp. v. Liberty Mutual Ins. Co.** ___ F.Supp.3d ___, 2015 WL 5954109 (MDPA, 10/13/15) (Insurance / Reconsideration) – York filed suit seeking a declaration that its former insurer owed a duty to defend and indemnify York against underlying asbestos-related actions. Liberty Mutual moved for reconsideration under Rule 59(e), arguing that the court made an error of law in striking 3 paragraphs of an affidavit supporting its contention that New York law applied and in granting partial summary judgment in favor of York on a choice-of-law issue. Following an extensive discussion of both Rule 59’s requirements and those of Fed. R. Evid. 406, Judge S. Rambo granted defendant’s motion in part – placing one paragraph of the affidavit in the record – but denying the remainder. The inclusion of one paragraph did not alter the court’s prior choice-of-law conclusion.

**Moore v. CVS Rx Services, Inc.** ___ F.Supp.3d ___, 2015 WL 6692266 (MDPA, 10/30/15) (Labor & Employment / ADA) – In an opinion that includes a particularly detailed description of the ADA’s reasonable accommodation requirement and of a disparate treatment claim under the ADA, Judge M. Brann granted the defendant/employer’s motion for summary judgment, concluding that the plaintiff, who admitted that pregnancy-related complications made her wholly unable to do her job (1) did not raise a genuine issue of material fact as to whether defendant failed to reasonably accommodate her disability, and (2) did not make out a prima facie case of disparate treatment and, in the alternative, failed to raise a genuine issue as to whether the employer’s stated reason for termination was pretextual.

**U.S. v. Alcorta** ___ F.Supp.3d ___, 2015 WL 6703448 (MDPA, 11/3/15) (Criminal Law & Procedure / Indictment) – Defendant sought dismissal of the indictment charging her with a number of offenses related to the unlawful smuggling of aliens into the United States, arguing that the initial indictment failed to identify her with a sufficient degree of particularity, and that the court erred in amending the indictment, based on information obtained months after it was returned, to include the name “Yuma Alcorta” when the grand jury charged only “Bibi [Last Name Unknown].” After discussing applicable case law and principles, Judge C. Conner granted defendant’s motion, concluding that the circumstances did not suggest that the use of the name “Bibi” was a mere misnomer by a grand jury intending to identify Alcorta.

denied the motion, concluding that Bryant produced enough evidence from which a reasonable factfinder could infer (1) that the incidents of verbal harassment by her co-workers at the Hospital were motivated by racial animus; (2) the Hospital knew or should have known of the racial harassment in the workplace and failed to take prompt remedial action; (3) that a hostile work environment existed at the Hospital; (4) that her co-workers’ comments and behavior detrimentally affected her and unreasonably interfered with her work performance; (5) that the work environment became so intolerable that a reasonable person in Bryant's position could have felt compelled to resign; and (6) that Bryant was retaliated against for complaining about her co-workers’ racial harassment.

_Mawson v. Pittston Police Dep’t_, ___ F.3d ___, 2015 WL 7293209 (MDPA, 11/18/15) (Civil Rights-§1983 / Qualified Immunity / §1915 dismissal) – Judge M. Mannion adopted in part and rejected in part the magistrate judge’s recommendation that defendant’s motion on qualified immunity grounds be denied, concluding that (1) defendant was entitled to qualified immunity for his decision to stop the plaintiff, but (2) defendant was not entitled to qualified immunity for the scope and quality of the Terry stop, particularly as fact questions existed as to those matters. The district court also rejected defendant’s arguments that the case should be dismissed under 28 U.S.C. §1915(e)(2) because it was “economically frivolous” and malicious.

_Bruno v. Bozzuto’s Inc._, ___ F.R.D. ___, 2015 WL 7294464 (MDPA, 11/19/15) (Contract / Spoliation / Daubert) – Plaintiffs assert that wholesale distributor breached an alleged supply agreement. Because one plaintiff destroyed evidence necessary to compute damages, plaintiffs’ experts used defendant’s pro forma projections, which were developed for a purpose different from calculating contract damages, and did so without investigating the bases for those projections. Actual data later obtained from a third party to whom plaintiff had given electronic versions of the destroyed data showed that the projections were substantially inflated. Nonetheless, despite gaining access to the actual data, the experts continued to rely on the faulty projections in their reports. In an opinion that provides a comprehensive discussion of the applicable law, Judge M. Brann granted defendant’s motion to exclude plaintiffs’ experts, finding that the experts’ decision to use, without independent investigation, the pro forma projections and to continue using those projections when more accurate data were available rendered their opinions inherently unreliable.

_Ward v. Noonan_, ___ F.Supp.3d ___, 2015 WL 7568348 (MDPA, 11/25/15) (Civil Rights-§1983) – Vehicle passenger Ward filed numerous claims against numerous defendants arising out of his arrest for disorderly conduct at a DUI checkpoint. Confronted with motions for summary judgment from three groups of defendants, Judge A. R. Caputo in a comprehensive opinion granted summary judgment to most defendants, but because disputed issues of fact existed as to whether Ward was resisting arrest and thus whether the force used to take him into custody was reasonable, three defendants’ motions for summary judgment on Ward’s excessive force claims were denied.

_Real Alternatives, Inc. v. Sec’y, Dep’t of Health & Human Servs._, ___ F.Supp.3d ___, 2015 WL 8481987 (MDPA, 12/10/15) (Constitution / Affordable Care Act) – Non-religious, non-profit, pro-life organization and several employees who share its pro-life beliefs seek a judgment declaring the ACA’s Contraceptive Mandate and its application to plaintiffs to be a violation of equal protection rights under the Fifth Amendment, the APA and Religious Freedom Restoration Act. Judge J. Jones III granted defendant’s motion for summary judgment/dismissal and denied plaintiffs’ summary judgment motion, concluding that (1) Real Alternatives has standing; (2) Real Alternatives’ objection to contraceptive care does not similarly situate it to religious employers with religious objections to the Contraceptive Mandate; the government’s stated interest in protecting religious freedom serves a legitimate government purpose; (3) plaintiffs’ arbitrary and capricious claims failed for the same reasons that their Fifth Amendment equal protection claim failed; (4) plaintiffs’ claims that rely on the notion that emergency contraception is abortion fail to state a claim; and (5) assuming that individual employees have standing to assert a RFRA claim, that claim fails because the Contraceptive Mandate does not cause them to modify their behavior in violation of their religious beliefs.
Western District of PA Opinions

**McDaniel v. Kidde Residential & Commercial**, 2015 WL 5883724 (WDPA, 10/8/15) (Product Liability / Daubert) – Defendants challenged the admissibility of plaintiff’s expert’s opinions, asserting that his methodology was unreliable. Judge N. Fischer denied the motion, concluding that (1) there could be no challenge to opinions based on examinations of x-rays and measurements of fire extinguishers because defendants’ experts used the same methodology; and (2) that the expert’s method for testing the force needed to discharge the subject fire extinguisher was not a “generally accepted” for testing fire extinguishers did not support excluding his opinion testimony in part because there was no standard protocol for testing fire extinguishers. Defendants’ other arguments went to the weight the jury should give the testimony rather than to its admissibility.

**Erie Operating, LLC v. Foster**, 2015 U.S. Dist. LEXIS 137550 (WPDA, 10/8/15) (Arbitration) – Foster filed survival and wrongful death claims in state court against Erie Operating LLC; Erie in turn filed an action in federal court under the Federal Arbitration Act seeking to force Foster to arbitrate all claims pursuant to an arbitration agreement signed by his father upon becoming a resident in a skilled nursing facility that Erie operated. Noting that Pennsylvania law treats survival and wrongful death claims as separate and distinct claims, and that a survival action is dependent upon the rights that the decedent possessed at the time of his death while a wrongful death claim belongs to the heir(s), rather than the decedent, Senior Judge T. McVerry adopted the magistrate judge’s recommendation that the Foster’s survival claim may be subject to arbitration, but the wrongful death claim – given Foster was not a party to the arbitration agreement – was not. Foster’s motion to dismiss was granted in part.

**Rotten Records, Inc. v. Doe**, 2015 WL 6002794 (WDPA, 10/14/15) (Copyright / Rule 45 Third-Party Discovery) – After reviewing whether Rotten Records (1) made a prima facie showing of a claim of copyright infringement, (2) submitted a specific discovery request, (3) showed there was an absence of alternative means to obtain the subpoenaed information, (4) showed there was a central need for the subpoenaed information, and (5) showed that the owner of the known IP address had a minimal expectation of privacy, Magistrate Judge C. Eddy granted its request for an order permitting it to serve a third-party subpoena on Comcast pursuant to Rule 45, requiring Comcast to supply the name and address of its subscriber. Judge Eddy’s order also specified applicable time periods, rights to quash or object, and service and notice requirements.

**Pa. Gen. Energy Co., LLC v. Grant Twp.**, ___ F.Supp.3d ___, 2015 WL 6001550 (WDPA, 10/14/15) (Constitution / Preemption / Standing) – Operator of oil and gas wells challenged the constitutionality, validity and enforceability of a Grant Township ordinance that, among other things, made the depositing of waste from oil and gas extraction unlawful and declared any state or federal license to do so invalid. The Township moved to dismiss for lack of standing based on PGE’s failure to secure a Pennsylvania Department of Environmental Protection Permit to use a particular well within the Township as an injection well. Magistrate Judge S. Baxter denied the motion, noting that defendant was required to analyze the three elements required for constitutional standing (injury-in-fact, causation, and redressability) for each of the plaintiff’s thirteen distinct claims. The Township had not done that, and instead focused on one argument – the absence of a DEP permit – that did not bear on the legal claim in the case.

**McLaughlin v. Boss Production**, 2015 WL 5971137 (WDPA, 10/14/15) (Labor & Employment / FRCP 4 Service) – Reviewing federal and both Pennsylvania and California law regarding how a corporation may be served, Judge C. Bissoon concluded that McLaughlin had failed to establish that he properly served Boss Production because although a signature appeared on the certified mail receipt McLaughlin submitted as proof of service, there was no indication that the signatory was one of the persons authorized to accept service on behalf of the defendant-corporation. Because there was a possibility that proper service could be completed, the district court denied the motion to dismiss (without prejudice) and gave plaintiff a
limited additional time to show he had effectuated proper service.

Ricci v. Rockwater Northeast LLC, 2015 WL 6509442 (WDPA, 10/28/15) (Removal & Remand) – Ricci moved to have his personal injury case remanded on the ground that it had been untimely removed. Confronted with a dispute as to when the 30-day removal clock started running, Judge N. Fischer examined whether defendant’s counsel’s attendance at a hearing on disputed discovery motions could constitute waiver of service under Pennsylvania law. Concluding that attendance at the hearing, given defendant’s counsel took no steps to preserve any defense to the allegedly defective service, constituted waiver as of August 28, 2015. Because the notice of removal was not filed until September 30, it was not timely and Ricci’s motion was granted.

Northgate Processing, Inc. v. Spirongo Slag McDonald, LLC, 2015 WL 7308675 (WDPA, 11/19/15) (Venue) – Defendants filed a motion seeking either dismissal of this breach-of-contract action on grounds of improper venue or transfer under §1404(a) of the action to the District Court for the Northern District of Ohio, Youngstown Division. Upon her review of the private and public interest factors set forth in Jumara v. State Farm Insurance Co., 55 F.3d 873 (3d Cir. 1995), Judge N. Fischer granted the motion to the extent that defendants sought a transfer of the matter, concluding that (1) plaintiff’s claims arose, if at all, through conduct that took place (or was still taking place) in Ohio; (2) the convenience of the parties and witnesses, as well as the location of the books and records all favored transfer (the court noting that the Ohio courthouse was physically closer to all parties than was the courthouse in Pittsburgh); (3) public factors also strongly favored transfer.

Baldy v. First Niagara Pavilion, C.C.R.L., LLC, ___ F.Supp.3d ___, 2015 WL 7864187 (WDPA, 12/3/15) (Removal & Remand) – A subset of defendants removed plaintiff’s negligence/breach-of-contract action and included in their removal notice that non-removing defendants did not object to removal. Baldy moved for remand because the removal notice did not comply with the “rule of unanimity.” Judge J. Conti, following the rationale of other district courts within the Third Circuit, held that to effectuate proper removal all defendants must either clearly and unambiguously join in the notice of removal or file a separate written consent to removal with the court. In this case, neither the affidavit attached to the joint opposition to the motion for remand nor the non-removing defendants’ answers could be construed as timely notices of removal. Noting that even if the procedural defect in this case could be cured – a question on which district courts in the circuit differed – there were no extraordinary circumstances favoring allowing defendants to cure. Thus, the case was remanded to state court.

Fantone v. Burger, 2015 WL 8271296 (WDPA, 12/8/15) (Rule 41(b) Dismissal) – Concluding that five of six of the factors set forth in Poulis v. State Farm Fire & Casualty Co., 747 F.2d 863 (3d Cir. 1984), weighed in favor of dismissal, Magistrate Judge C. Eddy granted defendant’s motion to dismiss for failure to prosecute Fantone’s sole remaining claim, given discovery was twice extended and despite those extensions, Fantone failed to appear for deposition and then despite a court order to respond to defendant’s motion by a specific date, also failed to comply with that order or to seek an extension.

Lee v. Capozza, 2015 WL 9244833 (WDPA, 12/18/15) (Habeas Corpus) – Judge J. Conti denied Lee’s §2254 petition, agreeing with the magistrate judge that three of Lee’s claims were without merit, and further concluding that a fourth claim, which was based on an alleged error of state law or procedure and not on constitutional principles, was also without merit. The district court also rejected Lee’s assertion that he was entitled to an evidentiary hearing, citing Cullen v. Pinholster, 563 U.S. 170, 181 (2011), for the proposition that when the standard of review at §2254(d)(1) applies to a claim, the district court “is limited to the record that was before the state court that adjudicated the claim on the merits.” Section 2254(d)(1) applied to three of Lee’s claims, and the fourth was a record-based claim that Judge Conti viewed as requiring no evidentiary development.
OPEN FORUM

The CM/ECF System and Rule 58(a)’s Separate Document Requirement

By Susan Schwochau

Background: You represent the plaintiff in an employment discrimination case before Judge Abner B. Curtain. The court’s docket lists the following entry:

ORDER (ABC) Defendant’s motion for summary judgment 24 is GRANTED as against plaintiff on all claims. The Court will issue a memorandum opinion in the coming weeks outlining the reason for this ruling. (This is a TEXT ENTRY ONLY. There is no .pdf attachment associated with this entry.) (JSK) (Entered: 1/20/16).

A question that may not cross your mind: Does this text order/docket entry satisfy Rule 58(a)’s separate document requirement so as to trigger the start of the 30-day appeal period?

The panel in Witasick v. Minnesota Mutual Life Ins. Co., 803 F.3d 184 (3d Cir. 2015), said:

Text orders usually have no difficulty satisfying the separate document requirement of Rule 58(a) and In re Cendant [Corp. Securities Litigation, 454 F.3d 235, (3d Cir. 2006)]. They are separate and self-contained from any actual opinion; they note the relief granted; and they omit (or substantially omit) the District Court’s reasoning. And, significantly, they contain an electronic signature of a judge.

Your text order was “signed” by the judge (ABC), contains no reasoning (because the judge has yet to put his reasoning in writing), and shows that your client is to obtain no relief. Based on the language above, you may want to prepare your notice of appeal (and hope that you get the court’s reasoning for the decision before 30 days have passed).

Although the above-quoted language is arguably dicta, Witasick was the first opinion I encountered that suggested that a text order – by itself – could satisfy Rule 58(a)’s separate document requirement. Other courts that have considered or addressed the issue have rejected that notion, describing that a freestanding, separate document (paper or electronic) is necessary. Arzuaga v. Quiros, 781 F.3d 29, 33 (2d Cir. 2015); Barber v. Shinseki, 660 F.3d 877, 879 (5th Cir. 2011).

Lots of questions came to mind when I read Witasick, but the question that I kept returning to was one of notice, both to those using the CM/ECF system and those who cannot. If we are headed in the direction suggested in Witasick, is the fact that a text order can satisfy Rule 58(a) something that should be made clear in the district courts’ rules? I did some digging, and found that at least one district court – the District of Hawaii – states in its local rules that a text order, in combination with the electronically served document the CM/ECF system creates, can satisfy Rule 58(a).

I raise the following question for discussion among FPC members:

Question/Issue: Should the local rules of Pennsylvania’s district courts be amended to make explicit that

(1) a text order by itself can satisfy the separate document requirement for purposes of Rule 58; or that

(2) in combination with the electronically issued notice that generally accompanies a docket entry, a text order can satisfy Rule 58’s separate document requirement; or is no rule change necessary?

The “Open Forum” section in future issues of the FPC newsletter is open to all FPC members for raising questions of federal practice, rules, and other matters that are likely to be of interest or importance to other members. Submissions for possible inclusion in the Open Forum section can be sent to s.schwochau@comcast.net
Federal Practice Committee Leadership

PBA President William Pugh V has appointed the following people to lead the PBA Federal Practice Committee:

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**Co-Vice Chair:**
Melinda Ghilardi  
Federal Public Defenders Office, Scranton

**Co-Vice Chair:**
Nancy Conrad  
White and Williams LLP, Center Valley

Thank you

A sincere thank you to the following Federal Practice Committee members for their work and contributions to this edition of the PBA Federal Practice Committee newsletter:

- Steven Baiker-McKee, Babst Calland Clements & Zomnir PC, Pittsburgh
- Kevin H. Conrad, White and Williams LLP, Center Valley
- Nancy Conrad, White and Williams LLP, Center Valley
- Hon. D. Michael Fisher, U.S. Court of Appeals Third Circuit, Pittsburgh
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