Impact of the 2012—2013 Term of the United States Supreme Court on Federal Practice

The Federal Practice Committee presented one of the feature programs at the 2014 Mid-Year Meeting at Frenchman’s Reef & Morning Star Marriott Beach Resort in St. Thomas, U.S. Virgin Islands.

A panel of judges from the 3rd Circuit and the three district courts and practitioners discussed the impact of the 2012-13 term of the Supreme Court of the United States on federal practice. The program covered a number of important decisions handed down this past term by the Supreme Court. The panel was moderated by Hon. D. Michael Fisher, U.S. Court of Appeals for the Third Circuit, and Chair of the PBA Federal Practice Committee.

Panelists included:
Nancy Conrad, Esq., White and Williams, L.L.P., Vice Chair, PBA Federal Practice Committee
Hon. Christopher C. Conner, Chief Judge, U.S. District Court for the Middle District of Pa.
Hon. Theodore A. McKee, Chief Judge, U.S. Court of Appeals for the Third Circuit
Kathryn Lease Simpson, Esq., Mette, Evans and Woodside

Do you have ideas for a CLE program in your area?
Let the Chair know if you would like us to host a local CLE program in your area, either independently or jointly with your local bar. We are prepared to present our “Tips and Traps” program and are exploring other program topics. The committee is interested in providing educational programs wherever interest exists.

On Pages 2-4
Summaries of the most interesting federal practice precedential opinions issued by the United States Court of Appeals for the Third Circuit from October through December, 2013.
Criminal Cases

The court’s opinion in United States v. Ward, 732 F.3d 175 (October 15, 2013), addressed, among other sentencing-related questions, whether a district court errs by requiring that a defendant be sworn before delivering his allocution. The case was before the court for a second time, the court having previously remanded for resentencing. At the resentencing hearing, the district court judge asked whether the defendant wanted to make a statement. When the defendant responded that he did, the district court judge required that he first be sworn, a requirement that was the judge’s usual practice. The defendant gave his statement; there was no cross-examination. The district court imposed a sentence substantially similar to the sentence that was previously imposed. Examining the history of the right of allocution and the language of, and the policies underlying, Federal Rule of Criminal Procedure 32, the court concluded that the defendant did not have a right to an unsworn allocution, and declined to vacate the sentence.

In United States v. Peppers, 302 F.3d 120 (3d Cir. 2002), the Court of Appeals presented a framework that included fourteen questions for a trial court to ask a defendant in order to assure the court that the defendant’s decision to proceed pro se in a criminal prosecution is knowing, intelligent, and voluntary.

United States v. Manuel, 732 F.3d 283 (October 17, 2013), addressed the question whether Peppers also set forth the inquiry required in revocation hearings. After being released from prison, Manuel repeatedly violated the conditions of his supervised release. At a parole revocation hearing, Manuel informed the District Court that he wished to proceed pro se. The District Court engaged in a colloquy with Manuel, during which the Court inquired into Manuel’s educational background, warned Manuel of the dangers in representing himself, and asked several questions about the reason for Manuel’s desire to proceed pro se. Afterward, it granted Manuel’s request. At an adjourned revocation hearing, at which Manuel presented witness testimony, the District Court revoked Manuel’s supervised release and sentenced him to two consecutive sixteen-month terms of imprisonment. On appeal, Manuel argued that the District Court’s colloquy was inadequate, and therefore his waiver of the right to counsel was ineffective.

After noting that there is no constitutional right to representation by counsel at a parole revocation hearing, the Court of Appeals highlighted the due process concerns underlying Federal Rule of Criminal Procedure 32.1. Those concerns were addressed if the defendant knowingly and voluntarily waived representation by counsel. Following other courts of appeal, the Court of Appeals thus held that, in the context of a hearing regarding the revocation of supervised release, the appropriate test is whether the totality of the circumstances demonstrates that the defendant knowingly and voluntarily waived representation by counsel. Based on the record, the Court of Appeals concluded that this test was satisfied, and it affirmed.

Other criminal cases:

USA v. Fish, 731 F.3d 277 (October 1, 2013) (DNJ) (Sophisticated money laundering enhancement; standard of review)

USA v. Tyler, 732 F.3d 241 (October 3, 2013) (MDPA) (scope of witness tampering statute in light of recent Supreme Court decisions)

USA v. Blair, 734 F.3d 218 (November 4, 2013) (WDPA) (Armed Career Criminal Act)

We join numerous COAs and hold that the date of a prior conviction is susceptible to DC review under Shepard and Taylor and is not governed by Apprendi. The recent decisions in Alleyne and Descamps do not alter this conclusion.

USA v. Ottaviano, No. 11-4553, 2013 U.S. App. LEXIS 25602 (December 24, 2013) (DNJ) (Judicial questioning of witness)
Civil Cases
Federal Rule of Civil Procedure 23(f) states that “A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered.” Under Eastman v. First Data Corp., 736 F.3d 675 (December 4, 2013), in the absence of a timely-filed motion to reconsider, a petition that is filed more than 14 days after a class-certification order is entered is untimely and requires dismissal.

In Eastman, the plaintiffs sought to appeal the district court’s denial of their motion to certify a class, but filed their petition three days late. They had not previously filed any motion to reconsider the class certification denial. The Court of Appeals rejected plaintiffs’ argument that their petition should be permitted based on excusable neglect, given their mistaken understanding that Federal Rule of Civil Procedure 6(d) gave them an additional three days. The Court also rejected plaintiffs’ argument that the Court should grant permission to file out of time, noting that Federal Rule of Appellate Procedure 26(b)(1) precluded extensions with respect to petitions for permission to appeal. As a result, the Court of Appeals dismissed the petition.

At issue in Kisano Trade & Invest Ltd. v. Dev Lemster, 737 F.3d 869. (December 12, 2013), was whether the District Court abused its discretion in dismissing the case on forum non conveniens grounds in favor of plaintiffs litigating their claims in Israel. Relying on a Second Circuit decision, plaintiffs asserted that given a treaty between the U.S. and Israel, the District Court erred in not according the same deference to the foreign plaintiffs’ choice of forum as would be accorded to a domestic plaintiff. The Court of Appeals, looking to more recent Second Circuit decisions, rejected the plaintiffs’ argument, noting that lesser deference is given to a foreign plaintiff’s choice of a U.S. forum because it cannot be as readily assumed that the U.S. is the more convenient forum. The Court of Appeals ultimately affirmed, rejecting as well the plaintiffs’ arguments regarding the District Court’s balancing of private and public interest factors.

Other civil cases:

Taveras v. United States Attorney General, 731 F.3d 281 (October 1, 2013) (BIA) (Waiver of Inadmissibility) A grant of cancellation of removal pursuant to § 240(A) has no bearing on whether the conviction involved in that case can be considered in his request for adjustment of status and a § 212 (h) waiver of inadmissibility in a second removal proceeding pursuant to § 212(h).

In re Pendleton, 732 F.3d 280 (October 3, 2013) (DNJ, EDPA, & WDPA) (Certificate of Appealability/ Criminal Law & Procedure) Petitioners may file successive habeas petitions under 28 USC § 2244(b)(3)(A) because they have made a prima facie showing that Miller v. Alabama is retroactive to cases on collateral review.

Simon v. FIA Card Services, NA, 732 F.3d 259 (October 7, 2013) (DNJ) (Fair Debt Collection Practices Act / Bankruptcy) DC properly held that § 1692e(5) and (13) claims should be dismissed for alleged violations of Rule 45 and BR 9016. H2: DC properly dismissed § 1692e (11) claims because the mini-Miranda requirement of the FDCPA conflicts with the automatic stay provision of the Code.

H3: DC erred in dismissing § 1692e(5) and (13) claims for allegedly violating Rule 45 and BR 9016 by failing to serve subpoenas directly on the individuals and failing to include tax of Rule 45(c)-(d).

Delaware Coalition for Open Gov’t, Inc. v. Strine, 733 F.3d 510 (October 23, 2013) (DDEL) (First Amendment (Open Courts))

American Civil Liberties Union v. FBI, 733 F.3d 526 (October 23, 2013) (DNJ) (FOIA) FBI satisfied its burden under FOIA Exemption 7A with respect to all withheld information regarding law enforcement efforts to profile prospective terrorists.
Other civil cases (continued)

C.G. v. Pennsylvania Dep’t of Education, 734 F.3d 229 (November 5, 2013) (MDPA) (IDEA/ADA/RA)
DC did not err when it held, following a bench trial, that P’s failed to prove that Pennsylvania formula for funding special education by assuming that 16% of children in each district were disabled. Disparate impact is not enough under Alexander.

In Re: KB Toys Inc., 736 F.3d 247 (November 15, 2013) (DDEL) (11 USC § 502) A trade claim that is subject to disallowance under § 502(d) (as a preference, for example) in the hands of the original claimant is disallowable in the hands of a transferee. Transferor was not entitled to a good faith defense under § 550(b) because it bought claims of the estate, not property of the estate.

Rahman v. Kid Brands, Inc., 736 F.3d 237 (November 15, 2013) (DNJ) (Scienter pleading requirements under PSLRA)

In Re: Nortel Networks, Inc., 737 F.3d 265 (December 6, 2013) (DDEL) (Bankruptcy: whether parties agreed to allocation of escrowed funds by arbitration)


Addie v. Kjaer, 737 F.3d 854 (December 16, 2013) (DVI) (Gist-of-the-Action doctrine)

Friedman’s Liquidating Trust v. Roth Staffing Cos. LP (In re Friedman’s Inc.), No. 13-1712, 2013 U.S. App. LEXIS 25605 (December 24, 2013) (DDEL) (We hold that where “an otherwise unavoidable transfer” is made after the filing of a bankruptcy petition, it does not affect the new value defense.)

George v. Rehiel, No. 11-4292, 2013 U.S. App. LEXIS 25604 (December 24, 2013) (EDPA) (Whether TSA and FBI agents entitled to qualified immunity for actions taken at airport checkpoint upon finding Arabic flashcards on traveler)


U.S. District Court, Eastern District of Pennsylvania
Judges Nitza Quinones, Felipe Restrepo and Jeffrey Schmehl were recently confirmed, while 5 additional vacancies exist by virtue of Judges Michael Baylson, Curtis Joyner, Eduardo Robreno, Stewart Dalzell and Mary McLaughlin assuming Senior Status. The nominations of Judge Edward Smith and Gerald McHugh are pending before the U.S. Senate.

U.S. District Court Western District Pennsylvania
There are three vacancies as a result of the passing of Hon. Gary Lancaster, the resignation of Hon. Sean McLaughlin and Hon. Terry McVerry assuming Senior Status.

United States Court of Appeals for the Third Circuit
Cheryl Ann Krause, a partner in the Philadelphia office of Dechert LLP has been nominated to fill the vacancy created by Judge Sloviter taking Senior Status. A vacancy still exists as the result of Judge Anthony Scirica assuming Senior Status.

RESOURCES

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