U.S. Supreme Court 2013-14 Term: Review the Top Cases and Preview the Top Cases to Be Argued in 2014

The PBA Federal Practice Committee provided a successful CLE program at the PBI Center in Pittsburgh on August 26, 2014. The program reviewed cases from the 2013 term that addressed free speech and religion; the Fourth Amendment; civil rights; federalism and separation of powers; federal courts and civil procedure; patent and copyright law; bankruptcy; and criminal law and trial rights. Highlights of some of the more interesting cases that will be argued during the 2014 term were also provided to the more than 60 people attending this program. Participants were able to earn 2 substantive CLE credits.

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.

Program faculty included: Hon. D. Michael Fisher, U.S. Court of Appeals for the Third Circuit, Pittsburgh; Hon. Maureen P. Kelly, U.S. District Court for the Western District of PA, Pittsburgh; Dean William M. Carter, Jr., University of Pittsburgh School of Law, Pittsburgh; Robert L. Byer, Esq., Duane Morris, LLP, Pittsburgh; and Dean Kenneth G. Gormley, Duquesne University School of Law, Pittsburgh.

Seeking Volunteers

The PBA Federal Practice Committee, Local Rules Subcommittee, is seeking volunteers to consider whether the PBA should draft comments in response to the following:

The Judicial Conference Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules on August 15, 2014 proposed amendments to their respective rules and forms, and requested that the proposals be circulated to the bench, bar, and public for comment through February 17, 2015. Hearings will be held on the proposed amendments between October and February. Information on the proposed amendments is here: http://1.usa.gov/1ksGwez

If interested, please contact PBA Committee staff liaison Susan Etter at susan.etter@pabar.org.
Summaries of the most interesting federal practice precedential opinions issued by the United States Court of Appeals for the Third Circuit and the Middle District of PA from July through September, 2014.

**Third Circuit Precedential Opinions**
**July – September 2014**

**Constitution Party of Pennsylvania v. Aichele**, 757 F.3d 347 (3d Cir. 2014) (Standing/Civil Rights-Voting) – District court’s dismissal on jurisdictional grounds was reversed because defendants’ challenge to plaintiffs’ standing to contest Pennsylvania’s ballot access policies was a facial attack rather than a factual attack, and the district court therefore applied an improper standard.

**U.S. v. Flores-Mejia**, 759 F.3d 253 (3d Cir. 2014) (Sentencing) – The Court of Appeals imposed a new rule going forward that governs situations in which a party has an objection based upon a procedural error in sentencing but, after that error has become evident, has not stated that objection on the record. Henceforth, when a party wishes to take an appeal based on a procedural error at sentencing – such as the court’s failure to meaningfully consider that party’s arguments or to explain one or more aspects of the sentence imposed – that party must object to the procedural error complained of after sentence is imposed in order to avoid plain error review on appeal. United States v. Sevilla, 541 F.3d 226 (3d Cir. 2008), is therefore superseded.

**Batchelor v. Rose Tree Media School Dist.**, 759 F.3d 266 (3d Cir. 2014) (Civil Rights-Other (IDEA)) – District court properly dismissed unexhausted claims that school district retaliated against plaintiffs for exercising rights under the IDEA; retaliation claims related to the enforcement of rights under the IDEA must be exhausted before a court may assert subject matter jurisdiction.

**Ohntrup v. Makina ve Kimya Endustrisi Kurumu**, 760 F.3d 290 (3d Cir. 2014) (Civil Procedure/Third Party Discovery) – After applying the doctrine of “practical finality” to exercise jurisdiction over these appeals, the district court’s grant of defendant’s counsel’s motion to withdraw was affirmed but its order denying post-judgment discovery in aid of execution was vacated. Potential inability to show that the subject property is not immune from attachment is immaterial to the question of unreasonable burden.

**Opalinski v. Robert Half Int’l Inc.**, 761 F.3d 326 (3d Cir. 2014) (Arbitration) – Where an agreement to arbitrate individual disputes makes no reference to classwide arbitration, the availability of class arbitration is a “question of arbitrability” for a court to decide unless the parties unmistakably provide otherwise.

**Dwyer v. Cappell**, 762 F.3d 275 (3d Cir. 2014) (Constitution-First Amendment) – An attorney who wanted to include on his website excerpts from judicial opinions about his legal abilities challenged an attorney advertising guideline requiring publication of the entire opinion from which an excerpt came. The guideline was held to violate the First Amendment because it was not reasonably related to preventing consumer deception and was overly burdensome.

**Lodge No. 5 of the Fraternal Order of Police v. City of Philadelphia**, 763 F.3d 358 (3d Cir. 2014) (Constitution-First Amendment) – Summary judgment for the city was reversed and case remanded with instructions to enter judgment in favor of the FOP; restriction in Home Rule Charter that prevents member of the police department from making contributions to their union’s political action committee violates the First Amendment.
**U.S. v. Erwin**, 765 F.3d 219 (3d Cir. 2014) (Criminal Law & Procedure/Contracts (Plea Agreement) – After concluding that all of defendant’s challenges fell within the appellate waiver in his plea agreement, the Court of Appeals held that a defendant who, post-sentence, breaches his plea agreement by appealing subjects himself to that agreement’s breach provision. In this case, the plea agreement allowed the government to withdraw its motion for a downward departure. As a result, the Court of Appeals vacated defendant’s sentence and remanded for de novo sentencing.

**Ferring Pharmaceuticals Inc. v. Watson Pharmaceuticals, Inc.**, 765 F.3d 205 (3d Cir. 2014) (Statutes – Lanham Act False Advertising) – A party seeking a preliminary injunction in a Lanham Act case is not entitled to a presumption of irreparable harm and must instead demonstrate a likelihood of suffering irreparable harm if an injunction is not granted. Because the plaintiff did not make that showing, the district court did not abuse its discretion in denying its motion for a preliminary injunction.

**D.E. v. Central Dauphin School Dist.**, 765 F.3d 260 (3d Cir. 2014) (Other Civil Rights (IDEA)) – Although affirming the dismissal of plaintiff’s Rehabilitation Act and ADA claims, the Court of Appeals reversed the district court’s dismissal of his IDEA claims for failure to exhaust administrative remedies. The Court concluded that the district court had interpreted the hearing officer’s award in a manner inconsistent with public policy principles underlying the IDEA, and effectively provided the school district a way to escape liability for its past IDEA violations by refusing to “agree” with plaintiff and his family to set up a fund for purposes of obtaining the educational services to which he was clearly entitled. The Court then held that (1) a party seeking to enforce a favorable decision from an administrative due process hearing did not need to exhaust administrative remedies (by appealing that decision) before filing suit in a court of law and (2) individuals seeking to enforce a favorable decision obtained at the administrative level are “aggrieved” for purposes of the IDEA and may properly pursue such claims in court.

**Budhun v. Reading Hospital & Medical Ctr.**, 765 F.3d 245 (3d Cir. 2014) (Labor-FMLA) – District court did not abuse its discretion in denying leave to amend to add an ADA claim, but erred in granting summary judgment on plaintiff’s FLMA retaliation and interference claims. As to the interference claim, genuine issues of material fact existed regarding whether the plaintiff was exercising her right to return to work on August 16, 2010, and whether she could not perform an essential job function. As to the retaliation claim, the district court erred in concluding that plaintiff could not establish a prima facie case of FMLA retaliation as a matter of law.

**U.S. v. Salahuddin**, 765 F.3d 329 (3d Cir. 2014) (Criminal Law & Procedure) – The Court of Appeals rejected numerous challenges to defendants’ convictions of conspiracy to commit extortion under color of official right in violation of the Hobbs Act. Holdings of note include (1) Hobbs Act conspiracy under §1951 does not require an overt act and (2) the goal of the conspiracy need not be achieved for a conspiracy conviction.

**U.S. v. Shannon**, 766 F.3d 345 (3d Cir. 2014) (Criminal Law & Procedure) – Concluding that the government’s arguments bordered on frivolous and were not supported by a plain reading of the record, the Court of Appeals vacated the defendant’s judgment of conviction and remanded the case for new trial because defendant was cross-examined on his post-arrest silence in violation of Doyle v. Ohio, 426 U.S. 610 (1976), and the government failed to prove
beyond a reasonable doubt that the error did not contribute to the verdict obtained.

_Freidrich v. Davis_, 767 F.3d 374 (3d Cir. 2014) (Federal Jurisdiction – Diversity) – A U.S. citizen domiciled in Germany is “stateless” for purposes of diversity jurisdiction. The district court did not err in concluding that defendant had produced sufficient evidence to rebut the presumption of continued domicile in Pennsylvania and that plaintiff had failed to meet her burden of showing diversity of citizenship.

_Santomenno ex rel. John Hancock Trust v. John Hancock Life Ins. Co._, 2014 WL 4783665 (September 26, 2014) (ERISA) – Plaintiffs filed suit on behalf of themselves and a putative class of benefit plans and plan participants that have held or continue to hold group annuity contracts with defendants, alleging that defendants charged excessive fees for its services in breach of its fiduciary duty under ERISA. The district court properly dismissed the suit under Rule 12(b)(6) because defendants were not a fiduciary with respect to the fees that were set.

**Eastern District of PA Opinions**  
**July – September 2014**

**Booker v. Nutter**, 2014 WL 4762415 (EDPa 9/24/14)  
**Background:** Plaintiff, pro se, was illegally detained and his vehicle searched. The searching officers were interviewed, and information from the interviews was then used to obtain a search warrant for the vehicle. Plaintiff sued the City of Philadelphia and the officers, claiming his Fourth and Fourteenth Amendment rights were violated. He alleged that the City “turned a ‘blind eye’” to allegations of police misconduct and failed to properly train the officers. Defendants moved to dismiss.

**Holdings:** The District Court, L. Stengel, J., held that Plaintiff alleged a plausible claim of a pattern of police misconduct. He provided other instances of similar misconduct, via local news articles and reports. Additionally, the fact that two versions of the investigative report pertaining to Plaintiff existed gave rise to an inference that the City failed to properly train and supervise its officers. Defendants’ motion to dismiss denied.

**Kortyna v. Lafayette College**, --- F. Supp.3d ---, 2014 WL 4682084 (EDPa 9/19/14)  
**Background:** Plaintiff, a College professor, was accused of sexual harassment by two students. He claimed the accusations caused him debilitating anxiety. Plaintiff sought to have his attorney attend his disciplinary hearing on his behalf, as he felt he could not adequately represent himself due to his anxiety. The College refused Plaintiff’s request. He filed the suit under Title III of the ADA, which does not require administrative exhaustion. The College moved to dismiss on the basis that Plaintiff’s claim should have been brought under Title I, which does require administrative exhaustion.  

**Holdings:** The District Court, L. Stengel, J., held that “[b]ut for the employee-employer relationship, [Plaintiff] and Lafayette would not be connected.” Therefore, Title I of the ADA applied. Likewise, this was not an instance where both Title I and Title III could apply, as the disciplinary hearing at issue was entirely based upon Plaintiff’s employment, and not some other relationship with the College. Motion to dismiss was granted.

**United States v. Merck & Co., Inc. and Chatom Primary Care v. Merck & Co., Inc.**, --- F. Supp.2d --, 2014 WL 4407969 (EDPa 9/5/14)  
**Background:** Two former virologists brought a qui tam False Claims Act suit against Merck, alleging that it falsified its data on efficacy rates,
even after mumps outbreaks in 2006 and 2009. A class action was filed based on these claims, as well. The class action suit raised violations of the Sherman Act and various state laws. The claims allege that because Merck is the only company approved to sell a mumps vaccine in the United States, its “manipulation and misrepresentation” of the vaccine’s efficacy created a monopoly of the mumps vaccine market. Merck moved to dismiss both actions. **Holdings:** The District Court, C. D. Jones, J., denied the motion to dismiss all claims in the qui tam action. In the class action, all state law claims were dismissed except for claims arising under New York and New Jersey consumer protection statutes. Judge Jones also sustained the Sherman Act claim on the basis that the unique facts of the case—namely, Merck’s monopoly over the market and its statutory and contractual duty to disclose information—created the basis for an antitrust claim. Motion to dismiss was granted in part and denied in part.  

**Background:** In the underlying Fair Debt Collection Practices Act case, default judgment was entered in Plaintiff’s favor and she was awarded $1,000, plus attorney’s fees and costs. Plaintiff was represented by two attorneys, a Pennsylvania solo practitioner and a California based attorney who was not admitted in Pennsylvania. However, the California-based attorney never sought pro hac vice admission and did not enter his appearance in the case. He sought compensation as a “consulting” attorney. **Holdings:** The District Court, E. Robreno, J., held that the attorney did more than a consulting attorney. He, not local counsel, had primary contact with Plaintiff, prepared submissions to the Court (though local counsel signed them), and worked independently of local counsel. Additionally, the attorney’s work accounted for 86% of the attorney time billed in the matter. Thus, the attorney actively participated in the case, and in doing so without first obtaining pro hac vice admission, violated local rules. Attorney’s fees were denied as to the California attorney.  

**Background:** Plaintiff, sought coverage for his daughter’s inpatient mental health treatment through his ERISA-covered employee welfare plan. Plaintiff’s daughter suffered from an eating disorder, suicidal ideation, self-injurious behavior, obsessive-compulsive disorder, and borderline personality disorder. The plan’s claim administrator approved coverage for the daughter’s initial stay at a treatment facility, but after 25 days of treatment, further coverage for residential treatment was denied. The administrator denied further coverage because it received information from the facility that the daughter was medically and psychologically stable, had not engaged in self-harming, was at 90% of her ideal body weight, and was not exhibiting suicidal ideation. Plaintiff appealed with the plan, and an independent review organization agreed with the claim administrator. Plaintiff sued the plan, and, after the pleadings were complete, the plan moved for summary judgment. **Holdings:** The District Court, R. Buckwalter, S.J., held that because an administrator of an ERISA plan is given extensive discretionary authority, the decision could only be overturned if arbitrary and capricious. Given the extensive evidence, as well as review procedures, it was not arbitrary and capricious for the claim administrator to determine that Plaintiff’s daughter could receive sufficient care at a lower level of treatment. The claim administrator’s decision was followed by a
new peer review at each level which involved the daughter’s treating physicians and therapists. The case was also submitted to an independent review organization which also determined that denial of continued residential treatment was proper. Motion for summary judgment was granted.

**Ozburn-Hessey Logistics, LLC v. 721 Logistics, LLC, --- F. Supp.2d ---, 2014 WL 4055826 (EDPa 8/15/14)**

**Background:** 721 Logistics, a newly-formed competitor of Plaintiff, hired away several of Plaintiff’s employees. 721 Logistics also allegedly obtained a spreadsheet that contained Plaintiff’s customer contact information. Plaintiff brought suit, and several of its claims were disposed of in summary judgment. Plaintiff’s claims of misappropriation of trade secrets, unfair competition, conspiracy to commit unfair competition, and breach of contract survived. A bench trial was held.

**Holdings:** The District Court, F. Restrepo, J., determined that Defendant “offered employment to nine OHL employees for the specific purpose of hiring skilled and gifted employees, and with no intention of crippling OHL’s perishables division or of inducing the employees to commit wrongs against OHL.” As to the trade secrets claim, the Court found that a spreadsheet of customer contact information was not a trade secret, as “[t]here is no basis in Pennsylvania law for affording trade-secret protection to a ‘compilation’ that exists only in the collective consciousness.” Judgment was entered in favor of the defendants on all claims.


**Background:** Petitioner was convicted of first degree murder and sentenced to life without parole when he was 15 years old. In light of the 2012 decision of the Supreme Court of the United States in Miller v. Alabama, -- U.S. --- (2012), in which the Court held that a mandatory sentence of life without parole for a juvenile homicide defendant was unconstitutional, Petitioner sought habeas relief.

**Holdings:** Although the Pennsylvania Supreme Court has held that Miller does not apply retroactively, the Third Circuit was silent on the issue. The District Court, T. Savage, J., initially noted that while substantive rules apply retroactively, procedural rules do not. Miller sounded in both substance and procedure. However, “because it categorically bans a sentencing practice or a scheme as applied to all juveniles convicted of murder, Miller announces a new substantive rule.” The petition was granted and Petitioner was ordered to be resentenced.


**Background:** Former professional football players filed a lawsuit against the alleging that the NFL failed to take reasonable precautions to protect players from concussions and sub-concussive head injuries and concealed the risks of the injuries from the players. More than 5,000 players have filed similar suits. An initial agreement was rejected by the Court in January, 2014, on the basis that the proposed $675 million was given the number of former players affected. The parties reached an agreement in which the cap on cash award to former players was lifted.

**Holdings:** The District Court, A. Brody, J., held that the proposed settlement resolved the concerns she had with the initial agreement. She noted that “[t]he proposed class-action settlement should more quickly make resources and compensation available for these retired players.” The class was designated as “[a]ll living NFL players who, prior to [June 25, 2014], retired, formally or informally, from playing professional
football with the NFL or any Member Club,” their representatives, spouses, and dependents. The class consists of two classes: those who have been diagnosed with a number of neurological impairments prior to the class certification, and those who were not. The settlement agreement was preliminarily approved.

Middle District of PA Opinions
July - September 2014

**McLaine v. Lackawanna County, __ F.Supp.2d __,** 2014 WL 3055383 (MDPA 7/7/14)

**Background:** County employee brought § 1983 action against county employer and officials alleging that he was terminated in violation of his First Amendment rights. Defendants moved to dismiss.

**Holdings:** The District Court, Robert D. Mariani, J., held that: (1) allegations stated claim against commissioners for violation of employee’s First Amendment right of political association, and (2) allegations stated § 1983 claim against county. Motion denied.

**Wallace v. Powell, __ F.R.D. __,** 2014 WL 3109201 (MDPA 7/7/14)

**Background:** In consolidated actions comprised of both individual cases and putative class actions, juveniles and their parents alleged that two judges, operators of juvenile detention facilities, and others engaged in conspiracy related to construction of the facilities and subsequent detainment of juveniles in those facilities. Plaintiffs moved for final certification of class for settlement, approval of settlement, and award of attorney fees and costs.

**Holdings:** The District Court, A. Richard Caputo, J., held that: (1) settlement classes satisfied requirements for class certification; (2) notice of settlement contained requisite information for absentee class members; (3) proposed settlement was fair, reasonable, and adequate; (4) attorney fee request was reasonable; and (5) lodestar cross-check supported requested attorney fee award. Ordered accordingly.

**Mann v. Palmerton Area School District, --- F.Supp. 2d ---,** 2014 WL 3557180 (MDPA 7/17/14)

**Background:** A high school student and parents brought action under § 1983 against school district alleging violations of son’s Fourteenth Amendment due process rights after son sustained traumatic brain injury during football practice.

**Holdings:** The District Court, A. Richard Caputo, J., held that: [1] plaintiffs stated claim under state created danger theory, and [2] plaintiffs sufficiently alleged a policy or custom required for municipal liability. Motion granted in part and denied in part.

**United States v. Tyler, __ F.Supp.2d,** 2014 WL 3855207 (MDPA 8/6/14)

**Background:** After his convictions of tampering with a witness by murder and tampering with a witness by intimidation and threats were affirmed on direct appeal, petitioner sought habeas relief. The United States District Court for the Middle District of Pennsylvania, William W. Caldwell, J., 2012 WL 951479, dismissed petition for lack of jurisdiction. Petitioner appealed. The Court of Appeals, Fuentes, Circuit Judge, 732 F.3d 241, granted petition and remanded.

**Holding:** On remand, the District Court, William W. Caldwell, J., held that fact convictions could no longer be upheld under official proceeding provisions of either offense required vacation of convictions and new trial.
Tayoun v. City of Pittston, __ F.Supp.2d __, 2014 WL 3943739 (MDPA 8/12/14)

**Background:** Former city police chief brought action against city and mayor, alleging, inter alia, that mayor violated First Amendment by demoting him in retaliation for reporting officer’s criminal activity to Pennsylvania Attorney General. City and mayor moved for summary judgment.

**Holdings:** The District Court, Matthew W. Brann, J., held that: (1) chief acted as private citizen when he reported officer’s criminal activity to Attorney General; (2) chief spoke on matter of public concern when he reported officer’s criminal activity; and (3) genuine issue of material fact existed as to whether mayor had adequate justification for demoting chief. Motion denied.


**Background:** Emotionally disabled child, through her parent, sued Pennsylvania school district claiming that school district failed to identify child as a student in need of special education and failed to provide her with a free appropriate public education, in violation of the Individuals with Disabilities Education Act (IDEA) and Rehabilitation Act. Hearing officer found in favor of student and awarded limited compensatory education. Parties cross-moved for judgment on administrative record.

**Holdings:** The District Court, Sylvia H. Rambo, J., held that: (1) hearing officer’s application of two-year limitation period measured from filing of due process complaint was error of law; (2) child’s father knew or should have known about his claims when he received evaluation for special education services from cyber charter school, not one year and nine months earlier when he received report of licensed psychologist who evaluated child to determine her eligibility for program; (3) hearing officer properly concluded that school district breached its Child Find obligation by failing to identify plaintiff as a student with a disability and in need of special education; (4) school district’s Child Find violation resulted in a substantive denial of a free appropriate public education for which a compensatory education was owed; and (5) although not adopting “blanket” approach, instead of 30 minutes compensatory education for each day during relevant time period, court would award full days compensatory education.


**Background:** Prisoner brought § 1983 action against police officers asserting numerous civil rights claims pursuant to the Fourth, Fifth, Sixth, and Fourteenth Amendments arising from the investigation that ultimately led to his conviction for use of a communication facility in the commission of a felony drug offense. Officers moved for summary judgment. Susan E. Schwab, United States Magistrate Judge, issued report recommending the motion be granted in part and denied in part, and the parties filed objections.

**Holdings:** The District Court, Christopher C. Conner, Chief Judge, held that: (1) Heck v. Humphrey favorable termination bar could apply to claims that arose before prisoner’s conviction; (2) Heck did not bar prisoner’s claims that the officers violated his Fourth Amendment right to be free from unreasonable searches and seizures; (3) Heck barred prisoner’s claim for unlawful arrest and confinement; (4) Heck did not bar prisoner’s claims that the officers violated his Sixth Amendment right to counsel during custodial interrogation; and (5) officers were not entitled to sovereign immunity to the extent prisoner asserted § 1983 claims against them in their official capacities. Motion granted in part and denied in part.

**Background:** After Chapter 7 trustee sold real property that had been found to be part of the bankruptcy estate and placed the sale proceeds in escrow, former attorney who had represented debtor's principal in a series of criminal and civil matters filed motion claiming that he held equitable title to the property and was entitled to the funds. Following trial, the Bankruptcy Court denied the motion, and attorney appealed.

**Holdings:** The District Court, Malachy E. Mannion, J., held that: [1] addressing a “somewhat novel” question, debtor's principal's initial objection to trustee's attempt to sell the subject property, which was based on principal's assertion that he had agreed to sell the property to former attorney prepetition, was not a binding judicial admission because it was effectively withdrawn by principal prior to trial; [2] trustee was not judicially estopped from arguing that funds in question were not part of the sale of the subject property; and [3] the bankruptcy court's finding that former attorney had no equitable interest in the subject property was supported by the record. Decision of Bankruptcy Court was affirmed.


**Background:** Following affirmance of his state court conviction for first-degree murder, 534 Pa. 527, 633 A.2d 1119, petitioner sought habeas relief. Appeal was taken from denial by the District Court, 2007 WL 4370900, of petition for habeas relief. The Court of appeals, 457 Fed.Appx. 170, affirmed in part and remanded.

**Holdings:** The District Court, Christopher C. Conner, J., held that: [1] counsel was deficient in failing to call witness; [2] counsel was deficient in failing to impeach government witness; [3] defendant was prejudiced by failure to call defense witness; and [4] defendant was prejudiced by failure to impeach government witness. Petition granted


**Background:** Female high school student brought action against school district and various administrators, alleging violations of the Fourteenth Amendment and Title IX, as well as various state law tort claims. Defendants moved to dismiss.

**Holdings:** The District Court, Yvette Kane, J., held that: [1] allegations were sufficient to plead a violation of her personal security and bodily integrity; [2] allegations were insufficient to plead that policymaker had knowledge of sexual relationship with assistant principal; [3] allegations were insufficient to plead deliberate indifference by superintendent and assistant superintendent; [4] allegations were insufficient to state a failure to train claim;[5] allegations were insufficient to state a supervisory liability claim; [6] allegations were sufficient to state a hostile educational environment claim under Title IX; and [7] under Pennsylvania law, school district was immune from student's tort claims. Motion granted in part and denied in part.

Western District of PA Opinions
July - September 2014

Jackson v. Davis, --- F.Supp.2d ---, 2014 WL 3420462 (WDPA 7/14/14)

**Background:** Plaintiff asserted civil claims under 42 U.S.C. § 1983 and state law against several municipalities and police departments in connection with a search and seizure of property and subsequent arrest and prosecution for drug-related offenses, convictions for which were overturned on appeal in state court.
**Holdings:** The District Court, Nora Barry Fischer, J., held that: [1] the Rooker-Feldman Doctrine was inapplicable because plaintiff was not attempting to have the federal court review and reject state court judgments; [2] the court lacked personal jurisdiction over certain defendants due to insufficient service of process upon the municipality and police officers; [3] plaintiff’s Fourth Amendment claim was barred by Pennsylvania’s two-year statute of limitations because the cause of action accrued on the date of the alleged illegal search and seizure; [4] plaintiff’s false arrest and malicious prosecution claims must fail because he cannot show that his arrest was unsupported by probable cause because the undisturbed attempted theft charges establish probable cause as a matter of law; [5] the state’s suppression of improperly seized drug evidence did not preclude the court from considering such evidence in the context of a § 1983 claim; and [6] “willful misconduct” is not a separate cause of action under Pennsylvania law. Defendants’ motion to dismiss was granted, with prejudice.

**York Group, Inc. v. Pontone,** --- F.Supp.2d ---, 2014 WL 3735157 (WDPA 7/28/14)

**Background:** More than three years after commencement of suit and after the court had ruled on parties’ cross-motions for summary judgment, defendants, citing 28 U.S.C. § 1404(a), sought to transfer venue to either the Southern or Eastern Districts of New York.

**Holdings:** The District Court, Joy Flowers Conti, C.J., denied the motions to transfer venue, holding: [1] the moving party bears the burden of establishing need for transfer and must provide the court with sufficient facts indicating that a transfer is necessary, such as affidavits, depositions, stipulations, or other documents; [2] the Pontone defendants waived their rights to object to venue in the current court because the forum-selection clause listed two acceptable venues, Pittsburgh or New York; [3] the Batesville defendants’ conclusory allegations of hardship were insufficient to illustrate that private interest factors such as witness unavailability or inability to produce documents in the current forum existed; [4] defendants did not establish that “public interest factors,” such as administrative difficulty, local interest, familiarity of judge, public policies of fora, and practical considerations making trial expeditious and inexpensive, weigh strongly in favor of transfer; and [5] convenience of counsel is not a factor to be considered in the balance of conveniences. Motion to transfer denied.

**Davila v. Northern Reg’l Joint Police Bd.**, --- F.Supp.2d ---, 2014 WL 3735631 (WDPA 7/28/14)

**Background:** Plaintiff claimed violation of the Equal Protection Clause and Fourth Amendment of United States Constitution as a result of an allegedly wrongful detainment. The court previously dismissed the county jail as defendant, and plaintiff moved for reconsideration of dismissal in light of new evidence and change in controlling law.

**Holdings:** The District Court, Mark R. Hornak, J., held that: [1] an intervening case, Galarza v. Szalcyk, 745 F.3d 634 (3d Cir. 2014), clarified that immigration detainers issued by Immigration and Customs Enforcement (“ICE”) were discretionary and a local jail’s policy of detaining individuals solely on ICE detainers could be an unconstitutional practice creating municipal liability under 42 U.S.C. § 1983; [2] while a federal agent who instructs an employee of a local police department to detain an individual may subject the United States to liability for the conduct of the local police officer under the FTCA, once the federal officer revokes his instructions the United States no longer is liable for the local police
officer’s continued actions; [3] the facts alleged by plaintiff establish that ICE had probable cause to arrest her for violation of federal law because when asked to present her visa, the plaintiff informed the arresting officer that she was a lawful permanent resident (LPR) but did not have her LPR identification card on her person; and [4] as long as an officer has probable cause to arrest a party for a crime the arrest can be made notwithstanding the fact that the probable cause was not for the conduct identified at the time of the arrest. Motion for reconsideration was granted with respect to local jail and plaintiff could file an amended complaint within 21 days; claim against United States of America was dismissed.

George v. Giroux, --- F.Supp.2d ---, 2014 WL 3892082 (WDPA 8/1/14)

Background: Petition for writ of habeas corpus by state prison inmate alleging ineffective assistance of counsel for failure to raise petitioner’s speedy trial claim under Rule 600 of the Pennsylvania Rules of Criminal Procedure.

Holding: The District Court, Mark R. Hornak, J., adopted the Report and Recommendation of Robert C. Mitchell, M.J., that the petition be denied because: [1] plaintiff’s claim of denial of a speedy trial was not raised as a federally recognizable ineffective assistance of counsel claim because it was initially raised as a violation of Pennsylvania state Rule 600 and, therefore, the District Court could not review the claim and [2] plaintiff’s procedurally improper ineffective assistance claim nonetheless lacked merit as delays were largely attributable to petitioner’s actions, petitioner was not prejudiced by delay, and trial counsel twice unsuccessfully raised the speedy trial issue. Petition for writ of habeas corpus denied.


Background: Plaintiff moved for sanctions to disqualify defendants’ expert after defendants disclosed to him “Defendants’ Confidential Early Neutral Evaluation Statement,” which defendants had prepared in advance of mediation. Plaintiff argued that it is permissible to sanction a party for disclosing confidential mediation discussions that may have influenced witnesses.

Holding: The District Court, Lisa Pupo Lenihan, C.M.J., denied the motion for sanctions because: [1] there was no evidence that the expert relied upon the disclosed document to form his expert opinion; [2] the defendants’ disclosure was to their own expert witness and not to a potential third party witness; and [3] disclosure of the document was not in bad faith because defendants merely provided the document in order to provide the expert with background information. Finally, if the expert admits during his deposition that he did rely upon the disclosed document to form his expert opinion, then some or all of the document may become discoverable.

McNeilly v. City of Pittsburgh, --- F.Supp.2d ---, 2014 WL 4197395 (WDPA 8/22/14)

Background: Plaintiff, a police officer with the City of Pittsburgh, claimed that she was passed over for promotion by her superiors without an opportunity to interview for the position in retaliation for exercising her First Amendment rights, in violation of her federal rights pursuant to 42 U.S.C. § 1983. Plaintiff previously initiated a lawsuit in the Western District claiming that she was retaliated against for exposing corruption within the police department. In 2007, that case was resolved when the parties entered into a settlement agreement under which plaintiff was to be given “good faith consideration and interviewed” for the position in question.
Holdings: The District Court, Cynthia Reed Eddy, M.J., held that: [1] plaintiff’s allegations that defendants acted within an ongoing pattern of retaliation were sufficient to state a claim for violation of federal law and [2] the District Court did not retain jurisdiction to enforce the 2007 settlement agreement, but the court had supplemental jurisdiction over the breach of contract claim because it arises from the same facts as the federal claim. Motion to dismiss denied.

Glover v. Udren, --- F.Supp.2d ----, 2014 WL 4348078 (WDPA 9/2/14)

Background: Homeowner brought action against mortgage servicer alleging several claims, including that servicer violated Fair Debt Collection Practices Act (FDCPA). A Magistrate Judge recommended that Defendants’ summary judgment motion be granted and plaintiff filed objections to the Report and Recommendation.

Holdings: The District Court, Donetta W. Ambrose, J., held that: [1] plaintiff failed to present sufficient evidence indicating that the mortgage servicer demanded or collected amounts which now were owed pursuant to the FDCPA; [2] a loan modification agreement “transmittal letter” is not distinguishable from a loan modification agreement under the FDCPA and, therefore, such “transmittal letters” are not actionable communications under the FDCPA because they do not constitute a demand for payment; and [3] parties must submit further briefing regarding whether a loan servicer’s failure to withdraw a foreclosure action constitutes a mischaracterization of the alleged debt under the FDCPA. Motion granted in part and denied in part.

Kahan v. Slippery Rock Univ. of Pa., --- F.Supp.2d ---, 2014 WL 4792170 (WDPA 9/24/14)

Background: After University decided not to renew contract, plaintiff, a male professor, asserted claims under state and federal law, including claims for gender-based discrimination, retaliation, and hostile work environment.

Holdings: The District Court, Joy Flowers Conti, C.J., held that: [1] plaintiff’s evidence that he was required to share a classroom while one female professor was not required to do so and his allegations of supposed male gender stereotypes were insufficient to support his claim for gender-based discrimination; [2] plaintiff failed to establish a causal connection between his filing the EEOC charge and the decision not to rehire him; and [3] plaintiff failed to present sufficient evidence of hostile work environment due to repeated false accusations that he sexually harassed a student. Summary judgment on each of the federal claims was granted in favor of defendant and the court declined to exercise supplement jurisdiction over the remaining state law claims.


Background: Plaintiff brought action under citizen suit provision of Resource Conservation and Recovery Act (“RCRA”) to abate an “imminent and substantial endangerment” (“ISE”) allegedly caused by coal byproducts disposed at the site by defendant. Defendant moved to dismiss for lack of subject matter jurisdiction.

Holdings: The District Court, Lisa Pupo Lenihan, C.M.J., held that: [1] the statutory definition of solid waste, rather than scope of regulations promulgated by EPA, determine whether a material is a solid waste subject to an ISE citizen suit; [2] existence of state regulatory scheme does not preclude ISE citizen suit; and [3] factual dispute exists as to whether coal byproducts are solid waste under the statutory definition. Motion to dismiss denied.
Judicial Vacancies

U.S. District Court, Eastern District of Pennsylvania

The following four individuals were nominated on June 16, 2014 for the EDPA. They had their Senate Judiciary Hearings on July 24 and are awaiting confirmation.

Wendy Beetlestone, Mark A. Kearney, Joseph F. Leeson, Jr., and Gerald J. Pappert.

U.S. District Court, Western District of Pennsylvania

There are three vacancies.

United States Court of Appeals for the Third Circuit

The U.S. Senate unanimously confirmed Cheryl Krause for a seat on the U.S. Court of Appeals for the Third Circuit.

One other vacancy still exists.

Thank you

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

**Hon. D. Michael Fisher**, U.S. Court of Appeals Third Circuit, Pittsburgh

**Nancy Conrad**, White and Williams LLP, Center Valley

**Melinda Ghilardi**, Federal Public Defenders Office, Scranton

**Philip Gelso**, Law Offices of Philip Gelso, Kingston

**Susan Schwobach**, Duane Morris, LLP, Pittsburgh

**Tom Wilkinson**, Cozen O’Connor, Philadelphia

**Joshua N. Ruby**, Cozen O’Connor, Philadelphia

**Jeremy A. Mercer**, Fulbright & Jaworski LLP

**Michael Gaetani**, Fulbright & Jaworski LLP

**Shannon DeHont**, Fulbright & Jaworski LLP

**Joshua Snyder**, Fulbright & Jaworski LLP

Federal Practice Committee Leadership

PBA President Frank O’Connor has appointed the following people to lead the Federal Practice Committee:

**Chair**: Hon. D. Michael Fisher  
U.S. Court of Appeals  
Third Circuit, Pittsburgh

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

**Co-Vice Chair**: Melinda Ghilardi  
Federal Public Defenders Office, Scranton
Judicial Conference Further Amends Proposed Discovery Rule Changes
in Response to Extensive Comments
October 2014
By Thomas G. Wilkinson, Jr. & Joshua N. Ruby*

In August 2013, the Judicial Conference Committee on Rules of Practice and Procedure (“Standing Committee”) published proposed amendments to the Federal Rules of Civil Procedure.1 The proposed amendments included significant limits on the presumptive scope of discovery, as well as a highly restrictive standard for imposing spoliation sanctions based on lost electronically stored information (“ESI”). After substantial public participation – over 2,300 written comments and testimony from more than 120 witnesses at public hearings – the Standing Committee approved and promulgated a much more limited set of amendments in June 2014.2 Absent changes imposed by the Supreme Court and Congress, these new rules will go into effect on December 1, 2015. Although not as expansive as the draft amendments proposed last year, these proposals substantially revise the Rules governing discovery practice in the federal courts.

The Revised Amendments

The Standing Committee has approved and forwarded proposed amendments to the Federal Rules of Civil Procedure aimed at reducing costs and delay in civil litigation to the Supreme Court and Congress for their consideration. The proposed amendments are based on the recommendations of the Advisory Committee on Federal Rules of Civil Procedure (“Advisory Committee”) and are specifically designed to increase cooperation among lawyers, proportionality in the use discovery tools, and early and active judicial case management. Assuming – as is typical – that the Supreme Court and Congress do not alter the proposed amendments, Rules 26 and 37 will undergo substantial revision.

Presumptive Limits on Discovery Requests – Proposed Amendments Withdrawn

The Standing Committee initially proposed cutting the presumptively permissible number of depositions and interrogatories and including, for the first time, a presumptive number of requests for admission.3 In addition, the draft amendments would have limited depositions to six hours, instead of the current presumptive limit of seven hours.

In the face of “fierce resistance,” the Standing Committee withdrew these proposed amendments. In a memorandum explaining the proposed amendments as adopted, Judge David G. Campbell, chair of the Advisory Committee, cited to the “fear [many expressed] that the new presumptive limits become hard limits in some courts and would deprive parties of the evidence needed to prove their claims or defenses.”4

Thomas G. Wilkinson, Jr. is a member of Cozen O’Connor in Philadelphia, where he practices in the Commercial Litigation Department (twilkinson@cozen.com). He is the Past President of the Pennsylvania Bar Association and past chair of its Civil Litigation Section. Joshua N. Ruby is an associate at Cozen O’Connor, where he practices in the Commercial Litigation Department (jruby@cozen.com).
Broadly speaking, the plaintiffs’ trial bar were outspoken in their opposition to further reductions in the discovery available without leave of court. The Philadelphia Trial Lawyers Association’s comment on the draft amendments noted that:

“[p]laintiffs often rely on the use of these inexpensive discovery tools to obtain the information they need to meet their burden of proof. ... [T]hese proposed amendments tip the scales of justice toward the side of big corporations and make it difficult, if not impossible, for an individual to obtain the information necessary to try their case on the merits.”

Support for the proposed amendments came from the defense bar and frequent corporate defendants. But even organizations with members in both groups – like the Pennsylvania Bar Association and the Philadelphia Bar Association – objected to some or all of the new constraints in the draft amendments. As the written comment the Pennsylvania Bar Association (“PBA”) submitted to the Standing Committee noted, “[w]hile reducing the cost of discovery is a worthwhile endeavor, a party’s access to justice and ability to obtain facts should not be sacrificed solely in the name of reducing costs.”

The Advisory Committee listened. Judge Campbell explained that “[t]he intent of the proposals was never to limit discovery unnecessarily,” and that “[t]he [Advisory] Committee concluded that it could promote the goals of proportionality and effective judicial case management through other proposed rule changes. ...” So, at least through the next round of revisions to the Rules, the presumptive limits on depositions, interrogatories, and requests for admission remain unchanged.

Narrowing the Scope of Discovery – Rule 26

The Standing Committee also proposed meaningful revisions to the scope of discovery defined in Rule 26. As with the proposed – and withdrawn – presumptive limits on discovery, the proposed amendments to Rule 26 generated significant opposition, primarily, but not exclusively, within the plaintiffs’ bar. In response to these comments, the Advisory Committee made minor revisions to its proposed amendments and explained at length that the amendments worked no material change in the proper scope of discovery under Rule 26.

The proposed new Rule 26(b) provides that a party may obtain discovery of:

any nonprivileged matter that is relevant to a party’s claims or defenses and proportional to the needs of the case considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

The proposed Rule also deletes the familiar language noting that discovery may be relevant, even if inadmissible, if it is “reasonably calculated to lead to the discovery of admissible evidence.” Instead, the proposed Rule simply provides that “[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable.”
Many public comments expressed concern about the initial draft of the Rule. Because the initial draft proposed by the Standing Committee had included “the amount in controversy” as the first factor in the proportionality analysis, many objected that the test would turn on simple math – how much the claims sought versus how much the discovery was likely to cost. The PBA’s public comment is again instructive: it recommended that the explanatory comment clarify that “the amount in controversy and the burden or expense of discovery are simply two factors to be considered . . ., and that no single factor may be dispositive or even determinative in the proportionality analysis.”

The Advisory Committee again responded by revising the list of factors relevant to the proportionality inquiry to address these concerns. The new proposed Rule places “the amount in controversy” as the second factor in the proportionality analysis – behind “the importance of the issues at stake in the action” – and includes “the parties’ relative access to relevant information” as a relevant factor. Judge Campbell explained that these changes “avoid[] any implication that the amount in controversy is the most important concern [in assessing proportionality] and “emphasize that courts should consider the private and public values at issue in the litigation – values that cannot be addressed by a monetary award.”

The Advisory Committee also expanded its explanatory note to clarify that the amendments “do[] not change the existing responsibilities of the court and the parties to consider proportionality, and ... do[] not place on the party seeking discovery the burden of addressing all proportionality considerations.” In sum, these changes are designed to limit the unintended consequences of placing such burdens on the party seeking discovery that some suggested the initial draft of the proposed amendments would have.

With respect to the deletion of the familiar “reasonably calculated to lead to the discovery of admissible evidence” language, the Advisory Committee note explains that the proposed amendment deletes the phrase because it has “been used by some, incorrectly, to define the scope of discovery.” Judge Campbell addressed the public comments opposing this change by noting that such comments “complained that it would eliminate a ‘bedrock’ definition of the scope of discovery, reflecting the very misunderstanding the amendment is designed to correct.”

**A Unified Standard for Imposing Sanctions for Spoliation**

The proposed amendments also contain a revised Rule 37(e) governing sanctions for discovery violations involving ESI. The amended Rule 37(e) approved by the Standing Committee is a wholesale rewrite not only of the existing Rule 37(e) but also of the amended Rule 37(e) in the initial draft of the proposed amendments. Once again, extensive public comment informed the Advisory Committee’s decision to make substantial revision to the initial draft amended Rule in the proposed amendments the Standing Committee approved.

The current version of Rule 37(e) provides that “[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.” The federal
circuit courts have split on the requisite mental state for the imposition of sanctions based on such a loss: negligence or willfulness.18

The initial draft of the revised Rule 37(e) attempted to resolve this division by only permitting sanctions where a party’s failure to retain evidence “caused substantial prejudice in the litigation and [was] willful or in bad faith[,]” unless the “other party’s actions . . . irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation.”19 The initial draft also enumerated several factors relevant to determining whether a party had acted willfully or in bad faith.20 Finally, the Advisory Committee Note to the initial draft stated that the burden would fall on the party seeking the lost ESI to prove substantial prejudice flowing from the loss.21

This initial draft of Rule 37(e) met with substantial criticism from Judge Shira Scheindlin of the Southern District of New York, a leading ESI jurist and author of the influential Zubulake series of decisions. In a decision issued the same day as the initial draft proposed amendments were released, Judge Scheindlin wrote “I do not agree that the burden to prove prejudice from missing evidence lost as a result of willful or intentional misconduct should fall on the innocent party. Furthermore, imposing sanctions only where evidence is destroyed willfully or in bad faith creates perverse incentives and encourages sloppy behavior.”22

Again, the Advisory Committee addressed these critiques and adopted an entirely rewritten Rule 37(e). Instead of the narrow focus on culpability that the current circuit split emphasizes, the proposed Rule permits a court to take corrective action when ESI is lost “because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery.”23 Upon a finding of prejudice – without requiring a finding of culpability – the court “may order measures no greater than necessary to cure the prejudice.” Alternatively, upon finding that a party acted with intent to deprive its adversary of the use of the ESI in litigation – but without requiring a finding of prejudice – the court may make an adverse inference, give an adverse inference instruction to the jury, or end the litigation by dismissal or default judgment.24

In addition to permitting judges to order curative measures without a finding of willful misconduct the Advisory Committee Note to the revised Rule also addresses the allocation of the burden of showing prejudice. “The rule does not place a burden of proving or disproving prejudice on one party or the other. . . . The rule leaves judges with discretion to determine how best to assess prejudice in particular cases.”25 The Advisory Committee’s public dialogue with Judge Scheindlin thereby produced a new standard for sanctions based on lost ESI that removes much of the existing legal uncertainty and preserves remedial measures for negligent and reckless destruction of ESI while reserving the most serious sanctions for cases of intentional misconduct.

**Other Amendments**

The proposed amendments include revisions to other portions of the Rules which generated much less public comment and controversy. In brief, they are:
- Rule 1 would change to “emphasize” that the Rules should be “employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”

- Rule 4 would be amended to reduce the presumptive time limit for service of a summons and a complaint from 120 to 60 days.

- Rule 16 would be amended to require the court to hold a scheduling conference with the parties in-person or by telephone or videoconference, reduce the time limit for a judge to issue a scheduling order, and permit the scheduling order to direct parties to preserve electronically stored information and/or require the parties to request a conference with the court before moving for an order relating to discovery.

- Rule 26 would be amended to delete the provisions permitting discovery regarding the “subject matter of the action” upon a showing of “good cause.”

- Rule 26 would also be amended to permit parties to serve document requests under Rule 34 after 21 days have elapsed since service, regardless of whether the adversary has answered the complaint or the scheduling conference has taken place.

- Rule 34 would be amended to require parties to state their objections to documents requests with “specificity” and to “state whether any responsive materials are being withheld on the basis of that objection.” This proposed change addresses “confusion that frequently arises when a producing party states several objections and still produces information, leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the basis of the objections.”

- Rule 84 references certain forms that are intended to “illustrate the simplicity and brevity of statement that these rules contemplate.” The Standing Committee has recommended that Rule 84 and the associated forms be removed, except for Form 5 (Notice of a Lawsuit and Request to Waive Service of a Summons) and Form 6 (Waiver of the Service of Summons).

What Will Be the Effect of the Proposed Amendments?

In response to much of the public comment opposing the amendments to Rule 26, the Advisory Committee emphasized how little change the proposed amendments will effect. The Advisory Committee notes that proportionality has been part of Rule 26 since the 1983 amendments and that the 2000 amendments attempted to clarify that the “reasonably calculated to lead to the discovery of admissible evidence” language did not define the scope of discovery. Other than directing that courts and litigants pay more attention to proportionality considerations, only time will tell whether the amendments to Rule 26 will have a material impact.

The changes to Rule 37 will have at least one clear impact: the circuit split concerning the culpable mental state required to impose discovery sanctions should become moot. But new case-by-case determinations will arise about what constitutes “reasonable steps” to preserve ESI, what constitutes
sufficient evidence to find prejudice, and who must produce evidence showing or disproving prejudice. Considerable opportunity exists for new uncertainty even under the revised Rule 37.

While more limited in scope than the initial recommended rule changes, the revised proposed amendments should prove to be more helpful guidance to federal court practitioners and judges as to the scope of available discovery and the standard for imposing sanctions or other remedies arising from the mishandling of electronically stored information.

3. Memorandum from Judge David G. Campbell, Chair, Advisory Committee on Federal Rules of Civil Procedure, to Judge Jeffrey Sutton, Chair, Standing Committee on Rules of Civil Procedure Regarding Proposed Amendments to Federal Rules of Civil Procedure at 4 (June 14, 2014) [hereinafter “Campbell Memorandum”].
4. Id.
7. PBA Comment at 5.
9. See, e.g., PTLA Letter.
10. Proposed Amendments at 10 (emphasis on proposed new language).
12. PBA Comment at 1.
15. Proposed Amendments at 19.
17. Campbell Memorandum at 10.
23. Proposed Amendments at 36.
24. Proposed Amendments at 37.
25. Proposed Amendments at 43.
27. Proposed Amendments at 3-4.
29. Proposed Amendments at 11.
31. Proposed Amendments at 34.
32. Proposed Amendments at 49.