



PENNSYLVANIA BAR ASSOCIATION FEDERAL PRACTICE COMMITTEE



Cases, News & Updates

Third Quarter 2017 • November

COMMITTEE NEWS

Board of Governors Approves the FPC’s Recommendation on Judicial Vacancies in the Western District

On Sept. 14, 2017, the Board of Governors, acting in lieu of the House of Delegates, unanimously approved the FPC’s recommendation regarding the judicial vacancies that exist in the Western District of Pennsylvania. That recommendation was:

That the President of the Pennsylvania Bar Association be authorized to urge the President of the United States, members of the United States Senate and the U.S. Senate Judiciary Committee to take prompt action to fill the four existing vacancies and one additional forthcoming vacancy on the U.S. District Court for the Western District of Pennsylvania.

The Western District has 10 authorized judgeships. There have been three vacancies since 2013, four since 2016. There is currently no active Article III district judge in residence in two of the court’s three divisions (Erie and Johnstown). The judicial crisis will get worse in November as Judge David Cercone has formally announced he will assume senior status, creating a fifth vacancy. Thus, by November, half of the authorized judgeships will be vacant. In the last year, three senior judges have transferred to inactive or retired status and no longer hear any cases.

These circumstances prompted the FPC’s Executive Council members to approve the above recommendation, which was submitted at the Board of Governors meeting on Sept. 14.

Reminder: Next Committee Meeting – Nov. 16, 2017

The Executive Council will hold its next quarterly meeting on Nov. 16, 2017 at 1:30 p.m. The meeting will be held in conjunction with PBA Committee/Section Day.

As a general practice, all committee members are invited to participate in Executive Council meetings as non-voting

members (see Article IV Section 8). This helps keep all committee members engaged and ensures a pool of interested members for future committee leadership.

Please mark your calendar and join us, in person or by phone, if you can. Committee/Section Day will be held at The Red Lion Hotel Harrisburg East, Harrisburg. The conference call number is 1-877-659-3786, and the passcode is 6677829609#.

If you have any items of concern, please email the committee chair, co-vice chairs or subcommittee chairs. Their contact information is provided below.

Scranton Best Sentencing Practices CLE a Resounding Success



From all accounts, the FPC’s “Best Sentencing Practices in the Middle District of Pennsylvania” – held in Scranton on Aug. 31 – was a hit with all who attended. Returned evaluations showed ratings of “excellent” or “exceeded expectations” in all aspects of the program. Submitted comments indicated attendees found particularly valuable the ability to hear perspectives that they would ordinarily not be exposed to, to hear from a judge about what is important from his view in sentencing, and to get a variety of perspectives. The quality and diversity of the panel was a

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big part of the CLE's success. Panelists were:

- Hon. Thomas I. Vanaskie, U.S. Court of Appeals for the Third Circuit
- Hon. Christopher C. Conner, Chief Judge, U.S. District Court, Middle District of Pennsylvania
- Bruce Brandler, U.S. Attorney, Middle District of Pennsylvania
- Heidi R. Freese, Assistant Federal Public Defender, Federal Public Defender Designee, Middle District of Pennsylvania, and
- Douglas S. Moyle, Supervising U.S. Probation Officer, Middle District of Pennsylvania.

Course planners Melinda Ghilardi and Philip Gelso did a fantastic job putting together this CLE, and, of course, Philip Gelso's performance as moderator did much to enhance the quality of the program!



From left: Philip Gelso, Bruce Brandler, Heidi Freese, Judge Vanaskie, Judge Conner, Melinda Ghilardi, Doug Moyle

Subcommittees

Reports from the Chairs

Legislative

Congress is preoccupied with other matters, so there does not appear to have been any movement on any of the major Judicial Code revision proposals that have been the subject of previous reports in this space. However, the House Judiciary Committee did favorably report one bill that would amend the Judicial Code. H.R. 3996, the Protecting

Access to the Courts for Taxpayers Act (PACTA), would amend Section 1631 to allow transfers to the Tax Court of cases mistakenly filed in the district court – often by *pro se* litigants. This is important, because by the time the taxpayer plaintiff learns that he or she has filed in the wrong court, the short filing deadline for the Tax Court has already passed.

The bill is noteworthy for a second reason. It was jointly sponsored by the chairman and ranking member of the Courts Subcommittee – Congressman Issa (R. Calif.) and Congressman Nadler (D. N.Y.) – two members who are often in disagreement. And the bill passed in the full committee on a voice vote. So, as in the past, judiciary legislation becomes the occasion for bipartisanship.

Our committee might want to consider endorsing the bill and sharing our view with our representatives and with Sens. Casey and Toomey.

At the same markup session, the committee also approved another bill to amend Title 28. This was H.R. 4010, the Congressional Subpoena Compliance and Enforcement Act. But as the title suggests, this bill is not of general litigation interest.

Prof. Arthur Hellman

Outreach and Diversity

One of the CLE programs during the July YLD Summer Summit in State College was “Tips from the Federal Bench.” The Federal Bench presenters were Judge Malachy E. Mannion from the Middle District and Judge Kim R. Gibson from the Western District. Also participating were Colin J. O’Boyle from Elliott Greenleaf and Jennifer Menichini of Greco Law Associates PC.

The program was very well-received, with approximately 60 in attendance for the 9:30 a.m. CLE. The panel discussed some of the basics of practice in federal court, with the aim of covering – at least in a condensed form – a federal case from initial filing through discovery, into pretrial matters and then trial. The panel discussed the resources available through the courts and the PBA to assist the federal practitioner.

Judge Mannion and Judge Gibson also talked about some of the differences between the Middle District and the



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Western District in such areas as the courts' mediation programs and their handling of discovery disputes. Atty. O'Boyle noted some of the differences in the Eastern District as well. Judge Mannion and Judge Gibson provided some very useful pointers and insight into effective practice in federal court, making note of the things a new practitioner should make sure to do and of the things a new practitioner should definitely avoid doing.

Jennifer Menichini

Welcome New FPC Members!

The FPC continues to grow! On behalf of the FPC, Chair Hon. D. Michael Fisher sends a warm welcome to new members joining in the third quarter:

- M. Jason Asbell, Lancaster County, Gibbel Kraybill & Hess LLP
- Leticia Chavez-Freed, York County, The Chavez-Freed Law Office
- James Greco, Lackawanna County, Greco Law Associates PC
- Christopher Powell Jr., Lackawanna County, Powell Law
- Brandon Reish, Monroe County
- Edward Rymysz, Lycoming County, Miele & Rymysz PC
- Megan Schnader, Out of state

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 newsletters. Please consider participating in any of the FPC's subcommittees – see for subcommittee contact information to the right. You can 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 U.S. District Courts in Pennsylvania. And don't forget to join our new PBA FPC LinkedIn group: <https://www.linkedin.com/groups/PBA-Federal-Practice-Committee-8592167/about>.

Contact Information

The FPC's subcommittee chairs welcome new members, and they invite and encourage all FPC members to join one or more of its subcommittees. If you are interested in serving on any of the six subcommittees, please contact:

Educational Programs Subcommittee –

Kathleen Wilkinson, Philadelphia
Wilson Elser Moskowitz Edelman & Dicker LLP
kathleen.wilkinson@wilsonelser.com

Legislative Subcommittee

Professor Arthur Hellman, Pittsburgh
University of Pittsburgh School of Law
hellman@pitt.edu

Local Rules Subcommittee

Marc Zucker, Philadelphia
Weir & Partners LLP
mzucker@weirpartners.com

Newsletter Subcommittee

Susan Schwochau, Pittsburgh
s.schwochau@comcast.net

Nominations Subcommittee

Brett G. Sweitzer, Philadelphia
Defender Association of Philadelphia
brett_sweitzer@fd.org

Outreach and Diversity Subcommittee

Jennifer Menichini, Lackawanna
Greco Law Associates PC
jmenichini@callGLA.com

FEDERAL PRACTICE NEWS

Rules Changes

The Judicial Conference Advisory Committees on Appellate, Bankruptcy, Criminal and Evidence Rules have proposed amendments to the following rules and forms:

- Appellate Rules: 3, 13, 26.1, 28 and 32;
- Bankruptcy Rules: 2002, 4001, 6007, 9036, 9037 and Official Form 410;
- Criminal Rules: New Rule 16.1;
- Rule 5 of the Rules Governing Section 2254 Cases;

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- Rule 5 of the Rules Governing Section 2255 Proceedings; and
- Rules of Evidence: 807.

According to the Judiciary's website, "At this time, the Committee on Rules of Practice and Procedure has only approved these proposed amendments for publication for comment. The proposed amendments have neither been submitted to nor considered by the Judicial Conference or the Supreme Court. After the public comment period, the advisory committees will decide whether to submit the proposed amendments to the Committee on Rules of Practice and Procedure for approval in accordance with the Rules Enabling Act." The public comment period closes on Feb. 15, 2018.

Read the text of the proposed amendments and supporting materials at: http://www.uscourts.gov/sites/default/files/preliminary_draft_08_2017_0.pdf. For more information on how to submit or review comments, see the Judiciary's website: <http://www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment>.

STATUS OF JUDICIAL VACANCIES

U.S. Court of Appeals, Third Circuit

- There are three vacancies: one created when Judge Marjorie Rendell assumed senior status (July 1, 2015), one created when Judge Fuentes assumed senior status (July 18, 2016), and one created when Judge D. Michael Fisher assumed senior status (Feb. 1, 2017). On June 19, 2017, President Trump's nomination of Stephanos Bibas, University of Pennsylvania Law School professor of law and criminology, was received in the Senate and referred to the Committee on the Judiciary. Professor Bibas was nominated to fill Judge Rendell's seat. A Judiciary Committee hearing was held on Oct. 4, 2017, and the Committee approved the nomination on Oct. 26, 2017.

U.S. District Court, Western District of PA

- There are four vacancies: one created with the passing of Judge Gary Lancaster (Apr. 24, 2013), one created when Judge Sean McLaughlin resigned (Aug. 16, 2013), one

created when Judge Terrence McVerry assumed senior status (Sept. 30, 2013), and one created when Judge Kim Gibson assumed senior status (June 3, 2016). Recent reports show no nominees.

U.S. District Court, Eastern District of PA

- There are four vacancies: one created when Judge Mary McLaughlin assumed senior status (Nov. 18, 2013), one created when Judge Luis Restrepo was elevated (Jan. 11, 2016), one created when Judge James Knoll Gardner assumed senior status (Apr. 3, 2017), and one created when Judge Legrome Davis assumed senior status (Sept. 28, 2017). Recent reports show no nominees.

Judge Tucker Steps Down as Chief Judge

The Honorable Lawrence F. Stengel became chief judge of the U.S. District Court in the Eastern District of Pennsylvania on Aug. 1, 2017, when Judge Petrese B Tucker, who served as chief judge since 2013, stepped down. Judge Tucker will remain in active status.

The following excerpts are from the announcement on the Eastern District's website:

As Chief Judge, [Judge Tucker] oversaw the hiring of a new Clerk of Court, promoted the nationally recognized Eastern District of Pennsylvania Re-Entry Court, supported IT and courtroom improvements and exercised authority over one of the busiest federal courthouses in the United States.

Judge Stengel said, "Chief Judge Tucker provided leadership to our Court through a period of significant transition and she did so with a thoughtful, patient and quietly effective approach. She demonstrated intelligence, understanding and humility, she never did anything to serve her own ego, and she has consistently listened and worked toward consensus. Our judges are grateful to Chief Judge Tucker for her commitment to our Court and for her unwavering dedication to the process of delivering equal justice to the citizens of the Eastern District of Pennsylvania. She has every right to be proud of her legacy of leadership to our Court."

CASE SUMMARIES

Summaries of Third Circuit and Pennsylvania district court decisions filed between July and September 2017 involving issues of potential interest to FPC members.

THIRD CIRCUIT PRECEDENTIAL OPINIONS

Daubert v. NRA Group, LLC, 861 F.3d 382 (3d Cir. 2017) (Statutes [TCPA, FDCPA] / Civil Procedure [Sham affidavit]) – Daubert claimed that the NRA Group violated the Fair Debt Collection Practices Act (FDCPA) and the Telephone Consumer Protection Act (TCPA) when, in the effort to collect a \$25 debt, it sent a letter that allowed an account-related barcode to be seen through the envelope’s glassine windows and called Daubert 69 times in 10 months using an automated dialer. The district court granted Daubert summary judgment on his TCPA claim and, at trial, granted the NRA Group judgment as a matter of law on the FDCPA claim. As to the latter, the district court concluded that although the use of a barcode on Daubert’s envelope violated the FDCPA, the violation resulted from an unintentional, bona fide error as the NRA Group had relied on two district court decisions holding to the contrary. Both parties appealed. The Court of Appeals affirmed as to the TCPA claim, holding that the district court (1) correctly concluded that no reasonable jury could find that Daubert expressly consented to receive calls from the NRA Group, and (2) did not abuse its discretion in disregarding an affidavit that flatly contradicted another person’s prior 30(b)(6) testimony. The district court, however, erred in granting judgment as a matter of law to the NRA Group because the bona fide error defense doesn’t apply to mistakes of law. The court reversed the judgment for the NRA Group and remanded with instructions to enter judgment for Daubert.

Taha v. Cty. of Bucks, 862 F.3d 292 (3d Cir. 2017) (Class Action) – Bucks County and the Bucks County Correctional Facility created a publicly searchable “Inmate Lookup Tool” into which they uploaded information about the 66,799 people who had been held or incarcerated at the correctional facility since 1938. Taha filed suit alleging that they had publicly disseminated information in violation

of the Pennsylvania Criminal History Record Information Act (CHRIA). After granting Taha’s motion for partial summary judgment on liability, the district court certified a plaintiffs’ punitive damages class of individuals about whom incarceration information had been disseminated, finding that the only remaining question of fact was whether defendants had acted willfully. In this interlocutory appeal from the certification decision, the Court of Appeals concluded that (1) defendants had waived their argument that the district court erred in granting partial summary judgment on liability before deciding the class certification motion; (2) Taha had both Article III and statutory “aggrieved” party standing despite not being able to recover compensatory damages; (3) the district court did not err when it based its certification order on its conclusion that punitive damages could be imposed under CHRIA even if Taha could not recover compensatory damages; (4) the CHRIA on its face permits punitive damages to be imposed on government agencies; and (5) because defendants’ willfulness was the sole remaining fact question, the district court properly determined that common questions predominated over individual questions. The court therefore affirmed the district court’s certification decision.

Knick v. Twp. of Scott, 862 F.3d 310 (3d Cir. 2017) (Civil Rights-§1983) – After being issued a notice of violation, Knick raised Fourth, Fifth and Fourteenth Amendment challenges to a township ordinance that, among other things, required all public and private cemeteries to be kept open and accessible to the general public during daylight hours and permitted code enforcement officers to enter any property for the purposes of determining the existence and location of any cemetery. The district court dismissed with prejudice Knick’s claim that the ordinance violated the Fourth Amendment in maintaining a warrantless inspection scheme, and it dismissed without prejudice her claims that the ordinance takes private property without just compensation pending exhaustion of state-law remedies. The Court of Appeals affirmed, concluding that (1) Knick lacked Article III standing to pursue her Fourth Amendment facial and as-applied challenges because she did not appeal the decision that the search of her property (an open field) was lawful; and (2) despite characterizing them as “facial” challenges, Knick’s remaining claims were for

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just compensation under the Takings Clause, and thus were subject to exhaustion under *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). Because Knick’s prior state-court case did not satisfy the exhaustion requirement, and because her case was not exceptional so as to justify excusing that requirement, her claims were not ripe and were properly dismissed. The court also provided detailed explanations regarding standing where both facial and as-applied challenges are brought and regarding the distinction between a facial legal challenge and a facial taking.

Castleberry v. STI Grp., 863 F.3d 259 (3d Cir. 2017) (Labor & Employment [Discrimination]) – Castleberry and Brown brought suit against Chesapeake Energy and STI Group, a subcontractor for Chesapeake Energy, alleging harassment, discrimination and retaliation in violation of 42 U.S.C. § 1981. Among other allegations, they claimed that when working on a fence-removal project, a supervisor told Castleberry and his coworkers that if they had “nigger-rigged” the fence, they would be fired. Castleberry and Brown were the only African-American general laborers on the crew. Two weeks after they reported the offensive language to a superior, they were fired without explanation. They were rehired shortly thereafter, but then terminated again for “lack of work.” The district court granted defendants’ Rule 12(b)(6) motion as to all claims. The Court of Appeals reversed and remanded as to all but the disparate impact claim, which was not cognizable under § 1981. The court clarified that plaintiffs alleging harassment are required to plead that they were subjected to a hostile work environment in which there was discrimination that was “severe or pervasive” (rather than the “pervasive and regular” standard applied by the district court) and that an isolated incident of discrimination (if severe) could suffice to state a harassment claim. The district court erred in dismissing the retaliation claims on the ground that it was unreasonable for plaintiffs to believe that a single incident of a discriminatory remark could amount to unlawful activity. It also erred in dismissing plaintiffs’ disparate treatment claims because it had effectively jettisoned the *McDonnell Douglas* burden-shifting framework in doing so.

EEOC v. City of Long Branch, 866 F.3d 93 (3d Cir. 2017) (Civil Procedure / Federal Magistrates Act) – The EEOC filed a subpoena enforcement action against the City of Long Branch to obtain documents pertaining to a charge of discrimination. The district court referred the motion to enforce to a magistrate judge. The magistrate judge did not specifically rule on the EEOC’s argument that Long Branch waived its right to object to the subpoena because it failed to exhaust its administrative remedies, but issued an order enforcing the subpoena in part. The EEOC appealed to the district court, raising only the issue of whether it was properly precluded from disclosing other employees’ disciplinary and related records to the charging party. The district court affirmed, and the EEOC appealed, raising both the exhaustion issue and that disclosure issue. The Court of Appeals concluded that it had to vacate and remand without reviewing the merits of either issue because of a “significant procedural defect” – the district court had erroneously treated the motion to enforce that the magistrate judge had reviewed as a non-dispositive motion instead of a dispositive motion, contrary to *NLRB v. Frazier*, 966 F.2d 812 (3d Cir. 1992). Because the EEOC had not “appealed” the exhaustion issue and because the district court treated the motion as a non-dispositive motion, the district court never subjected the exhaustion issue to “reasoned consideration.” As the disclosure issue would only be “live” if Long Branch had not waived its defenses, the court concluded that it could not review that issue either.

In re: Howmedica Osteonics Corp., 867 F.3d 390 (3d Cir. 2017) (Civil Procedure [§ 1404(a) transfer] / Contracts [Forum Selection Clauses]) – Howmedica filed suit in New Jersey district court against five former sales representatives, DePuy Orthopaedics (a competitor) and Golden State Orthopaedics, (DePuy’s regional distributor, which was joined as a necessary party), asserting breach of the sales representatives’ employment agreements’ confidentiality and non-compete clauses. Four of the agreements designated New Jersey as the forum for any litigation arising out of the agreements; one designated Michigan. Howmedica sought a writ of mandamus after the district court transferred the entire case to the district court for the Northern District of California (NDCA) under § 1404(a). After determining

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that it had mandamus jurisdiction despite the NDCA's issuance of two preliminary scheduling orders, the Court of Appeals concluded that the New Jersey district court had erred in: (1) incorrectly applying *Atlantic Marine Construction Co. v. U.S. District Court*, 134 S. Ct. 568 (2013) (holding that, except in "the most unusual cases," a district court should give effect to a valid forum-selection clause when adjudicating § 1404(a) transfer motions), to the contracting parties in the case (Howmedica and the sales representatives); and (2) seemingly taking an "all or nothing" approach to transfer rather than addressing that *Atlantic Marine* applied only to those contracting parties. Because the case involved non-contracting parties, competing forum-selection clauses, personal jurisdiction challenges and allegations of necessary party status, the court set forth, building on *In re: Rolls Royce Corp.*, 775 F.3d 671 (5th Cir. 2014), a four-step framework for addressing § 1404(a) transfer motions, where such complications exist. In the interests of judicial efficiency, the court applied that framework itself and ultimately concluded that it would issue a writ of mandamus vacating the transfer order and instructing the New Jersey district court on remand to (1) sever Howmedica's claims against DePuy and Golden State, (2) transfer those claims to the NDCA under 28 U.S.C. § 1404(a) and (3) retain jurisdiction over Howmedica's claims against the five sales representatives.

Kelly v. Maxum Specialty Ins. Group, 868 F.3d 274 (3d Cir. 2017) (Federal Court Jurisdiction / Declaratory Judgment Act) – Carman, Princeton Tavern's insurance broker, failed to notify the issuer of the bar's dram shop liability policy about the Kellys' suit against the bar. The bar assigned to the Kellys its rights to sue Carman, and they did so in state court for negligence and breach of contract (the tort action). They later filed a separate state court action against Carman and its professional liability insurer, Maxum, seeking a declaration that Maxum was obligated to defend and indemnify Carman against the tort action claims (the declaratory action). Maxum removed that case, asserting diversity jurisdiction once the Kellys and Carman were properly aligned as plaintiffs. The Kellys sought remand, disputing diversity jurisdiction and asking in the alternative that the district court decline jurisdiction

over the declaratory action. Without ruling on the diversity jurisdiction issue, the district court declined to hear the lawsuit, concluding that the still-pending tort action constituted a parallel proceeding to the declaratory action, and remanded the action to state court. Maxum appealed. The Court of Appeals held that the mere potential or possibility that two proceedings will resolve related claims between the same parties is not sufficient to make those proceedings parallel; rather, there must be a substantial similarity in issues and parties between contemporaneously pending proceedings. Applying this standard, the court concluded that the two actions were not parallel. The court then turned to the other factors set forth in *Reifer v. Westport Insurance Corp.*, 751 F.3d 129 (3d Cir. 2014) and concluded that the lack of pending parallel state proceedings was not outweighed by opposing factors. The court reversed the district court's order and remanded for the district court to decide whether it has subject matter jurisdiction over the action.

In re: Lipitor Antitrust Litig., 868 F.3d 231 (3d Cir. 2017) (Antitrust) – In two sets of consolidated appeals, plaintiffs alleged that companies holding the patents for Lipitor and for Effexor XR delayed entry into the market of generic versions of those drugs by engaging in an overarching monopolistic scheme that involved fraudulently procuring and enforcing the underlying patents and then entering into reverse-payment settlement agreements with generic manufacturers. The district court rejected the *Walker Process* fraud, false Orange Book listing, sham litigation, sham FDA citizen petition and overall monopolistic scheme allegations related to *Lipitor* plaintiffs' monopolization claims against Pfizer and later also dismissed their remaining allegations relating to the reverse-payment settlement agreement between Pfizer and Ranbaxy. The district court also dismissed *Effexor XR* plaintiffs' challenges to the reverse-payment settlement agreement between Wyeth and Teva. The Court of Appeals reversed both sets of judgments. As to reverse-payment settlement agreement claims, the district court erred in holding both sets of plaintiffs to a pleading standard that went beyond what *Twombly* and *Iqbal* require. The allegations included a sufficient level of specificity as to payment size, and they did not need to counter potential defenses in order to meet the proper standard with respect

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to the payment being unjustified. The court also rejected the *Effexor XR* defendants' arguments that (1) the FTC's failure to object to their settlement agreement prevented *Effexor XR* plaintiffs from bringing an antitrust challenge to that agreement, and (2) because they submitted the proposed settlement agreement to the district court for confirmation, the *Noerr-Pennington* doctrine immunized their settlement agreement from antitrust scrutiny. Largely because it also concluded that the *Lipitor* plaintiffs' *Walker Process* fraud allegations were plausible, the court reversed the district court's dismissal of those plaintiffs' claims relating to Pfizer's fraudulent procurement and enforcement of its '995 patent.

United States v. Poulson, 871 F.3d 261 (3d Cir. 2017) (Sentencing) – After Poulson pleaded guilty to one count of mail fraud, the district court determined that his fraudulent real estate investment scheme had cost over 50 of his investors more than \$2.7 million and that over 25 investors endured a “substantial financial hardship,” under a recently added enhancement to the guidelines (U.S.S.G. § 2B1.1). It sentenced Poulson to 70 months' imprisonment, followed by three years of supervised release with an occupational restriction that barred him from working in the real estate industry for five years. On appeal, Poulson challenged (1) the application of the § 2B1.1 enhancement based on eight victims who he contended did not suffer the level of “substantial financial hardship” contemplated by the guidelines, and (2) the five-year occupational restriction. Addressing §2B1.1 for the first time, the Court of Appeals concluded that the provision (along with Application Note 4(F)'s non-exhaustive list of factors courts are to consider) gave the district court considerable discretion in determining the number of victims who endured a “substantial financial hardship,” and rejected Poulson's challenges with respect to the eight individuals. The court, however, agreed with Poulson that the district court erred in imposing an occupational restriction that extended beyond his term of supervised release, and it vacated that portion of the sentence.

Satterfield v. DA Phila., 871 F.3d 152 (3d Cir. 2017) (Habeas Corpus / Civil Procedure) – A jury convicted Satterfield of first degree murder in June 1985. In 2002, Satterfield filed a petition for federal habeas relief raising,

among others, claims of actual innocence and ineffective assistance of trial counsel. The district court granted relief on his ineffective-assistance-of-counsel claim – that decision, however, was reversed on appeal, and Satterfield's petition was denied as time-barred on remand. In 2014, Satterfield filed a motion with the district court under Rule 60(b)(6) seeking relief from that judgment, arguing that *McQuiggin v. Perkins*, 133 S. Ct. 1924 (2013) (utilizing the fundamental-miscarriage-of-justice exception to allow petitioners who can make a showing of actual innocence to overcome AEDPA's one-year statute of limitations) was a change in decisional law that served as an extraordinary circumstance upon which Rule 60(b)(6) relief may issue. The district court denied the motion, concluding that *McQuiggin* was not a ground for relief. The Court of Appeals granted a COA on the issue of whether *McQuiggin*, either alone or in combination with other equitable factors, is sufficient to invoke relief from final judgment under Rule 60(b)(6) to allow an appellant to raise an otherwise time-barred valid claim that trial counsel was ineffective. The court vacated the district court's order because it appeared that the district court, contrary to *Cox v. Horn*, 757 F.3d 113 (3d Cir. 2014), focused on whether *McQuiggin*, in isolation, was sufficient to serve as an extraordinary circumstance. Although the court left whether Satterfield's Rule 60(b)(6) motion should be granted to the district court, it emphasized that the nature of the change in decisional law itself must be a factor in the analysis – the “values encompassed by the fundamental miscarriage-of-justice exception and which drive the Supreme Court's decision in *McQuiggin* cannot be divorced from the Rule 60(b)(6) inquiry.”

EASTERN DISTRICT OF PA OPINIONS

Giovanni v. United States Dep't of the Navy, __ F. Supp. 3d __, 2017 WL 2880749 (E.D. Pa. July 6, 2017) (Federal and state court jurisdiction over challenges to a CERCLA remedial action) – After discovering that chemicals from nearby naval facilities infiltrated their water supply, the Giovannis sued the Navy in state court under Pennsylvania's Hazardous Sites Cleanup Act, seeking an injunction requiring the Navy to provide “medical monitoring,” a

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health assessment, a health effects study and blood testing. The Navy removed the case under 28 U.S.C. § 1442(a)(1) and later filed a Rule 12(b)(1) motion asserting that the naval facilities were subjects of an ongoing response action under CERCLA and that both the federal court and the state court lacked jurisdiction over the Giovannis' action. The Giovannis argued that their suit was not a challenge to a CERCLA removal or remedial action and thus the federal court had jurisdiction. Judge G. Pappert rejected the Giovannis' argument, concluding that their action seeking medical monitoring was a challenge to a removal or remedial action under 42 U.S.C. § 9613(h). Not only did the federal court not have subject-matter jurisdiction over their claims, the state court, under § 9613(b) and (h), did not have jurisdiction either. Because the state court did not have jurisdiction and because the action was removed under § 1442, the court dismissed the action under the doctrine of derivative jurisdiction.

Rose v. Dowd, 2017 WL 3008747 (E.D. Pa., July 14, 2017) (Defamation / Choice-of-law) – Dowd, the author of the 1989 “Dowd Report” (concluding that Rose had bet on the Reds from 1985 to 1987 in violation of Major League Rule 21), stated in a 2015 radio interview that “Michael Bertolini, you know, told us that he not only ran bets but he ran young girls for [Rose] down at spring training, ages 12 to 14 ... So that’s statutory rape every time you do that.” Rose filed a complaint against Dowd for defamation *per se*, defamation, and tortious interference with existing or prospective contractual relationship. Dowd moved to dismiss under Rule 12(b)(6), based in part on the application of Nevada law. After concluding that Pennsylvania law, rather than Nevada law, applied because no relevant differences existed, Chief Judge P. Tucker held that (1) Rose sufficiently pleaded a claim for defamation *per se* based on Rose’s allegation that Dowd made on-air statements that imputed criminal offenses and serious sexual misconduct to Rose; (2) he failed to sufficiently plead a claim for defamation (but allowed for Rose to amend his pleading as to that claim); and (3) failed to state a claim for relief that was plausible on its face with respect to his tortious interference count. The motion to dismiss was therefore granted in part and denied in part.

Boyer v. City of Philadelphia, 2017 WL 3023585 (E.D. Pa., July 17, 2017) (Civil Rights - §1983 (Employment Discrimination) / PA Whistleblower Law) – In his §1983 action, former police officer Boyer alleged that the City of Philadelphia, the former police commissioner and several police department employees violated the Equal Protection Clause when they disciplined him more harshly than white officers who had committed similar or more serious offenses. He also alleged that city employees and fellow police officer Ortiz violated the Pennsylvania Whistleblower Law by retaliating against him for reporting Ortiz’s allegedly criminal conduct. Defendants sought summary judgment. Judge J. DuBois denied the defendants’ motion in part with respect to the Equal Protections claims, rejecting the contentions that Boyer had failed to produce evidence of similarly situated persons who were treated differently and that he had failed to show a custom of differential treatment for purposes of his claim against the city. The court concluded that although Boyer had not produced evidence of a practice of general disparate treatment of minorities, he did produce evidence from which a reasonable jury could conclude that there was a well-settled municipal practice of using different disciplinary processes for police officers based on their race. Motions were granted as to the whistleblower claim because it was time-barred: it did not satisfy the relation-back provision of Rule 15(c), plaintiff’s arbitration proceedings did not toll the 180-day time limit for each alleged retaliatory act, and there was no evidence of actionable conduct by defendants within the limitations period.

Center City Periodontists, P.C. v. Dentsply International, Inc., ___ F.R.D. ___, 2017 WL 3142119 (E.D. Pa. July 24, 2017) (Class Action) – Dental practices brought a breach of express warranty claim alleging that the waterlines of Dentsply’s Cavitron ultrasonic scaler naturally accumulated biofilm, exposing patients and dental staff to potentially hazardous bacteria levels in excess of safe water standards, even when operated and maintained in a manner consistent with the Directions for Use. They asked that the following class be certified under Rule 23(b)(3): All dentists, periodontists, dental and periodontal practices, and dental and periodontal schools and institutions (a) who are citizens of the State of New Jersey or the Commonwealth

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of Pennsylvania, respectively, (b) who purchased Cavitron ultrasonic scalers during the time period Jan. 1, 1997 to the date of trial, and (c) who were using a public water source for their Cavitrons at the time of installation. Subclasses for each state were also proposed. Both parties also filed motions to exclude the other's experts under *Daubert*. In accord with *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183 (3d Cir. 2015), Judge C.D. Jones, II first disposed of the *Daubert* motions, concluding that plaintiffs' experts would be excluded (partly because of a lack of fit between the issues in the case and the proposed testimony) but that defendant's expert would be allowed to testify. Turning to the class certification issue, the court concluded that the only Rule 23(a) prerequisite that plaintiffs could satisfy was that a common question of law of fact existed; they failed to demonstrate that typicality, adequacy or numerosity requirements were satisfied. Plaintiff-specific defenses undermined typicality and adequacy; a lack of sufficient evidence undermined numerosity. Rule 23(b)(3)'s predominance, superiority and ascertainability requirements were also not met. The court therefore denied the class certification motion.

Finnemen v. SEPTA, ___ F. Supp. 3d ___, 2017 WL 3168678 (E.D. Pa. July 25, 2017) (Civil Rights-§1983) – While in a SEPTA station, in an effort to get away from someone he thought was suspicious, Finnemen entered a SEPTA booth, where he squatted behind the door, and shortly thereafter returned to the platform. The booth's operator – defendant Campbell – called SEPTA's Control Center to report that she had just been assaulted, and identified Finnemen as the alleged assailant. After the assault and robbery charges against him were dropped, Finnemen filed suit against Campbell and the SEPTA police officers alleging malicious prosecution, false arrest, false imprisonment, excessive force, and state tort claims. Defendants moved for summary judgment. Judge E. Robreno granted the motion in favor of the police officers on the false arrest, false imprisonment, excessive force, malicious prosecution and state tort claims against them. The court denied the motion as to the malicious prosecution claim against Campbell because (1) construing the disputed facts in the light most favorable to Finnemen, Campbell lied about his actions to the officers and during

the preliminary hearing, and Finnemen could thus prove that she initiated the prosecution; (2) there was a genuine dispute of material fact regarding whether Campbell acted maliciously or “for a purpose other than bringing the plaintiff to justice;” and (3) Campbell was not entitled to sovereign immunity.

In re Imprelis Herbicide Mktg., Sales Practices & Prod. Liab. Litig., 2017 WL 3621001 (E.D. Pa. Aug. 18, 2017) (Standard of review for challenges to Imprelis Appeal Panel decisions) – The class action settlement between DuPont (maker of the herbicide Imprelis) and plaintiffs alleging the herbicide caused property damage included in its provisions a means by which property owners could file claims and obtain compensation or relief for the damage they sustained. The agreement also included an appeals process for those who filed settlement claims. Under the process a three-member panel could review specified types of decisions. The appeal panel's determination was made reviewable by a court, but the agreement did not set forth a standard of review to be applied. In this case, a property owner sought review of the denial of his claim for additional benefits on the ground that the condition of one of his trees had worsened. Judge G. Pratter rejected DuPont's contention that the same standard applicable to arbitrators under the Federal Arbitration Act should apply, and instead charted a “middle course,” concluding that an “arbitrary and capricious” standard of review was appropriate. Applying that standard, the court decided that the panel's decision was not arbitrary or capricious.

Doe v. Wolf, 2017 WL 3620005 (E.D. Pa. Aug. 23, 2017) (Constitution [Second Amendment]) - Section 6105 of the Pennsylvania Uniform Firearms Act (PUFA) prohibits a person temporarily committed under Section 302 of the Mental Health Procedures Act (MHPA) from possessing firearms. Plaintiffs brought a facial challenge to the constitutionality of Section 6105, alleging that it deprived them of their Second Amendment right without due process, and that pre-deprivation procedures were necessary before the state police entered an individual who had been committed under Section 302 into the databases used to disqualify persons from possessing firearms. Plaintiffs had not attempted any of the three

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post-deprivation remedies to restore their firearm rights. Defendants sought dismissal under Rule 12(b)(1) or 12(b)(6). Judge J. Slomsky dismissed as defendants Governor Wolf, Attorney General Shapiro, and the Pennsylvania State Police (PSP) on Eleventh Amendment sovereign immunity grounds, but denied the Rule 12(b)(1) motion as to the Commissioner of PSP, who was sued in his official capacity for prospective injunctive relief. The court denied the Rule 12(b)(6) motion, concluding that plaintiffs had plausibly alleged that (1) due process requires some pre-deprivation procedures after a Section 302 commitment before that person is divested of his or her Second Amendment right to bear arms, and (2) the post-deprivation remedies do not protect their Second Amendment right sufficiently enough to satisfy due process concerns.

Razak v. Uber Technologies, Inc., 2017 WL 4052417 (E.D. Pa. Sept. 13, 2017) (Compensability under the FLSA of time Uber drivers spend waiting for trip request) – Razak and two other Uber drivers sued Uber on behalf of themselves and “[a]ll persons who provided limousine services, now known as UberBLACK, through Defendants’ App in Philadelphia, Pennsylvania,” alleging violations of the Fair Labor Standards Act and Pennsylvania’s wage and labor laws. In accord with the court’s prior rulings, Uber filed a motion for summary judgment on the limited issue of the compensability of the time plaintiffs spent “online” the Uber app (signifying they are available for trip requests), assuming for purposes of the motion only that plaintiffs were Uber employees rather than independent contractors. Although Judge M. Baylson noted that existing case law regarding on-call time was of limited use because of the unique technologies used in this case, the court broadly looked to the factors in *Ingram v. Cty. of Bucks*, 144 F.3d 265 (3d Cir. 1998) and concluded that four undisputed facts prevented it from finding as a matter of law that plaintiffs’ time “Online” was not compensable (e.g., that drivers have at most 15 seconds to accept a trip request from a rider which, if not accepted, will be deemed rejected). Uber’s motion was therefore denied.

Doe v. The Trustees of the Univ. of Pennsylvania, ___ F. Supp. 3d __ 2017 WL 4049033 (E.D. Pa. Sept. 13, 2017) (Challenge to University disciplinary proceedings) – Doe filed a multi-count complaint against UPenn’s Trustees

challenging disciplinary proceedings that culminated in an [allegedly false] finding that Doe had violated the university’s Sexual Violence Policy. The university sought dismissal of the entire complaint under Rule 12(b)(6). Judge J. Padova granted the motion in part and denied it in part. Doe’s breach of contract claim was dismissed insofar as that claim asserted that UPenn breached contractual obligations to be fair, provide notice, apply a preponderance of the evidence standard, conduct an impartial hearing, impose sanctions based on university precedent, afford a meaningful appellate process and provide a process free of racial bias and discrimination, but assertions that UPenn breached its contractual obligations to conduct a thorough investigation, provide certain training to investigators and hearing panel members, and provide a process free of gender bias or discrimination were allowed to proceed. Doe’s Title IX claims grounded on erroneous outcome and selective enforcement theories were allowed to proceed; his Title IX claim grounded on a deliberate indifference theory was dismissed. Doe’s claims brought pursuant to Title VI and § 1981 were dismissed. The court held that Doe’s UTPCPL claim was barred by the economic loss doctrine. Claims for intentional infliction of emotional distress were dismissed; claims of negligent infliction of emotional distress survived.

Sweda v. Univ. of Pennsylvania, 2017 WL 4179752 (E.D. Pa. Sept. 21, 2017) (Labor [ERISA]) – Section 403(b) plan participants and beneficiaries brought an action under ERISA, on behalf of themselves and a purported class, asserting that UPenn breached its fiduciary duties and violated ERISA’s “prohibited transactions” clause by (1) locking the plan into the CREF stock account and TIAA recordkeeping; (2) allowing TIAA-CREF and Vanguard to charge unreasonable or unnecessary administrative and other fees; and (3) maintaining “underperforming” funds. UPenn sought dismissal of all claims under Rule 12(b)(6). Judge G. Pratter granted that motion, concluding as to several of the fiduciary duty claims that plaintiffs had failed to allege facts that distinguished the challenged actions from lawful ones undertaken by reasonable plan administrators. The court concluded the attempt “to shoehorn [plaintiffs’] fiduciary duty claims into the prohibited transaction provision simply fail as a matter of law.”

MIDDLE DISTRICT OF PA OPINIONS

De La Fuente v. Cortés, __ F. Supp. 3d __, 2017 WL 3586047 (M.D. Pa. Aug. 21, 2017) (Constitutionality of Pennsylvania election statutes / *Res judicata*) – De La Fuente filed suit against the Secretary of the Commonwealth and the Commissioner of the Bureau of Commissions, Elections, and Legislation, claiming that various provisions within that election law violated the U.S. Constitution. The district court abstained and stayed the case, pursuant to *R.R. Comm’n of Texas v. Pullman*, 312 U.S. 496 (1941), pending resolution of unsettled state law in the Commonwealth Court. When the stay was lifted, defendants moved to dismiss the complaint under either Rule 12(b)(1) or Rule 12(b)(6). After rejecting defendants’ mootness and standing arguments, Judge J. Jones III addressed their contention that *res judicata* applied because De La Fuente failed to litigate his federal claim against 25 P.S. § 2911(e)(5) before the state court. The court rejected this as well, noting that at the time the court abstained, De La Fuente had asked the court to maintain jurisdiction over his federal claims, and the court agreed. Although he had not precisely asserted an *England* reservation (referring to *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964)), the court concluded that *res judicata* did not bar De La Fuente’s federal claims. Those claims had to be dismissed under Rule 12(b)(6), however, because controlling case law had already declared similar provisions constitutionally valid.

Balon v. Enhanced Recovery Co., Inc., __ F. Supp. 3d __, 2017 WL 3701723 (M.D. Pa. Aug. 28, 2017) (Standing [Concreteness under *Spokeo*] / FDCPA) – Balon filed a complaint in state court alleging that Enhanced Recovery violated the Fair Debt Collection Practices Act given language in the letter it sent her. Enhanced Recovery removed the action. The same day that Enhanced Recovery filed a Rule 12(b)(1) motion challenging Balon’s standing, Balon filed a summary judgment motion. When she responded to Enhanced Recovery’s motion, Balon agreed she had not suffered a “concrete” injury and filed a motion for remand. Judge W. Nealon concluded that Balon had pleaded a sufficiently “concrete” injury for purposes of Article III standing, based on *Spokeo Inc. v. Robins*, 136 S.Ct. 1540 (2016), *In re Google Inc. Cookie Placement*

Consumer Privacy Litig., 806 F.3d 125 (3d Cir. 2015), and Third Circuit decisions applying *Spokeo*. The court denied both Enhanced Recovery’s motion to dismiss and Balon’s motion for remand. As to Balon’s summary judgment motion, the parties contested whether the question her claim raised – whether the letter at issue constituted a false or misleading communication from the perspective of the “least sophisticated consumer” – presented a question of fact for the jury or a question of law. The court concluded that the issue was one of law. Reviewing the undisputed facts in the record, the court held that the challenged letter would be considered a “false representation or deceptive means to collect or attempt to collect any debt” by the “least sophisticated debtor” and granted Balon’s motion.

Clemens v. New York Central Mut. Fire Ins. Co., __ F. Supp. 3d __, 2017 WL 3724236 (M.D. Pa. Aug. 29, 2017) (Attorneys’ Fees) – This case began as an uninsured motorist claim (which was settled for \$25,000) and ended as a bad faith claim (on which a jury awarded \$100,000 in punitive damages). Plaintiff’s counsel then requested **\$1,122,156.43** in attorneys’ fees and interest – an amount the court described as “astounding.” The petition was, as Judge M. Mannion mildly put it, “woefully deficient.” Due to blatant errors in counsel’s computations, the court determined that only \$4,986.58 in interest was permitted, rather than the \$175,630.70 requested. As to the fee request, the court described a number of aspects as “flabbergasting,” “disturbing,” “egregious,” “outrageous” or “beyond shameful” (e.g., one attorney’s reconstruction – for a six-year period – of how much time it took other attorneys, paralegals or IT staff to perform tasks described in the firm’s system by “essentially mak[ing] up how much billable time she thought should be assigned to the task”; requesting a fee enhancement “[c]onsidering the absolutely opprobrious request for interest and fees”). Applying the lodestar method and reviewing “line by line” every entry billed by plaintiff’s counsel, the court ultimately determined that, “at best,” only about 13 percent of the hours billed were allowable. The court denied the request for fees in its entirety, concluding that “counsels’ inappropriate reaching for fees, . . . shock[ed] the conscience of th[e] court” The memorandum’s penultimate sentence: “Further, given

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the conduct of the plaintiff's counsel and the exorbitant request for fees in this case, a copy of this memorandum will be referred to the Disciplinary Board of the Supreme Court of Pennsylvania for their independent determination of whether disciplinary action should be taken... ”

United States v. Coles, ___ F. Supp. 3d ___, 2017 WL 3971090 (M.D. Pa. Sept. 8, 2017) (Motion to suppress [*Miranda*]) – Coles filed motions seeking to suppress evidence from his July 7, 2016 arrest, two subsequent searches, and a custodial interrogation on August 11, 2016. Chief Judge C. Conner denied those motions with respect to (1) Coles's challenge to the constitutionality of a cell phone tracking order; (2) evidence gathered during Coles's July 7, 2016 arrest and subsequent vehicle search; and (3) evidence gathered on July 22 of another person's apartment. In his motion to suppress statements he made during an Aug. 11, 2016 interview, Coles asserted that police officer violated the Fifth Amendment when, knowing that he had invoked his right to counsel while in *Miranda* custody on July 7, they brought him back to the police department, read him his *Miranda* rights and conducted a second interview on Aug. 11. At issue was whether the presumption created in *Edwards v. Arizona*, 451 U.S. 477 (1981) (once a suspect invokes his right to counsel, any subsequent *Miranda* waiver is involuntary until counsel is present or the suspect himself initiates communication, exchanges or conversation), applied or whether Coles had a break in *Miranda* custody to allow the exception in *Maryland v. Shatzer*, 559 U.S. 98 (2010) (14-day break in *Miranda* custody will suffice to release the *Edwards* presumption), to apply. The court concluded that Coles did not experience a break in *Miranda* custody when he was returned to pretrial detention for 35 days between interrogations. Because Coles's Aug. 11 statements were obtained in violation of the Fifth Amendment, the court granted the motion to suppress those statements.

Pacanowski v. Alltran Financial LP, ___ F. Supp. 3d ___, 2017 WL 4151181 (M.D. Pa. Sept. 19, 2017) (Arbitration by non-signatory) – Pacanowski opened a Home Depot credit card account. Citibank later purchased that account and sent revisions to the agreement governing it, one of which included an arbitration provision. Alltran Financial, acting as Citibank's debt collector, sent Pacanowski a letter

attempting to collect a delinquent balance. Pacanowski filed an action alleging that letter violated the Fair Debt Collection Practices Act. Alltran moved to dismiss and compel arbitration or to stay proceeding pending arbitration, based on the arbitration clause in Citibank's card agreement. Magistrate Judge K. Mehalchick denied the motion. Although a valid agreement to arbitrate existed between Pacanowski and Citibank, the court concluded, following *White v. Sunoco Inc.*, No. 16-2808, ___ F.3d ___, 2017 WL 3864616 (3d Cir. Sept. 5, 2017), that the plain language of the card agreement did not provide for non-signatories to initiate arbitration proceedings, even if those entities were “connected with” Citibank. The agreement, moreover, expressly permitted arbitration to be invoked by debt collectors to whom the debt had been assigned – here Alltran was not an assignee. The court also concluded that Alltran could not invoke arbitration as a non-signatory under equitable estoppel or third-party beneficiary theories of South Dakota contract law.

Mifflinburg Telegraph Inc. v. Criswell, ___ F. Supp. 3d ___, 2017 WL 4310187 (M.D. Pa. Sept. 28, 2017) (Sham Affidavit and Rule 56(h)) - Mifflinburg Telegraph filed a complaint against Heidi and Dale Criswell, two former employees, and Heidi's company, Wildcat Publications LLC, alleging violations of Computer Fraud and Abuse Act and the Lanham Act, in addition to a number of state-law claims as a result of Heidi's actions in forming and operating her competing business (actions that included misappropriating Mifflinburg Telegraph's customer lists and data files, taking actions before departing to make it difficult for Mifflinburg Telegraph to service repeat customers and misappropriating a Ricoh commercial printer from Mifflinburg Telegraph for Wildcat's use). Mifflin Telegraph filed motions for partial summary judgment against Heidi and Dale. Judge M. Brann – faced with numerous inconsistencies between Heidi's statement of facts and the record in the case – denied the motion as to Dale and granted in part and denied in part the motion as to Heidi, but deferred final judgment for 30 days to allow both defendants to file a response with respect to specific counts and rulings. One of those rulings was the court's decision to use Rule 56(h) to award Mifflinburg Telegraph all of the attorney fees it requested rather than reduce the award as it had for

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Wildcat. Treating her statement of facts as an affidavit, the court described, “Heidi Criswell’s affidavit falls squarely in the ‘sham affidavit’ category. . . . [H]er affidavit is not in accordance with the other evidence of record, including emails, contracts, billing statements, her resignation letter and even her own deposition testimony. She has been, as the English would say, somewhat economical with the truth. As a sanction, . . . I will instead award the entire amount [of attorneys’ fees] requested.”

WESTERN DISTRICT OF PA OPINIONS

Pearson v. Beard, 2017 WL 4326113 (W.D. Pa. Aug. 31, 2017) (Failure to prosecute / Summary judgment vs Rule 12(b)(6)) – In 2009, Pearson filed a civil rights action alleging, among other things, that defendant prison officials had violated his Eighth and First Amendment rights. After the case was dismissed, Pearson successfully appealed, and a use-of-force and two First Amendment retaliation claims were remanded for further proceedings. After remand, Pearson continued his pattern of not timely responding (if responding at all) to court orders or to motions filed by defendants. He also failed to pay any portion of the district court filing fee. Defendants filed a motion for summary judgment. Magistrate Judge K. Pesto recommended in the alternative that Pearson’s complaint be dismissed for failure to prosecute and that defendants’ motion be granted. As to summary judgment, the court noted that (1) merely filing a grievance does not render all subsequent adverse actions “retaliation” – more must be shown to satisfy the causation element of a retaliation claim; and (2) asserting something in a complaint may suffice for a Rule 12(b)(6) motion but is insufficient for a Rule 56 motion. Summary judgment was proper on the use of force claim because no jury could conclude that the defendant’s punching Pearson three times on his upper arm or shoulder was malicious or sadistic. Judge K. Gibson on Sept. 26, 2017 adopted the recommendation and both dismissed for failure to prosecute and granted defendants’ motion for summary judgment. (2017 WL 4329727).

South Park Ventures LLC v. Jack, 2017 WL 4082490 (W.D. Pa. Aug. 28, 2017) (Transfer under § 1404(a)) – South Park Ventures LLC was a member and 50 percent

interest holder of Water Energy Services, LLC (WES). After a number of transactions involving a dizzying number of different individuals and entities, a receiver was appointed and charged with selling WES as a going concern. Everybody sued everybody, largely in Ohio. SPV sued in Pennsylvania state court three individuals alleging that they breached their fiduciary duties to SPV as officers and directors of WES and for misrepresentation and fraud. Defendants removed the action and sought transfer to the Southern District of Ohio under 28 U.S.C. §1404(a). Magistrate Judge R. Mitchell recommended granting that motion. Factors favoring Ohio included (1) the claims arose in Ohio (that the effect of defendants’ actions was felt in Pennsylvania was irrelevant); (2) the documents were located in Ohio; (3) there was a related federal action in Ohio (plaintiff’s argument – that the Ohio action was filed in anticipation of imminent suit in an unfavorable forum – was rejected as defendants were not invoking the first-to-file rule); and (4) the Ohio judge’s familiarity with the parties and the agreements at issue. Judge N.B. Fisher adopted the recommendation and ordered the case transferred on Sept. 13, 2017 (2017 WL 4023499).

Hair v. Fayette County of Pennsylvania, ___ F. Supp. 3d ___, 2017 WL 4023346 (W.D. Pa. Sept. 13, 2017) (Labor & Employment [Discrimination]) – Hair, a former legal secretary in the county’s Public Defender’s Office, filed claims, among others, of discrimination, hostile work environment and retaliation under the Rehabilitation Act, the ADA and the PHRA, and claims of interference and retaliation under the FMLA. She sought partial summary judgment on her FMLA claims; defendants sought summary judgment on all claims. Judge D. Cercone granted defendants’ motion and denied Hair’s motion. The court concluded that summary judgment in favor of defendants was proper because (1) Hair failed to point to any evidence in the record that either Fayette County or its Public Defender’s Office received federal financial assistance (for Rehabilitation Act claims); (2) there was no evidence supporting Hair’s failure to accommodate claims under the ADA or PHRA (the record in fact showed multiple accommodations, just perhaps not the ones that Hair preferred); (3) there was no evidence that Hair’s coworkers made comments regarding her medical condition (hostile

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work environment claims under the ADA and PHRA); (4) the call-in requirements for notifying her employer of when she was going to use her FMLA leave were in compliance with regulations and did not interfere with her FMLA rights (FMLA interference claim); and (5) to the extent that alleged incidents were actually “adverse actions,” (e.g., a loss of a tangible benefit), there was no evidence to show that those actions were related to an exercise of a protected activity. The court found no evidence that Hair was constructively discharged from her employment. Thus, Hair’s retaliation claims under the ADA, FMLA and PHRA also failed. The court also noted that “the record is rife with evidence of [Hair’s] antagonism toward her coworkers, her complete disregard of office policies, and unprofessional behavior” – i.e., she would not be able to establish pretext even if she had made out a *prima facie* case.

Lopez v. CSX Transp. Inc., __ F. Supp. 3d __, 2017 WL 4063931 (W.D. Pa. Sept. 13, 2017) (Torts) – Lopez was “walking at a steady pace . . . with his head down, hood up, [and] cell phone in hand” listening to music (without earbuds). He never heard the train’s horn or bell. He never looked up at all as he approached the Ferndale Crossing in Cambria County, and he did not notice that cars had stopped. Lopez was severely injured when he was struck by the oncoming train. He asserted negligence claims and sought punitive damages; CSX moved for summary judgment. Judge K. Gibson granted defendant’s motion in part and denied it in part. The motion was denied as to Lopez’s negligent handling and operation claim because the court was unable to determine, as a matter of law, precisely when Lopez was placed in a position of peril and, as a result, could determine neither whether CSX satisfied its duty to attempt to slow or stop the train nor whether CSX could have avoided the accident once Lopez was placed in such a position. Lopez’s punitive damages claim was permitted to proceed, but was limited to the issue of whether the train’s operators had a subjective appreciation that Lopez was in a position of peril and consciously disregarded that risk by failing to attempt to slow or stop the train. The motion was granted as to Lopez’s claims that CSX negligently operated the train by exceeding (by about 1.5 mph) the authorized speed limit; that CSX negligently failed to install adequate pedestrian warnings

at the crossing; that CSX negligently failed to maintain the crossing; and CSX negligently failed to give proper audible warnings.

Seneca Resources Corp. v. Highland Twp., 2017 WL 4171703 (W.D. Pa. Sept. 20, 2017) (Motion to Intervene Post *Town of Chester*) – Seneca Resources Corporation challenged the constitutionality, enforceability and validity of the Home Rule Charter in Highland Township, which prohibited Seneca from creating and operating an injection well within the township. It sought an order striking the entire Home Rule Charter and temporarily and permanently enjoining the township and the board of supervisors (the board) from enforcing it. Defendants admitted allegations that numerous sections of the charter were unconstitutional, invalid and unenforceable. Two entities requested intervention under Rule 24(a) or 24(b), seeking to defend the charter and to assert counterclaims. The parties opposed the motion. Although Magistrate Judge S. Baxter requested that the two entities seeking intervention address their standing, neither did so “at their peril.” Because the Supreme Court in *Town of Chester, New York v. Laroe Estates Inc.*, 137 S. Ct. 1645 (2017) recently held that a litigant seeking to intervene as of right had to meet Article III standing requirements if the litigant wanted to pursue relief not requested by a plaintiff, the court addressed whether either entity had demonstrated standing. Concluding that neither had, the court denied intervention under Rule 24(a), and for the same reason, also denied permissive intervention.

Seneca Resources Corp. v. Highland Twp., 2017 WL 4354710 (W.D. Pa. Sept. 29, 2017) (Civil Rights – Constitutionality of Home Rule Charter barring injection wells) – In its action (see above), Seneca alleged that the Home Rule Charter was preempted by the federal Safe Drinking Water Act and the Pennsylvania Oil and Gas Act; was an impermissible exercise of police power and legislative authority; and violated the Supremacy Clause, the Petition Clause of the First Amendment; as well as Seneca’s rights to both substantive and procedural due process. As noted above, the defendants in this case – Highland Township and its board of supervisors – admitted in their answer that several provisions within the challenged Home Rule

Charter were invalid and enforceable. As a result, Seneca sought judgment on the pleadings. Although defendants actively concurred in that motion, following Third Circuit direction, Magistrate Judge S. Baxter conducted a thorough analysis of each of Seneca's arguments. The court concluded that three sections of the charter were either preempted by federal and state law, illegal exercises of legislative authority, or in violation of the Petition Clause; it did, on the other hand, reject several of Seneca's claims and denied judgment on those (e.g., that one section violated the Supremacy Clause, that the charter's provisions violated the Due Process Clause of the Fifth and Fourteenth Amendments). Because 13 other sections of the charter were inextricably intertwined with the three provisions found to be invalid, the court invalidated those as well.

Potts v. Hartford Life & Accident Ins. Co., ___ F. Supp. 3d ___, 2017 WL 4339675 (W.D. Pa. Sept. 28, 2017) (Labor & Employment [ERISA]) – After she was diagnosed with fibromyalgia and thoracic disc disease, Potts applied for and obtained short-term disability benefits. When those were exhausted, she obtained long-term benefits for the next two years because it was determined that she could not perform the duties of her own occupation (restaurant general manager). At that point – the end of the “own occupation” period under her employee welfare benefit plan – Hartford Life undertook a review of whether she was prevented from performing one or more of the essential duties in “any occupation.” Hartford Life concluded that the answer to that question was no and terminated Potts's long-term disability benefits. After appealing that decision, she sued under ERISA, claiming that Hartford Life breached the terms of the policy by improperly denying benefits based on her medical conditions. Both parties filed motions for summary judgment. After rejecting Potts's argument that Hartford Life had improperly delegated its decision-making authority to Hartford Fire Insurance Co., Judge K. Gibson concluded that Potts's claims were subject to the arbitrary and capricious standard of review. The remainder of the opinion sets forth in considerable detail the reasons why the court rejected each of Potts's many challenges and ultimately determined that Hartford's denial of benefits was not arbitrary and capricious. The court denied Potts's motion and granted Hartford's motion.

OPEN FORUM

By Susan Schwochau

Two Cautionary Tales On Attorneys' Fees Petitions

Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. “In the private sector, ‘billing judgment’ is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's *client* also are not properly billed to one's adversary pursuant to statutory authority.” *Copeland v. Marshall*, 205 U. S. App. D. C. 390, 401, 641 F.2d 880, 891 (1980) (en banc) (emphasis in original).

Hensley v. Eckerhart, 461 U.S. 424, 434 (1983)

[M]embers of the bar are quasi-officers of the court and they are expected to be careful and scrupulously honest in their representations to the court. . . . The courts frequently must rely not only upon the accuracy of the record keeping but upon the intellectual honesty of counsel in the allocation of hours worked and in the measurement of time. Lawyers therefore must exercise care, judgment, and ethical sensitivity in the delicate task of billing time and excluding hours that are unnecessary.

Hall v. Borough of Roselle, 747 F.2d 838, 841-42 (3d Cir. 1984)

These principles were front and center in *Clemens v. New York Central Mut. Fire Ins. Co.*, ___ F. Supp. 3d ___, 2017 WL 3724236 (M.D. Pa. Aug. 29, 2017) (summarized above), and *Young v. Smith*, ___ F. Supp. 3d ___, 2017 WL 3892057 (M.D. Pa. Sept. 6, 2017). Judge Mannion (*Clemens*) and Judge Brann (*Young*) both concluded, in effect, that the authors of the fee petitions before them completely failed to live up to their duty as an officer of the court. Both judges denied the fee petitions in their entirety. Judge Mannion referred a copy of his memorandum to the Disciplinary Board of the Supreme Court of Pennsylvania for its determination of whether disciplinary action should be taken against the attorneys. Judge Brann imposed a \$25,000

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sanction on the author of the petition pursuant to Rule 11 and 28 U.S.C. § 1927. The *Young* case is now on appeal.

Although some may think that Judge Mannion or Judge Brann went too far, I believe that both decisions should be required reading for every attorney.

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

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- **Jeremy A. Mercer**, BlankRome, Pittsburgh
- Prof. Arthur Hellman, Univ. of Pittsburgh School of Law, Pittsburgh
- **Jennifer Menichini**, Greco Law Associates PC, Lackawanna
- **Brett G. Sweitzer**, Defender Association of Philadelphia, Philadelphia

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A Special Invitation to Join the Pennsylvania Bar Association Federal Practice Committee

The Federal Practice Committee shall promote communication and cooperation between lawyers who practice in federal courts and members of the federal judiciary, and shall provide an opportunity to identify and address the differences between the local district court rules and orders of court that affect practice of law in the Eastern, Middle and Western Districts. The committee shall enhance knowledge and professional capabilities of lawyers who practice law in the United States District Courts in Pennsylvania, and shall promote the welfare of attorneys and judges employed by the government of the United States. The committee may review and make recommendations concerning federal legislation and proposed changes to the Federal Rules of Civil Procedure, Criminal Procedure, Federal Rules of Bankruptcy Procedure, and Federal District Court Rules.



Why Join? Benefits of Membership

- Access to a list serv and professional network of other federal practitioners.
- Learn about new court decisions and federal practice rules that affect your clients and work.
- Ask questions and share information with other attorneys and judges who work in the federal courts.
- Make your voice heard on legislation and rules changes that impact your daily work.
- Attend CLE programs that focus on issues that are directly related to your practice area.
- Participate in two committee meetings each year and other sub-committee meetings as scheduled. All meetings are available for attendance by telephone to maximize your time and convenience.
- Develop your leadership skills and share your expertise with others .
- Mentor or be a mentor to other federal practitioners. Be actively engaged in advancing and strengthening the profession.

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