



PENNSYLVANIA BAR ASSOCIATION
**FEDERAL
PRACTICE
COMMITTEE**



Cases, News & Updates

First Quarter 2017 • May 2017

COMMITTEE NEWS

The PBA FPC LinkedIn Group is up and running!

As announced on March 20, we now have another way to engage in online discussions of topics of interest to our committee – the PBA FPC LinkedIn group!

The PBA FPC's LinkedIn group lets you participate in existing discussions of topics that others have raised (*e.g.*, through the Open Forum segment of this newsletter), initiate discussions of topics or questions or just see what others are talking about. Best of all, you can do any of this at your convenience!

You need to be a member of LinkedIn and the FPC in order to join the FPC group. Our group is an “unlisted” group, so you won't find it by searching for it, and you have to ask to join it.

Asking is easy. If you are already a LinkedIn member, just click <https://www.linkedin.com/groups/PBA-Federal-Practice-Committee-8592167/about>.

Once you get to the page, ask to join. If you encounter any problems, please email the Newsletter Subcommittee chair at s.schwochau@comcast.net.

All prior Open Forum questions have already been posted, so if you've wanted to respond to any of those questions, you can do so as soon as your request to join is processed.

Please consider joining today!

The FPC Sponsors a CLE at the PBA's Annual Meeting in Pittsburgh

The FPC is sponsoring a “Hot Topics in Federal Practice” CLE at the PBA's upcoming Annual Meeting in Pittsburgh. A panel of federal judges and practitioners will provide insight on recent developments impacting the practice of law in the federal courts, including: injunctive practice challenging executive actions and appellate challenges; a discussion about the Article III standing doctrine and the

elements of standing necessary to maintain a federal lawsuit in light of the 2016 case of *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016); the impact of the 2016 amendments to the E-Discovery Rules; and other current hot topics important to effective federal practice. Judge D. Michael Fisher, FPC chair, will moderate. Chief Judge Joy Flowers Conti and Magistrate Judge Cynthia Eddy of the Western District, and Kemal Mericli of the Pennsylvania Office of Attorney General will be on the panel, as will FPC Co-Vice Chair Nancy Conrad, and FPC members Kathleen Wilkinson and Anne John. The CLE will be held on May 10 from 2:30 – 4:00 p.m. at the Omni William Penn Hotel in Pittsburgh.

Reminder: Next Committee Meeting May 10

The Executive Council will hold its next quarterly meeting on May 10 at 4:30 p.m. at the Omni William Penn Hotel in Pittsburgh, shortly after the FPC's “Hot Topics in Federal Practice” program at the PBA's Annual Meeting.

All committee members are invited and encouraged to participate in Executive Council meetings as non-voting members. Please mark your calendar and join us if you can. Call-in information will be provided via the PBA Federal Practice Listserv. If you have any items of concern, please email the committee chair, co-vice chairs or subcommittee chairs. Contact information for subcommittee chairs is provided below.

SUBCOMMITTEES

Reports from the Chairs

Legislative Subcommittee –

The first week of March might have been called “Federal Courts Week” at the U.S. House of Representatives. In quick succession, the House debated and passed three bills dealing with federal jurisdiction and procedure. First up was H.R. 985, the Fairness in Class Action Litigation Act (FICALA). As one would expect, the bill deals primarily with procedures for class actions, but it also has a provision



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on removal in diversity cases. Next was H.R. 725, the Innocent Party Protection Act (IPPA). IPPA is identical (except for its name) to the Fraudulent Joinder Prevention Act, which the House passed in the previous Congress. It too deals with removal in diversity cases. Finally, the House approved H.R. 720, the Lawsuit Abuse Reduction Act (LARA). LARA would amend Rule 11 to make sanctions mandatory for violation of the rule and to eliminate the “safe harbor.” All three bills passed on largely party-line votes. Their prospects in the Senate are uncertain.

Professor Arthur Hellman

Outreach and Diversity Subcommittee –

A Federal Practice CLE will be offered at the YLD Summer Summit this year. Judge Mannion (MDPA), Judge Gibson (WDPA) and Judge Kearney (EDPA) will be on the panel, and they will be providing tips from the bench for practicing in federal court. The CLE is Friday, July 28 at 9:30 a.m. FPC and YLD Executive Council member Jennifer Menichini and YLD Executive Council member Colin O’Boyle will also be on the panel. We will be sure to mention the Federal Practice Committee.

Jennifer Menichini

Contact Information

The chairs of the FPC’s six subcommittees welcome new members, and they invite and encourage all FPC members to join one or more of them. 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

Welcome New FPC Members!

The FPC continues to grow! On behalf of the FPC, Chair Hon. D. Michael Fisher sends a warm welcome our newest members:

- Kamron Abedi, Cumberland County
- Tyler Beaston, Lancaster County
- Althia Bennett, Dauphin County, Governor’s Office of the General Counsel
- Joseph Butcher, Allegheny County, Zimmer Kunz PLLC
- Daniel Daugherty, Out of state, IRS Office of Chief Counsel
- Jennifer Karpchuk, Delaware County, Chamberlain Hrdicka
- Theresa Mongiovi, Lancaster County, Brubaker Connaughton Goss & Lucarelli LLC
- Jessica Priselac, Philadelphia County, Duane Morris LLP
- Andrew Scott, Cumberland County

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 below for subcommittee contact information. 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>.



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FEDERAL PRACTICE NEWS

House Passes LARA: Would Amend Rule 11 to Mandate Sanctions on Every Violation

By Thomas G. Wilkinson

Pending federal legislation would amend Rule 11 of the Federal Rules of Civil Procedure to reinstate a mandatory sanction provision and eliminate the “safe harbor” added in 1993. The safe harbor allows parties and their attorneys to avoid Rule 11 sanctions by withdrawing frivolous claims within 21 days after a motion for sanctions is served.

Rather than authorizing federal judges only to impose sanctions to deter future litigation abuses, H.R. 720, the Lawsuit Abuse Reduction Act (LARA) would require judges to impose monetary sanctions in an amount sufficient to reimburse the prevailing party for reasonable attorneys’ fees and litigation costs attributable to the frivolous claim. This would roll back the 1993 amendments designed to grant judges the discretion to determine whether monetary sanctions are warranted in a particular case. H.R. 720 passed the House Judiciary Committee with a vote of 17-6 and the House on March 10 by a vote of 230-188. The Senate counterpart bill, S.237, has been referred to the Judiciary Committee.

The American Bar Association (ABA) has consistently opposed H.R. 720 for three main reasons. First, it would circumvent the Rules Enabling Act established by Congress to assure that amendment of the federal rules occurs only after a comprehensive and balanced review is undertaken by the judiciary. The Rules Enabling Act process involves promulgating procedural rule changes through the advisory and standing committees of the Judicial Conference, publication and distribution of the proposed rule to more than 10,000 individuals and, once approved, submission to the U.S. Supreme Court. If supportive, the Supreme Court transmits the proposed rule or amendment to Congress. The ABA maintains that H.R. 720 should have passed through the Rules Enabling Act process and that the federal judiciary previously expressed support for the 1993 amendments to Rule 11, including the safe harbor provision.

The ABA’s second objection is that there is no empirical evidence that Rule 11 is inadequate and needs to be amended to impose stiffer sanctions on parties and counsel. While proponents of H.R. 720, such a Judiciary Committee Chair Robert W. Goodlatte and the U.S. Chamber of Commerce, maintain that the legislation is needed to stem the growth of frivolous lawsuits, there has been no research or study supporting that conclusion. Instead, the proponents have offered only anecdotal evidence of memorable frivolous lawsuits. Many of these anecdotes relied on arise from cases brought in state courts and therefore would not be affected by the proposed rule change. The ABA contends that the studies that have been conducted, including by the Federal Judicial Center, concluded that almost all of the judges surveyed reported that in their experience groundless civil litigation is a small or at most a moderate problem, and the vast majority said that the problem was the same or smaller than it was when Rule 11 was amended.

The third ABA objection is that there is no evidence that the proposed changes to Rule 11 would deter the filing of non-meritorious lawsuits. Rather, the adoption of LARA would more likely encourage new litigation over sanction motions, thereby increasing, not reducing, court costs and delays. During the first decade of experience under Rule 11, a cottage industry of litigation revolving around Rule 11 claims flooded the legal system and wasted valuable court time and resources. The Judicial Conference of the United States, in a 2004 letter to the then chair of the Judiciary Committee, stated that mandatory application of Rule 11 had “created a significant incentive to file unmeritorious Rule 11 motions by providing a possibility of a monetary penalty; engender[ed] potential conflicts of interest between clients and lawyers; and provide[ed] little incentive ... to abandon or withdraw a pleading or claim – and thereby admit error – that lacked merit.” This position was reiterated in a 2013 letter from the chair of the Advisory Committee on Civil Rules to House Judiciary Committee Ranking Member Rep. John Conyers. That letter warned that the legislation would create a cure far worse than the problem it was meant to solve by reinstating the 1983 version that proved to be contentious and a wasteful diversion of resources for the bench and bar.

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LARA is opposed by many consumer and environmental groups. An earlier version of the Senate bill died in the Senate Judiciary Committee in 2016. According to published reports, had the legislation made it to Pres. Obama's desk in the 114th Congress, "it would most certainly have been vetoed." ABA/BNA Lawyers' Man. on Prof. Conduct 69 (Feb. 8, 2017).

The parallel state court rule is Pennsylvania Rule of Civil Procedure 1023.1 through 1023.4, which was modeled after Rule 11 and was the product of a cooperative effort between the PBA and the state legislature in conjunction with the Supreme Court's Civil Procedural Rules Committee. The state rule provides, in Rule 1023.2, a 28 day safe harbor provision and grants the trial court discretion to award the prevailing party on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion.

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 Julio Fuentes assumed senior status (July 18, 2016), and one created when Judge D. Michael Fisher assumed senior status (Feb. 1, 2017). Recent reports show no nominees.

U.S. District Court, Western District of PA

- There are four vacancies: one created with the passing of Judge Gary Lancaster (April 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 three vacancies: one created when Judge Mary McLaughlin assumed senior status (Nov. 18, 2013), one created when Judge Luis Restrepo was elevated (Jan. 11, 2016), and one created when Judge James Knoll Gardner assumed senior status (April 3, 2017). Recent reports show no nominees.

CASE SUMMARIES

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

THIRD CIRCUIT PRECEDENTIAL OPINIONS

U.S. v. Mateo-Medina, 845 F.3d 546 (3d Cir. 2017) (Sentencing) – Following *United States v. Berry*, 553 F.3d 273 (3d Cir. 2009), the Court of Appeals vacated Mateo-Medina's sentence because the district court plainly erred in considering Mateo-Medina's record of prior arrests that did not lead to conviction. The court also concluded that the error affected the entire sentencing hearing, prejudiced Mateo-Medina and undermined the fairness, integrity and public reputation of judicial proceedings. The court's opinion describes at length reasons why bare arrest records are unreliable for purposes of sentencing.

Karlo v. Pittsburgh Glass Works, LLC, 849 F.3d 61 (3d Cir. 2017) (Labor & Employment [ADEA]) – Plaintiffs, all over 50 years of age, brought a putative ADEA collective action after they were terminated as part of a companywide reduction in force. The district court granted summary judgment as to their disparate impact claim, ruling that plaintiffs' 50-and-older claim was not cognizable under the ADEA and, because of the district court's prior exclusion of plaintiffs' expert's statistics-related testimony, plaintiffs lacked evidence to support that claim. The Court of Appeals held that an ADEA disparate-impact claim may proceed when a plaintiff offers evidence that a specific, facially neutral employment practice caused a significantly disproportionate adverse impact based on age: A claim that a facially neutral policy significantly disfavors employees over 50 years old falls within the plain text of § 623(a) (2), even if that policy might favor younger members of the 40-and-over cohort. The court thus reversed the district court's grant of summary judgment on the ground that subgroup claims are not cognizable. The court also vacated the district court's order excluding the testimony of plaintiffs' statistics expert and remanded for further *Daubert* proceedings.

In re: Horizon Healthcare Servs. Inc. Data Breach Litig., 846 F.3d 625 (3d Cir. 2017) (Statutes [FCRA] /

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Federal Court Jurisdiction) – After two laptops containing unencrypted personal information were stolen from health insurer Horizon Healthcare Services, participants in the company’s insurance plans whose information was on those laptops filed suit on behalf of themselves and others alleging willful and negligent violations of the Fair Credit Reporting Act (FCRA). The district court dismissed the suit under Rule 12(b)(1), concluding that none of the plaintiffs had Article III standing because allegations did not include averments that their stolen information was actually used to plaintiffs’ detriment. Treating the Horizon’s challenge as a facial challenge to standing, the Court of Appeals held that Congress in the FCRA had established that the unauthorized dissemination of personal information by a credit reporting agency causes an injury in and of itself – whether or not the disclosure of that information increased the risk of identity theft or some other future harm. The court rejected Horizon’s argument that *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) compelled a different result, noting that under *Spokeo*, an injury need not be “tangible” in order to be “concrete,” and concluding that Congress acted within its discretion to elevate the disclosure of private information by a credit reporting agency into a concrete injury. As a result, the court vacated the district court’s order of dismissal.

U.S. v. Jackson, 849 F.3d 540 (3d Cir. 2017) (Criminal Law & Procedure) – Jackson challenged the district court’s denial of his pretrial motions to suppress evidence derived from allegedly unlawfully intercepted cell phone calls, as well as certain of its evidentiary rulings. According to Jackson, the federal authorization of the wiretaps was unlawful because it was based on information received from illegal state wiretaps – illegal because the state court did not have jurisdiction over the cellphones being tapped when they were outside of Pennsylvania. After rejecting the government’s argument that Jackson lacked standing to challenge all of the wiretap evidence, the Court of Appeals joined other courts of appeals in adopting the “listening post” theory – under Title III of the Omnibus Crime Control and Safe Streets Act of 1968 either the interception of communications or the communications themselves must have been within the judge’s territorial jurisdiction. Because Pennsylvania’s wiretap statute permits

a state court to authorize the interception of calls outside of Pennsylvania if the “interception” is “anywhere within the Commonwealth,” and because the interceptions at issue in this case were made in Pennsylvania, the court affirmed the district court’s denial of Jackson’s motions to suppress. As to Jackson’s other challenges, the court found no plain error.

McKernan v. Superintendent, Smithfield SCI, 849 F.3d 557 (3d Cir. 2017) (Habeas Corpus) – On the second day of McKernan’s bench trial on murder charges, after the Commonwealth had rested, the trial court judge called the victim’s family and counsel into her robing room and held a lengthy conference about the content of a website that the victim’s family had created that contained criticism of the judge (e.g., that she was a “bleeding heart judge” who “often sympathize[d] with murderers and other violent criminals and [gave] them light sentences”). Among other things, the judge admitted to her belief that she had been slandered by the victim’s family and indicated that she was determined to prove them wrong. McKernan’s counsel described the conference to him and, rather than seeking recusal, advised that they continue with the same judge. The judge found McKernan guilty of first-degree murder. On review of the district court’s denial of McKernan’s § 2254 petition’s claim of ineffective assistance of counsel, the Court of Appeals held that (1) the right to an impartial trial extends to a bench trial, and such right cannot be waived by a defendant, and (2) counsel’s performance in failing to move for recusal of the trial judge fell far below the minimal standards of competence in the profession, and the state court’s failure to recognize this incompetence was an unreasonable application of the *Strickland* factors. The court reversed the decision of the district court and remanded with instructions to grant the petition for habeas corpus unless the Commonwealth decided within 60 days of remand to retry McKernan.

Doe v. Mercy Catholic Med. Ctr., __ F.3d __, 2017 WL 894455 (Mar. 7, 2017) (Statutes [Title IX])– Two years after she was dismissed from its residency program, Doe brought claims of retaliation, *quid pro quo* sexual harassment, and hostile environment under Title IX against a private teaching hospital. She never filed a charge with the EEOC under Title VII. The district court granted Mercy’s Rule 12(b)(6) motion, concluding that (1) Title IX didn’t apply

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to Mercy because it was not an “education program or activity;” (2) even if Title IX applied, Doe couldn’t use Title IX to circumvent Title VII’s administrative requirements; and (3) Doe’s hostile environment claim was untimely. The Court of Appeals vacated in part. Following *O’Connor v. Davis*, 126 F.3d 112 (2d Cir. 1997), the court held that a program is an “education program or activity” if it has “features such that one could reasonably consider its mission to be, at least in part, educational,” which is a mixed question of law and fact. The court also concluded that (1) Doe pleaded sufficient facts to conclude that Mercy’s residency program was an education program or activity under Title IX; (2) *Cannon v. University of Chicago*, 441 U.S. 677 (1979), extended to Doe’s Title IX retaliation, *quid pro quo*, and hostile environment claims and those private causes of action were cognizable; and (3) Title VII’s concurrent applicability did not bar Doe’s private causes of action for retaliation and *quid pro quo* harassment under Title IX and those claims were sufficient to proceed. The court agreed that Doe’s hostile environment claim was untimely and thus it did not address the effect of Title VII on that claim.

Aliments Krispy Kernels, Inc. v. Nichols Farms, __ F.3d __, 2017 WL 1055569 (Mar. 21, 2017) (Arbitration) – Buyer of pistachios sought to enforce an arbitration award it received against a supplier of pistachios; supplier sought to vacate that award on the ground that the parties never agreed to arbitrate. The district court granted the supplier’s petition because no genuine issue of material fact existed as to whether the parties failed to enter into “an express unequivocal agreement” to arbitrate. Buyer challenged that conclusion, urging that the district court (1) used the wrong legal standard, and (2) erred in finding, as a matter of law, that the parties did not enter into an agreement to arbitrate. The Court of Appeals first reiterated that the “express and unequivocal” language found in early opinions could not be used, after *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), as a substantive standard applicable to determining an arbitration agreement’s enforceability as a general matter. Instead, when assessing whether there is a valid agreement to arbitrate between the parties, only ordinary state-law principles of contract law are to be applied. Finding that the district court did not apply the

wrong standard, the court turned to the issue of whether the district court correctly determined that the parties did not enter into an agreement to arbitrate as a matter of New Jersey law. On this issue, the court disagreed with the district court, concluding that issues of material fact existed as to whether the parties agreed to arbitrate. The district court’s judgment was therefore vacated.

Rarick v. Federated Service Ins. Co., __ F.3d __, 2017 WL 1149099 (Mar. 28, 2017) (Federal Court Jurisdiction) – Plaintiffs in the two cases underlying this appeal sought both a judgment declaring that Pennsylvania law required Federated Service to provide them with uninsured (Rarick) or underinsured (Easterday) motorist coverage and damages for breach of contract. The district courts declined jurisdiction over the matters and remanded; Federated Service appealed. The request for both legal relief and a declaratory judgment in the underlying cases raised the issue of what legal standard a district court should apply when addressing whether it may decline jurisdiction. The Court of Appeals considered the three approaches taken by other courts: (1) a bright-line rule following *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), in all mixed-claims cases; (2) an independent claim test, under which courts may decline jurisdiction over the entire matter only if the legal claims are dependent on the declaratory claims; and (3) a “heart of the matter” or “essence of the lawsuit” test under which the court “examines the relationship between the claims, and determines what the ‘essence of the dispute’ concerns” (the approach taken by the district courts). The court held that the independent claim test was the most appropriate, concluding it was superior because it both prevents plaintiffs from evading federal jurisdiction through artful pleading and provides district courts with more flexibility than the bright-line test. Concluding that plaintiffs’ claims in the underlying cases were independent of each other, the court vacated the district courts’ judgments and remanded for a determination whether exceptional circumstances existed under *Colorado River*.

Ramirez v. Vintage Pharmaceuticals LLC, __ F.3d __, 2017 WL 1149502 (Mar. 28, 2017) (Class Action) – The district court remanded to state court for lack of subject matter jurisdiction a complaint filed by 113 birth control

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users in 28 states affected by a packaging error on certain brands of birth control pills. At issue in defendants' appeal was whether plaintiffs in their complaint proposed to try their claims jointly so that the case could be removed under CAFA as a mass action. Plaintiffs urged that their complaint's assertion that "claims have been filed together ... for purposes of case management on a mass tort basis," and their motion for admission to the state court's Mass Tort Program showed an intent to have the claims consolidated for pretrial purposes only. Finding these indicators ambiguous, the Court of Appeals reversed, concluding that the indicators were not sufficiently definite to prevent removal as a mass action. Especially where a state's permissive joinder rules explicitly presume that persons who join as plaintiffs in a single action based upon a common question of fact or law will have their claims tried jointly, where more than 100 plaintiffs file a single complaint containing claims involving common questions of law and fact, a proposal for a joint trial will be presumed unless an explicit and unambiguous disclaimer is included.

James v. Global TelLink Corp., ___ F.3d ___, 2017 WL 1160893 (Mar. 29, 2017) (Arbitration) – Users of defendants' prison phone services could sign up for an account either through defendants' website or through an automated telephone service. Web users had to indicate their assent to defendants' terms of use to open an account; those who opened accounts via telephone did not. The terms of use contained an arbitration agreement and a class-action waiver, stated that using the telephone service constituted acceptance of the terms, and gave a time frame for cancellation if users did not agree to the terms. Users filed a putative class action alleging that the charges for the phone services were unconscionable. The district court denied defendants' motion to compel arbitration with respect to plaintiffs who opened accounts by telephone. The Court of Appeals affirmed because those who opened accounts by telephone (1) never signed anything when they opened their accounts or deposited money (let alone an agreement containing an arbitration provision); (2) were not told they had to take the extra step of assenting to the terms and conditions available by hyperlink (and never visited the site); (3) were never presented with the terms available on the website; and (4) were not told that when they opened

accounts that merely using the service would constitute assent to the terms. As a result, those users did not agree to arbitrate.

EASTERN DISTRICT OF PA OPINIONS

In re: Pharmacy Benefit Managers Antitrust Litig., 2017 WL 275398 (E.D. Pa. Jan. 18, 2017) (Class certification and disputed expert support) – Plaintiffs in this multi-district litigation alleged that companies providing pharmaceutical benefits management services engaged in price-fixing conspiracies that resulted in reducing the amounts reimbursed to independent pharmacies for prescriptions they filled for participants of the drug benefit plans the defendants administered. In an opinion that goes into experts' statistical analyses and assumptions in great detail, Judge J. Jones II considered whether plaintiffs in the lead case had satisfied their burden under Rule 23 to obtain certification of their proposed class, and whether their experts – whose testimony was offered to support the class certification motions – withstood a defendant's *Daubert* challenge. The court granted the defendant's motion to exclude the experts' evidence, concluding, among other things, that the evidence failed to distinguish between legal conduct and illegal conduct, it did not track plaintiffs' different theories of liability and used statistical models that would find damages for class members who had suffered no damage. This doomed the class certification motion (although the court provided its assessment of each applicable requirement). The class certification motions for the lead class and another case were denied, and pending motions to decertify classes in two other cases were granted.

Quality Stone Veneer, Inc. v. Selective Ins. Co. of Am., ___ F. Supp. 3d ___, 2017 WL 345636 (E.D. Pa. Jan. 23, 2017) (Insurance) – Quality Stone Veneer (QSV) contracted with a developer to install stone veneer at a condominium construction project. After work on the project was done, the condominium association sued the developer, claiming it had failed to construct the condominium as required by contract specifications, bylaws, building codes and zoning ordinances. The developer later filed a joinder complaint against QSV for "contribution and/or indemnity breach of warranty/negligence." Selective – QSV's insurer – refused

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to defend, and QSV sought a declaration that Selective had such a duty. Both parties moved for summary judgment. Reviewing Pennsylvania law, Judge L. Stengel concluded that the term “occurrence” in QSV’s insurance policy excluded contractual claims for faulty workmanship and negligence claims that allege foreseeable damages stemming from faulty workmanship. Because all of the association’s claims against the developer and all of the developer’s claims against QSV alleged faulty workmanship rather than faulty products (*i.e.*, that the products were defective or actively malfunctioned), there was no “occurrence” under the policy. Rejecting QSV’s argument relying on its status as a subcontractor rather a developer and its arguments regarding other policy provisions, the court granted Selective’s motion.

In re: Search Warrant No. 16–960–M–01 to Google, ___ F. Supp. 3d ___, 2017 WL 471564 (E.D. Pa. Feb. 3, 2017) (Extraterritorial reach of the SCA) – Google discloses data to the government by having one of its authorized employees in the U.S. access the data through computers located in the U.S. The single user’s data, however, may be stored on servers across the world. In 2016, the court issued two search warrants pursuant to the Stored Communications Act (SCA) that required Google to disclose to FBI agents in Pennsylvania certain electronic data held in the accounts of targets in two separate criminal investigations. Google produced only that information that was within the scope of the warrants that it could confirm was stored on its U.S. servers. Relying on *Matter of Warrant to Search a Certain E-Mail Account Controlled & Maintained by Microsoft Corp.*, 829 F.3d 197 (2d Cir. 2016) (concluding that enforcing the warrant by directing Microsoft to seize the contents of its customer’s communications stored in Ireland would be an unlawful extraterritorial application of the SCA), *rehearing en banc denied*, 2017 WL 362765 (2d Cir. Jan. 24, 2017), Google argued that it was not required to produce electronic records stored outside the U.S. The government moved to compel Google to produce the remainder of the electronic data. Magistrate Judge T. Rueter, relying on language in *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090 (2016), noted that, assuming that the focus of the SCA was user privacy (as the Second Circuit had concluded), the issue for the court was where the conduct

relevant to the statute’s focus occurred. The court concluded that disclosure by Google of the electronic data relevant to the warrants at issue constituted neither a “seizure” nor a “search” of the targets’ data in a foreign country. Instead, the invasions of privacy will occur in the U.S. – the searches of the electronic data disclosed by Google pursuant to the warrants would occur when the FBI reviewed the copies of the requested data in Pennsylvania. Because compelling Google to disclose to the government the information that was the subject of the warrants did not constitute an unlawful extraterritorial application of the SCA, the court granted the government’s motions.

McDaniels v. City of Philadelphia, ___ F. Supp. 3d ___, 2017 WL 590271 (E.D. Pa. Feb. 13, 2017) (Failure to train / Failure to discipline / Evidence) – In 2013, a Philadelphia police officer with a checkered past fatally shot McDaniels, a passenger in a vehicle that crashed after a short chase that commenced when officers stopped the car for a traffic violation. The administrator of McDaniels’s estate filed a § 1983 action against the city, asserting that it failed to train the officer adequately regarding the use of deadly force and to discipline the officer adequately for his prior violations of department policy. The city moved for summary judgment. Judge C. Rufe first rejected the city’s contention that McDaniels could not establish a constitutional violation by the officer because there was a genuine factual dispute regarding whether the officer’s use of force was reasonable under the circumstances. The court also rejected the city’s challenges to plaintiff’s expert testimony, as they went to credibility and weight to be put on that testimony. Contrary to the city’s contentions, a 2015 DOJ report assessing the use of deadly force in the Philadelphia Police Department was not inadmissible hearsay, did not contain expert testimony, and was not a remedial measure barred by F.R.E. 407. The report was instead admissible as a public report under Rule 803(8). As a result, plaintiff offered sufficient competent evidence to create a genuine issue of material fact regarding whether the department failed to train its officers adequately. The court reached the same conclusion with respect to the failure-to-discipline theory. Because the city also failed to establish that it was entitled to summary judgment on the issue of deliberate indifference, and the plaintiff had put forth sufficient evidence to bring the issue

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of causation to the jury, the court denied the city’s motion.

In re Avandia Marketing, Sales Practices and Product Liability Litig., ___ F. Supp. 3d ___, 2017 WL 772866, (E.D. Pa. Feb. 28, 2017) (Diversity jurisdiction / County as real party in interest) – The County of Santa Clara, individually and on behalf of the people of California, filed in a California federal court a sales and marketing suit against GlaxoSmithKline, alleging violations of California’s False Advertising Law in the marketing of Avandia and asserting diversity jurisdiction. That case was transferred to the Eastern District of Pennsylvania as part of the Avandia multi-district litigation. Five years later (after discovery and several rounds of motion practice), the county, seeking to refile the case in state court, moved to dismiss its federal case for lack of subject-matter jurisdiction, claiming that the parties were never completely diverse. A special master issued a report and recommendation that the motion be denied, and the county filed objections. Judge C. Rufe agreed with the special master that motion should be denied. Under the Ninth Circuit decisions relied on, the county – not the State of California (as the county now contended) – was the real party in interest because the relief sought would inure to the benefit of the county. Because, however, the court’s denial of the county’s motion involved a “controlling question of law” on which there was a “substantial ground for difference of opinion,” the appellate resolution of which would “materially advance the ultimate termination of the litigation,” the court certified the matter for interlocutory review and granted the county’s request for a stay pending review by the Third Circuit.

Ellingsworth v. Hartford Fire Insurance Co., 2017 WL 1092341 (E.D. Pa. Mar. 23, 2017) (Gender stereotyping under Title VII) – In addition to ridiculing her directly, Ellingsworth’s (female) supervisor told her co-workers that Ellingsworth “dresses like a dyke” and has a “lesbian tattoo,” forced Ellingsworth to show her tattoo to co-workers and then asked those co-workers whether they thought it was a “lesbian tattoo” and told Ellingsworth’s co-workers (falsely) that Ellingsworth was a lesbian. Asserting that she was constructively discharged in March 2014, Ellingsworth filed a complaint against Hartford, alleging gender discrimination, harassment and retaliation in violation

of Title VII, claiming she was discriminated against and harassed because of the way she dressed, her appearance, style and perceived (by co-workers) sexual orientation. Hartford moved for dismissal, arguing that Title VII does not prohibit discrimination based on sexual orientation and that Ellingsworth’s claims were untimely because her complaint did not provide post-July 2013 dates for acts of alleged harassment. Judge L. Stengel denied the motion. The court rejected both Hartford’s emphasis on sexual orientation and its argument that it could not be liable under Title VII because the supervisor’s “perception” that Ellingsworth was gay was not correct. Ellingsworth alleged gender stereotyping, which is prohibited by Title VII regardless of whether the person subjected to it is actually gay. The court also concluded that Ellingsworth had stated a claim of retaliation. As to Hartford’s timeliness challenge, Judge Stengel noted that a plaintiff properly exhausts administrative remedies by filing an administrative complaint within the applicable time period following the date of the constructive discharge. Because Ellingsworth filed her administrative complaints about 60 days after the date she asserts she was constructively discharged, her claims were timely.

Sourovelis v. City of Philadelphia, ___ F. Supp. 3d ___, 2017 WL 1177101 (E.D. Pa. Mar. 30, 2017) (Federal court jurisdiction / Civil Procedure) – Plaintiffs, owners of real or personal property against which the Philadelphia D.A.’s office commenced civil forfeiture proceedings, filed a putative class action under § 1983 asserting that Philadelphia’s civil forfeiture policies and practices violated the Due Process Clause. Since the case began, the procedures underwent two changes, with the result that three sets of procedures were at issue (past, “interim,” and “current”). Plaintiffs claimed that the changes did not render the current procedures constitutional. State court administrators added in plaintiffs’ second amended complaint moved for dismissal of claims against them under Rules 12(b)(1) and (6); the city moved for the second time for dismissal of a subset of claims. Judge E. Robreno denied the state court administrators’ Rule 12(b)(1) motion, concluding that plaintiffs had standing with respect to all their claims against those administrators, the claims were

ripe, and the claims with respect to the past procedures had not become moot. The court also rejected, given the nature of relief plaintiffs sought, the defendants' argument that federalism and comity principles prevented the court from deciding the case. The court denied the administrators' Rule 12(b)(6) motion, rejecting their contentions that (1) the First Judicial District's procedures provide due process in accordance with the Fourteenth Amendment, and (2) the administrators were not the proper defendants. Judge Robreno denied the city's motion as it was an improper successive motion under Rule 12(g)(2) (prohibiting those filing Rule 12 motions from filing another Rule 12 motion raising a defense or objection that was available, but omitted from the earlier motion).

Schwartz v. Accuratus Corp., 2017 WL 1177171, (E.D. Pa. Mar. 30, 2017) (Duty of care in take-home liability case in New Jersey) – Prior to marrying her husband, Schwartz spent time at his apartment, and after their marriage, moved into that apartment. Schwartz, who suffers a variety of adverse health effects associated with chronic beryllium disease, alleged she was exposed to beryllium when her now husband or his roommate carried it home from work on clothing and/or shoes. The Third Circuit vacated the court's prior dismissal of Schwartz's negligence claim against Accuratus and remanded for further consideration in light of its own ruling and the New Jersey Supreme Court's guidance. That court, in answer to a certified question, stated that there should be no bright line limiting the duty of care to spouses and provided some factors to consider in determining whether there is a duty based on the circumstances of each take-home exposure case. On remand, Judge J. Schmehl applied the New Jersey Supreme Court's guidance and determined that the case allegedly concerned a toxin that was known to travel on clothes to workers' homes, could remain dangerous in the home for some time, and could cause serious damage with only minimal exposure. The court concluded that taken together, the nature of the toxic substance and the relationships involved in the case were sufficient to generate a duty of care. Accuratus' motion to dismiss was therefore denied.

MIDDLE DISTRICT OF PA OPINIONS

U.S. v. Aziz, ___ F. Supp. 3d ___, 2017 WL 118253 (M.D. Pa. Jan. 12, 2017) (Discovery and suppression of FISA-related information) – Charged with conspiracy and attempt to provide material support and resources to ISIL, solicitation to commit a crime of violence, transmitting a communication containing a threat to injure, Aziz moved for notice and disclosure of surveillance under FISA, and to suppress the fruits of such surveillance or any other collection conducted pursuant to FISA. Chief Judge C. Conner denied the motion. Aziz was not entitled to discovery of that material or to a *Franks* hearing because the court's *in camera* and *ex parte* review of government's application and its supporting materials did not reveal (1) anything suggesting that disclosure was necessary for an accurate determination of the legality of the surveillance or search or (2) a material misstatement or omission. The court also found no constitutional deficiency in FISA's notice and disclosure provisions. As to Aziz's assertions that the government may have failed to comply with FISA in application for or execution of the surveillance and search orders in this case, Judge Conner, applying *de novo* review of the FISC's probable cause determination, found ample probable cause to support the FISC's orders. The court also concluded that the FISA record was free of procedural defects requiring suppression.

Fassett v. Sears Holdings Corp., ___ F.R.D. ___, 2017 WL 386646 (M.D. Pa. Jan. 27, 2017) (Proportionality under amended Rule 26) – Fassett was severely injured when, hearing sputtering sounds from his lawnmower, he attempted to relieve the pressure in its fuel tank by loosening the gas cap. Gasoline sprayed from the machine onto his body, igniting in flames. Alleging design defect, Fassett asserted negligence and strict liability claims, among others. Fassett moved for orders to compel discovery from the lawnmower's manufacturer and its gas cap manufacturer, the parties disagreeing about the extent to which material related to gas cap or lawnmower designs other than those involved in the Fassett's accident were discoverable. Applying amended Rule 26's proportionality language, Judge M. Brann concluded that material corresponding to

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alternative designs or components that exhibit significant similarities to the design or component at issue should be discoverable in the greatest quantities and for the most varied purposes. Material on alternative designs or components that share less in common with the contested design or component, however, should be incrementally less discoverable — and for more limited purposes — as those similarities diminish. With this guidepost in mind, Judge Brann granted Fassett’s motions in part and denied them in part.

Silver v. Medtronic Inc., __ F. Supp. 3d __, 2017 WL 676015 (M.D. Pa. Feb. 21, 2017) (Preemption) – After the programmable drug infusion system implanted in his abdomen malfunctioned, Silver filed suit against its manufacturer, alleging manufacturing defect, failure to warn, negligence, breach of express warranty, breach of implied warranties, negligent misrepresentation and violation of Pennsylvania’s Unfair Trade Practices and Consumer Protection Law. Medtronic moved to dismiss on preemption and other grounds. Judge J. Jones III rejected Medtronic’s argument that the Medical Device Amendments of 1976 expressly preempted Silver’s claims, concluding that those claims were premised on Medtronic violating federal law in manufacturing his device, *i.e.*, the standards Silver sought to enforce were not different from or in addition to federal law. The “Current Good Manufacturing Practices” violations that Silver relied on qualified as “federal regulations” from which a parallel state claim could be made. The court also rejected Medtronic’s implied preemption argument because Silver’s claims arose by virtue of FDA violations that allegedly represented failures of parallel state common law duties. The court ultimately dismissed (1) Silver’s implied warranty claim, accepting that this claim was barred under Pennsylvania law; and (2) his negligent misrepresentation and Pennsylvania’s Unfair Trade Practices and Consumer Protection Law claims because they inadequately pleaded.

Malibu Media, LLC v. Doe, __ F. Supp. 3d __, 2017 WL 839471 (M.D. Pa. Mar. 3, 2017) (Sham lawsuit exception to *Noerr-Pennington* immunity) – Producer and distributor of adult pornographic videos filed a copyright infringement claim against “John Doe,” asserting that he downloaded, copied and redistributed Malibu’s copyrighted works

without authorization. Doe filed counterclaims and third-party claims against Malibu, its owners and its attorney, asserting that Malibu’s suit against him was the product of fraudulent, deceptive and racketeering conduct. In particular, Doe alleged that Malibu knowingly held itself out as a provider of free adult video content and voluntarily partnered with third-party sites encouraging users to share that content. It then developed a “for-profit business” of bringing infringement claims against those it misled into believing its content was free. Malibu and the third-party-defendants moved to dismiss Doe’s claims. Chief Judge C. Conner rejected Doe’s argument that Malibu’s suit against him and its series of lawsuits (77 in the Middle District alone) against others triggered the sham lawsuit exception, concluding that Doe’s allegations did not support the conclusion that Malibu’s suits were objectively baseless. Even if they were not barred by *Noerr-Pennington*, Doe’s claims for common law fraud, violation of Pennsylvania’s Unfair Trade Practices and Consumer Protection Law, and violation of RICO were insufficiently pleaded. As a result, the court granted the motions to dismiss.

Pennsylvania Dep’t of Human Servs. v. U.S. Dep’t of Health & Human Servs., __ F. Supp. 3d __, 2017 WL 959172 (M.D. Pa. Mar. 13, 2017) (Administrative Law) – The U.S. Department of Health and Human Services Departmental Appeals Board sustained the Centers for Medicare & Medicaid Services’ (CMS) disallowance of over \$3 million in Medicaid reimbursement claimed by the Pennsylvania Department of Human Services (DHS). The disallowance decision was based in part on the CMS’ 1994 “State Medicaid Director Letter” that stated that provider training was not a reimbursable administrative cost. The DHS appealed, and the parties cross-moved for summary judgment. Chief Judge C. Conner first ruled that the DHS’ “Exhibit A” to its reply brief would be excluded because the court was limited to the administrative record, of which Exhibit A was not a part. The court concluded that, although the 1994 letter was not entitled to *Chevron* deference (because it was a statement of policy without the force of law), it was entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Judge Conner granted defendants’ motion for summary judgment, ruling that (1) the agency’s application of the 1994 letter did not work an

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arbitrary and capricious result; (2) the Appeals Board did not abuse its discretion in denying the DHS' procedurally deficient discovery request; and (3) the Appeals Board's disallowance calculation was based on substantial evidence.

WESTERN DISTRICT OF PA OPINIONS

United States v. McMillan, __ F. Supp. 3d __, 2017 WL 44862 (W.D. Pa. Jan. 4, 2017) (Custodial interrogation during a stop) – Based on seeing a gun protruding from under the driver's seat when they looked into a parked car, officers stopped McMillan shortly after he drove the car away, and, after asking him to exit the car and handcuffing him, found the gun. After determining he had no permit to carry a concealed weapon, the officers arrested McMillan and, upon another search of the rented car, found 24 stamp bags of heroin. Charged with firearm and drug offenses, McMillan sought to suppress the gun and the heroin, as well as his statement to police during their encounter that he did not have a concealed weapon permit. Judge M. Hornak granted the motion in part and denied it in part. The gun would not be suppressed because there was no Fourth Amendment violation. The heroin would not be suppressed because, despite the search not being a proper search incident to arrest, the government showed that the heroin would have been inevitably discovered during the inventory search conducted when the rental car was towed. McMillan's statement that he did not have a gun permit would be suppressed because though not yet arrested when asked about having a permit, McMillan was in custody and had not, prior to the question being posed, been given *Miranda* warnings. The fact that he did not have a permit, however, would not be suppressed because the "independent source" doctrine applied: officers had confirmed McMillan's lack of a permit using law enforcement computer databases.

United States v. Lynch, __ F. Supp. 3d __, 2017 WL 36989 (W.D. Pa. Jan. 4, 2017) (Motion for judgment of acquittal or new trial) – Found guilty of 16 counts of willful failure to pay over withheld employment taxes due for several entities that make up the Iceoplex, tax attorney Lynch sought judgment of acquittal or, in the alternative, a new trial, arguing, among other things, that evidence was insufficient to show that he "willfully" failed to pay the taxes and that he was not a "person" under the applicable statute. He also

challenged numerous trial and pre-trial rulings in support of his contention that he was entitled to a new trial. Judge A. Schwab denied the motion for judgment of acquittal, concluding that the jury reasonably decided that Lynch's failure to pay the taxes was not indicative of good faith to pay what was owed and that, instead, his conduct showed an intent to willfully avoid paying as much of the amount owed as possible. Evidence was also more than sufficient to show that Lynch was the person responsible to collect, account for and pay over the employment taxes for the Iceoplex entities. The court also rejected Lynch's numerous challenges to pre-trial rulings and trial rulings (*e.g.*, Lynch's argument that the court's imposition of trial time limits violated his rights to due process and to confront witnesses and receive effective assistance of counsel [even though he used only 6.5 hours of the 20 hours he was permitted], and his argument that all of the court's adverse pre-trial and trial rulings evidenced judicial bias). Lynch's motion for a new trial was therefore also denied.

Wehrenberg v. Metropolitan Prop. & Casualty Ins. Co., __ F. Supp. 3d __, 2017 WL 90380 (W.D. Pa. Jan. 10, 2017) (Insurance) – Wehrenberg leased a house to a contractor for a period of five years, giving the tenant the option of buying the house if he paid each month's rent directly to the mortgage company. The tenant gutted the first floor of the property between late 2011 and mid-2012 in an effort to fix pre-existing structural problems. Wehrenberg discovered this in June 2012, and he told his tenant to get the house back together ASAP. About six months later, however, Wehrenberg discovered even more of the house had been gutted. Wehrenberg then filed a claim for the alleged vandalism with Metropolitan. Metropolitan said it would not cover the claim and never made an offer of settlement under the policy. Wehrenberg sued, claiming breach of contract and bad faith denial of coverage. Judge M. Hornak granted Metropolitan's motion for summary judgment, concluding that Wehrenberg's loss was not "sudden and accidental," and even if it were, it expressly fell under the policy's exclusion of losses caused by workmanship, repair, construction, renovation or remodeling. Wehrenberg's bad faith claim failed because he did not cite to anything in the record to support that claim.

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Evancho v. Pine-Richland Sch. Dist., __ F. Supp. 3d __, 2017 WL 770619 (W.D. Pa. Feb. 27, 2017) (Bathroom policy under Equal Protection Clause and Title IX) – Although it had allowed transgender students to use the bathroom of their choice for several years, in late 2016 the school board adopted a resolution under which all students were required to use either unisex bathrooms or the bathrooms of their “biological sex” – which was to be determined by the presence of a penis or a vagina (*e.g.*, an individual who lost his penis in an accident would not be a “boy”). Three transgender high-school seniors challenged the resolution as violating Title IX and the Equal Protection Clause and sought a preliminary injunction against its enforcement. It was undisputed that in all respects, the plaintiffs had — at least for their high school years — lived every facet of their in-school and out-of-school lives consistently with their respective gender identities rather than their “assigned sexes,” including — prior to the resolution’s adoption — the use of school restrooms. In an opinion that details the parties’ arguments and the evidence supporting those arguments (and lack thereof), Judge M. Hornak concluded that under the intermediate scrutiny standard, the plaintiffs had established a reasonable likelihood of success on their Equal Protection claim: The district had not demonstrated that there was an exceedingly persuasive justification for applying the resolution to common restroom use by the plaintiffs that was substantially related to an important government interest. The court found that there was an insufficient record of evidence of any actual threat to any legitimate privacy interests of any student by the plaintiffs’ use of restrooms consistent with their gender identity or that the set-up of the high school’s restrooms failed to fully protect the privacy interests of any and every student. As to the Title IX claim, the court concluded that plaintiffs had demonstrated a reasonable likelihood of showing that Title IX’s prohibition of sex discrimination includes discrimination as to transgender individuals based on their transgender status and gender identity. Judge Hornak could not conclude, however, that plaintiffs had a reasonable likelihood of success on the claim given the current “clouded” state of the law surrounding Title IX’s regulation dealing with bathroom use.

Smalis v. Huntington Bank, __B.R. __, 2017 WL 818503 (W.D. Pa. Mar. 1, 2017) (Rule 60) – In 2015, Smalis filed suit against mortgage lenders asserting claims with respect to the foreclosure of a piece of property that were nearly identical to the claims in a suit he and others had filed 10 years before. In a consent order filed in the earlier action, plaintiffs released claims they had or may have had against the mortgage lenders and the assignee of the property’s mortgage. Defendants moved to dismiss the latest suit; Smalis sought to vacate the consent order. The bankruptcy court denied Smalis’ Rule 60(b) motion and granted defendants’ motion to dismiss on claim preclusion grounds. Judge M. Hornak affirmed. The court concluded that 10 years is too long to wait to seek to vacate the consent order under Rules 60(b)(1),(2),(3) and (6), and Smalis’s contentions that he did not have notice of the consent order and that the attorney signing the order on his behalf did not have authority to do so had to be rejected given no showing that the bankruptcy court’s contrary findings were erroneous. Because the bankruptcy court had jurisdiction over the earlier action and had the power to enter consent orders, the consent order could not be vacated under Rule 60(b)(4). The court also ruled that the bankruptcy court properly held that the consent order, in conjunction with the doctrine of claim preclusion, prohibited Smalis from relitigating causes of action regarding the property.

Westport Ins. Corp. v. Hippo Fleming & Pertile Law Offices, __ F.R.D. __, 2017 WL 922150 (W.D. Pa. Mar. 7, 2017) (Rules 15 & 16 / Informal discovery requests) – In consolidated declaratory judgment actions involving a coverage dispute, Hippo asked the court to compel production of Westport’s underwriting manual and the underwriting file relating to Hippo, as well as the personnel files of three Westport employees identified as having worked on the Hippo coverage file. Westport sought leave to file an amended complaint adding several claims one day after the deadline the court set for amended pleadings. Judge K. Gibson granted Hippo’s motions as to the underwriting manual and file because, despite Hippo not asserting underwriting claims, those materials could be relevant to its bad faith claim (and to claims Westport sought to add). The court rejected, given the parties’ course of discovery conduct, Westport’s argument that Hippo’s

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request for personnel files should be denied because Hippo only requested those files in an email (rather than in a formal discovery request). It denied Hippo's motion as to the personnel files, however, because Hippo had not met the heightened relevancy standard for those files. The court granted Westport's motion for leave to file an amended complaint, concluding that (1) the minor delay and Westport's immediate correction of its "ministerial" error satisfied the "good cause" standard of Rule 16; and (2) a one-day delay and the possibility that additional claims would complicate ongoing settlement negotiations were insufficient reasons to deny leave to amend under Rule 15.

United States v. Wright, 2017 WL 1179006 (W.D. Pa. Mar. 30, 2017) (Double Jeopardy and court's discretion regarding third trial) – Wright was charged with one count of possession of a firearm by a convicted felon. He was tried twice, with each trial ending in mistrial being declared due to the different juries being deadlocked. After the second mistrial, the government noticed its intent to retry Wright for a third time, prompting Judge C. Bissoon to order the parties to "file cross-briefs stating their position regarding whether the court, through an exercise of its inherent authority, should prohibit or permit a second re-trial in this case." In the absence of Third Circuit guidance, Judge Bissoon turned to decisions of other federal and state courts. Although re-trial was not prohibited by the Double Jeopardy Clause, the court concluded that it had the inherent authority to dismiss, under some circumstances, an indictment following multiple mistrials. Examining seven factors identified by other courts to determine whether exercise of that power was appropriate in this case, Judge Bissoon ultimately concluded that five factors weighed in favor of dismissal. The prior trials were "virtual duplicates of each other," the government had no new evidence, and the prosecution in each trial diligently and professionally presented the government's case before the jury. Although the charged crime was serious, the public's concern in the effective and definitive conclusion of criminal prosecutions and the prejudice to the defendant also weighed in favor

of dismissal. The court denied the government's request to retry Wright and dismissed the indictment with prejudice pursuant to its inherent authority.

Pennsylvania Gen. Energy Co., LLC v. Grant Twp., 2017 WL 1215444 (W.D. Pa. Mar. 31, 2017) (Validity of township ordinance under U.S. Constitution) – PGE intended to inject fracking waste fluids into a deep gas well in Grant Township; the township responded by adopting a "Community Bill of Rights Ordinance" that prohibited any corporation from "engag[ing] in the depositing of waste from oil and gas extraction" and that invalidated any "permit, license, privilege, charter, or other authority issued by any state or federal entity which would violate [this prohibition] or any rights secured by [the Ordinance], the Pennsylvania Constitution, the United States Constitution, or other laws." PGE filed suit challenging the ordinance, claiming, among other things, that it violated the Supremacy Clause, Equal Protection Clause, Petition Clause, Contract Clause, and both the substantive and procedural components of the Due Process Clause. The township filed a counterclaim, brought under § 1983, asserting that in bringing its suit, PGE had violated the township's constitutional right to "local community self-government." Reviewing the parties' motions for summary judgment, Magistrate Judge S. Paradise Baxter first denied the township's motion for summary judgment on its counterclaim and granted PGE's motion on that claim because PGE is not a state actor. Turning to PGE's motion on its federal constitutional claims, the court rejected the township's arguments that those claims were moot and that PGE could not establish causation and ultimately granted PGE's motion in part and denied it in part. Summary judgment was granted as to PGE's Equal Protection claim, its Petition Clause claim, and its substantive due process claim. Summary judgment was denied as to PGE's Supremacy Clause claim, its Contract Clause claim, and its procedural due process claim.

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OPEN FORUM

Mr. Wilkinson's article on the LARA is the source for this issue's Open Forum questions:

Given your experiences, do you think the proposed amendments to Rule 11 will cause the new rule to be used more often as a tactical weapon?

In light of your experiences, will those amendments work to reduce frivolous claims?

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

Thank You

The chair of the FPC Newsletter Subcommittee extends a sincere thank you to the following Federal Practice Committee members for their contributions to this edition of the PBA Federal Practice Committee newsletter:

- Hon. D. Michael Fisher, U.S. Court of Appeals Third Circuit, Pittsburgh
- Philip Gelso, Law Offices of Philip Gelso, Kingston
- Melinda Ghilardi, Federal Public Defenders Office, Scranton
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