PBA NEWS

PBI's Annual U.S. Supreme Court Roundup
Scheduled for Jul. 22, 2019

The four-credit CLE will be presented live at the PBI CLE Conference Center, located in the Wanamaker Building in Philadelphia, and simulcast to other locations. See page 14 for program details and registration information.

COMMITTEE NEWS

Save Oct. 25, 2019 on Your Calendars!

The FPC will hold its first Federal Practice Institute in conjunction with the University of Pittsburgh School of Law on Oct. 25, 2019. The all-day program will carry six CLE credits, including one ethics credit. Look for more details in upcoming newsletters, and save the date!

FPC Presents Supreme Court CLE During the PBA Midyear Meeting

During the PBA Midyear Meeting in Grand Cayman, members of the FPC's leadership joined distinguished jurists in presenting a two-credit CLE entitled “The Impact of the 2016-2017 Term of the Supreme Court of the United States on Federal Practice and a Preview of the Top Cases for 2017-2018.” Held on Feb. 1, the CLE included a lively discussion about some of the most interesting decisions issued by the U.S. Supreme Court during the past term and a look ahead at the fascinating issues to be addressed by the court in the coming year. Panelists included Hon. D. Brooks Smith, chief judge, U.S. Court of Appeals for the Third Circuit; Hon. Juan R. Sánchez, chief judge, U.S. District Court for the Eastern District; and Hon. Mark R. Hornak, chief judge, U.S. District Court for the Western District. Other panelists were FPC At-Large Member and PBA President-elect Anne John, Riley H. Ross III and Kathryn L. Simpson. FPC chair, Hon. D. Michael Fisher, U.S. Court of Appeals for the Third Circuit, moderated the discussion.

Reminder: Next Committee Meeting – May 16

The Executive Council will hold its next quarterly meeting on May 16, 2019 at 2:30 p.m. in conjunction with the PBA Annual Meeting at the Marriott Lancaster at Penn Square in Lancaster, PA.

All FPC members are invited to participate in Executive Council meetings as nonvoting members (see Article IV.
Section 8), so please mark your calendar and join us, in person or by phone, if you can.

Those who are able to attend in person will be able to support FPC Executive Council member Anne John as she becomes the 125th president of the Pennsylvania Bar Association! Look for conference call information in the agenda that FPC Secretary Stephanie Hersperger will be distributing shortly before the meeting.

If you have any items of concern, please email the committee chair, co-vice chairs or subcommittee chairs. Contact information can be found at the end of this newsletter.

Welcome New FPC Members!
The FPC continues to grow! Hon. D. Michael Fisher, FPC chair, sends a warm welcome to new members joining in the first quarter of 2019:

- Rick L. Etter, Allegheny County, Fox Rothschild LLP
- Gawen Grunloh, Cumberland County
- Sandra Thompson, York County, Law Office of Sandra Thompson

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 quarterly newsletters. Please consider participating in any of the FPC’s subcommittees – see pages 13 and 14 for subcommittee contact information. You can also contact Executive Council members with any ideas you may have on how the FPC can best pursue its mission of promoting communication and cooperation among members of the federal judiciary and lawyers who practice in federal courts, and enhancing the knowledge and professional capabilities of lawyers who practice law in the United States District Courts in Pennsylvania.

SUBCOMMITTEES

Reports from the Chairs
No reports this quarter

FEDERAL PRACTICE NEWS

Status of Judicial Vacancies

U.S. Court of Appeals, Third Circuit
- On Mar. 12, 2019, Paul B. Matey, senior vice president, general counsel and secretary at University Hospital in Newark, was confirmed by the Senate by yea-nay vote.
- There is one remaining vacancy, which was created when Judge Thomas Vanaskie assumed senior status on Nov. 30, 2018.

U.S. District Court, Eastern District of PA
- Nominations have been made to fill two of the five vacancies.
- On Jan. 23, 2019, Joshua Wolson, a partner at Dilworth Paxson LLP, was again nominated to fill Judge James Knoll Gardner’s seat and Philadelphia Court of Common Pleas Judge John Milton Younge was again nominated to fill Judge Mary McLaughlin’s seat. Both nominations were placed on Senate executive calendar on Feb. 7, 2019.
- A nomination has yet to be made to fill the vacancies created when Judge Legrome Davis assumed senior status (Sept. 28, 2017); when Judge Lawrence Stengel retired (Aug. 31, 2018); and when Judge Joel Slomsky assumed senior status (Oct. 9, 2018).

U.S. District Court, Middle District of PA
- There is one vacancy, which was created when Judge Yvette Kane assumed senior status (Oct. 11, 2018).

U.S. District Court, Western District of PA
- Nominations have been made to fill three of the four vacancies.
- On Jan. 23, 2019, J. Nicholas Ranjan, a partner at K&L Gates, was again nominated to fill Judge Kim Gibson’s seat. The nomination was placed on the Senate executive calendar on Feb. 7, 2019.
On Mar. 5, 2019, Judge Robert J. Colville of the Court of Common Pleas of Allegheny County was nominated to fill Judge Arthur Schwab’s seat, and Stephanie L. Haines, Assistant United States attorney in the U.S. Attorney’s Office for the Western District of Pennsylvania, was nominated to fill Judge David Cercone’s seat. Both nominations were referred to the Committee on the Judiciary. Hearings were held regarding Haines’ nomination on April 10.

A nomination has yet to be made to fill the vacancy created when Chief Judge Joy Flowers Conti assumed senior status (Dec. 6, 2018).

**UPCOMING EVENTS**

- **May 15-17:** PBA Annual Meeting, Lancaster Marriott at Penn Square, 25 South Queen Street, Lancaster, PA. Details: PBA website.
- **June 5:** Philadelphia Bar Federal Practice afternoon CLE and reception at Loews Hotel, Philadelphia. Details: Philadelphia Bar Association website.
- **June 18:** Historical Society for the Eastern District annual dinner, honoring this year: Chief Judge Sánchez and the past seven chief judges; Downtown Club, Philadelphia. Details: Society Vice President Thomas J. Elliott, Elliott Greenleaf.
- **June 19:** Bucks County Bar’s Annual Federal Practice Reception and CLE, Doylestown; hosted by Judge Rufe, CLE presented by Chief Judge Sánchez, admission ceremony, reception introducing Judge Kenney. Details: Bucks County Bar Association.
- **June 28:** The Use of Technology in Mediation, one-credit CLE to be held at noon in the Jury Assembly Room, Room 3300, Joseph F. Weis Jr. U.S. Courthouse, 700 Grant Street, Pittsburgh, PA 15219. Details: Howard J. Schulberg, Goehringer Rutter & Boehm.

**CASE SUMMARIES**

Summaries of Third Circuit and Pennsylvania district court decisions issued between Jan. 1 and Mar. 31, 2019 involving issues of potential interest to FPC members.

**THIRD CIRCUIT PRECEDENTIAL OPINIONS**

*T Mobile N.E. LLC v. City of Wilmington*, 913 F.3d 311 (3d Cir. 2019) (Federal court jurisdiction) – After Wilmington’s Zoning Board of Adjustment (ZBA) orally denied its application to erect an antenna on top of a senior living high-rise, T Mobile filed suit, asserting that the denial violated the Telecommunications Act of 1996 (TCA). The city’s answer asserted among other defenses that the complaint was not ripe because the ZBA had not yet issued a final written decision. Two days after that answer was filed, the ZBA issued such a decision. Nearly a year later, T Mobile moved for, and was granted, leave to amend or supplement the initial complaint to note the ZBA’s action. The district court granted the city’s motion for summary judgment for want of jurisdiction, concluding that the initial complaint was unripe and that the supplemental complaint could not fix the ripeness problem because it was filed past the 30-day window for seeking review of the ZBA’s final action. The Court of Appeals agreed with the district court that the ZBA’s oral decision did not qualify as a “final action,” but then concluded that (1) the 30-day time limit in the TCA’s review provision was non-jurisdictional, and (2) Rule 15 allowed an untimely supplemental complaint to relate back and cure an unripe initial complaint. Because T Mobile’s supplemental complaint related back and cured the initial complaint’s ripeness problem, the district court erred in granting summary judgment to the city. That judgment was reversed. (Opinion author: Judge K. Jordan)

*U.S. v. Wright*, 913 F.3d 364 (3d Cir. 2019) (Criminal Law & Procedure) – Wright, charged with being a felon in possession of a firearm, pleaded not guilty and proceeded to trial in May 2016. The jury was unable to reach a verdict. A second trial was held in March 2017, and that jury was also unable to reach a verdict. After the government noted its intent to retry Wright, the district court had the parties brief “whether the Court, through an exercise of its inherent authority, should prohibit or permit a second re-trial in
this case.” The district court dismissed the indictment with prejudice, holding that it “ha[d] the inherent authority, under some circumstances, to dismiss an indictment following multiple mistrials.” The government appealed. Reviewing applicable Supreme Court precedent, the Court of Appeals noted that a court could dismiss an indictment based upon its inherent authority only if the government engaged in misconduct, the defendant was prejudiced, and no less severe remedy was available to address the prejudice. A court’s power to preclude a prosecution was also limited by the separation of powers. Here, no misconduct or prejudice was shown. The court concluded that exercising inherent authority to dismiss an indictment based only on the fact that two juries could not reach a verdict intruded on the executive’s domain and thereby violated the separation of powers. Because there was also no statute or procedural rule that permitted the district court’s action, the court reversed the dismissal of the indictment. (Opinion author: Judge P. Shwartz; one judge dissenting)

Bryan v. U.S., 913 F.3d 356 (3d Cir. 2019) (Constitution [Fourth Amendment]) – From Aug. 31 to Sept. 7, 2008, USVI residents Beberman, Bryan and Francis were on a Caribbean cruise that began in San Juan and took them to a number of foreign ports before returning to that city. During their trip, U.S. Customs and Border Protection (CBP) officers searched their cabins on suspicion of drug-smuggling activity. The travelers filed suit asserting Fourth Amendment Bivens claims against the officer who had recommended the cabin searches (through entering a “lookout” in the TECS System on Sept. 5) and against the officers who had executed the cabin searches in St. Thomas on Sept. 6. The travelers also asserted tort claims against the United States under the FTCA. The district court granted defendants’ motions for summary judgment, concluding that neither the lookout nor the searches violated the Fourth Amendment, that the officers were entitled to qualified immunity because their conduct did not violate clearly established Fourth Amendment rights, and that the FTCA claims were barred by the discretionary function exception. On Sept. 4 – two days before the cabin search – the Third Circuit issued United States v. Whitted, 541 F.3d 480 (3d Cir. 2008) (holding that a search of a cruise ship cabin at the border is non-routine and requires reasonable suspicion, which unsubstantiated information from TECS can establish). The Court of Appeals concluded that the Whitted reasonable suspicion standard was not clearly established at the time the lookout was entered or the time the search was conducted – none of the officers involved could reasonably have been expected to have learned of the development in Third Circuit’s Fourth Amendment jurisprudence within one or two days. Because the district court also correctly decided that the FTCA claims were barred, its judgment was affirmed. (Opinion author: Judge J. Roth)

Estate of Roman v. City of Newark, 914 F.3d 789 (3d Cir. 2019) (Civil Rights - § 1983) – In 2014, after Newark police officers forcibly entered and searched the apartment of Roman's girlfriend, they found drugs in a common area that was shared by multiple tenants. The officers arrested Roman, who was in the apartment, and he was charged with several drug offenses. The New Jersey Superior Court found the search to be unlawful. The charges were dropped, and Roman was released from custody. Roman then filed suit against the city and various police officers alleging inter alia that (1) the city had a custom or policy of unconstitutional searches, inadequate training and poor supervision and discipline (§ 1983 claims); and (2) the officers unlawfully searched the apartment and were liable for the state-law torts of unlawful imprisonment and malicious prosecution. The district court granted defendants’ Rule 12(b)(6) motion and dismissed the entire complaint and a subsequently filed amended complaint. The Court of Appeals first addressed the documents that it could consider on review and concluded that it could consider a 2016 consent decree was attached to the defendants’ motion to dismiss but not a Department of Justice report on the investigation of the Newark police department. The court then concluded that Roman had sufficiently alleged a custom of warrantless or nonconsensual searches and also adequately pled that the city failed to train, supervise and discipline its police officers. It therefore vacated the portion of the district court’s judgment dealing with municipal liability. The court then concluded that Roman had sufficiently alleged a custom of warrantless or nonconsensual searches and also adequately pled that the city failed to train, supervise and discipline its police officers. It therefore vacated the portion of the district court’s judgment dealing with municipal liability. The district court did not err, on the other hand, in construing Roman’s malicious prosecution and unlawful imprisonment claims as state-law tort claims and in dismissing them because Roman had not complied with the requirements of New Jersey’s Tort Claims Act. (Opinion author: Judge T. Ambro; one judge dissenting in part)
U.S. v. Chapman, 915 F.3d 139 (3d Cir. 2019) (Criminal Law & Procedure) - Chapman pleaded guilty to conspiracy to possess with the intent to distribute cocaine. In his plea agreement, the government agreed that Chapman could request a sentence lower than the guideline range, but not lower than 144 months’ imprisonment. After several continuances, the district court set a date for Chapman’s sentencing hearing for Mar. 10, 2017. On that date, Chapman immediately informed the court that, due to his counsel’s error, he was never told that he would be sentenced at that hearing and therefore had been unable to notify his family of that sentencing. He requested a continuance so that his family could be present and that both he and his family could provide the court with letters of support. Although it acknowledged that defense counsel’s error caused Chapman’s lack of notice, the district court denied the request, stating that proceeding with the sentencing would not impact his substantive rights. Chapman was sentenced to 192 months. The Court of Appeals concluded that the district court abused its discretion because it interfered with Chapman’s right to allocution as codified in Fed. R. Crim. P. 32(i)(4)(A), which allows a defendant to present any information that could persuade a court to impose a lesser sentence. The court vacated the sentence and remanded for resentencing, and given the particular circumstances of the case, thought it best to remand to a different judge. (Opinion author: Judge L.F. Restrepo)

McKinney v. Univ. of Pittsburgh, 915 F.3d 956 (3d Cir. 2019) (Civil Rights - § 1983) – Between 2010 and 2012, McKinney, a tenured professor, did not do well in annual reviews of his performance, with the result that he received only “maintenance” salary increases and repeated admonitions from his dean. In 2013, with no improvement in performance, the dean reduced his salary by 20 percent. McKinney lodged a complaint with the university provost, whose office investigated and found the salary reduction was not improper. McKinney then sued, alleging that the university’s policies created a property interest in the entirety of his base salary and that the university unconstitutionally deprived him of that property interest without due process. The district court granted summary judgment in McKinney’s favor, and the university appealed. The Court of Appeals concluded that the language of the university policy McKinney urged created a property interest was not sufficient to give him a “legitimate expectation” in the continuance of his base salary. The court reversed the district court’s order granting summary judgment to McKinney and remanded with instructions to enter judgment in favor of the university. (Opinion author: Judge C. Krause)

City of Philadelphia v. U.S. Attorney General, 916 F.3d 276 (3d Cir. 2019) (Statutes [Congressional delegation of authority to AG]) – The federal Edward Byrne Memorial Justice Assistance Grant Program gives state and local law enforcement additional funds for personnel, equipment, training and other criminal justice needs. The Justice Department notified the city that it was withholding Philadelphia’s FY2017 award because it was not in compliance with three newly implemented conditions the AG described as “designed to ensure that the activities of federal law-enforcement grant recipients do not impair the federal government’s ability to ensure public safety and the rule of law by detaining and removing aliens upon their release from local criminal custody.” Philadelphia filed a six-count complaint against the AG, challenging the new conditions on statutory and constitutional grounds. The district court granted summary judgment to the city, concluding inter alia that the AG did not have statutory authority to promulgate the challenged conditions; he did so arbitrarily and capriciously; the new conditions violated the Spending Clause; and one condition also violated the Tenth Amendment. The district court also granted permanent injunctive relief, ordered the Justice Department to disburse the city’s FY2017 funds, and issued declaratory relief on all of the city’s legal claims. The Court of Appeals reviewed the three statutory sources of authority the AG asserted supported the new conditions and held that Congress had not empowered the AG to enact them. The district court’s order permanently enjoining the Justice Department from enforcing the new conditions was therefore affirmed. The court also held, however, that the district court abused its discretion as to the scope of the injunctive relief, and it vacated that order to the extent it imposed a requirement that the federal government obtain a judicial warrant before seeking custody of aliens in city custody. (Opinion author: Judge M. Rendell)
**FTC v. Shire ViroPharma Inc.**, 917 F.3d 147 (3d Cir. 2019) (Statutes [FTC Act]) – Shire ViroPharma manufactured and marketed the drug Vancocin, and it was for a time shielded from generic competition by the FDA’s recommendation that generic manufacturers seeking to demonstrate bioequivalence had to conduct in vivo clinical endpoint studies. The FDA changed its position in early 2006. Shortly thereafter and continuing until April 2012, Shire submitted a total of 43 filings (including a citizen petition) to the FDA seeking to require ANDA applicants to conduct in vivo clinical endpoint studies. Nearly five years after the FDA’s 2012 rejection of Shire’s citizen petition, the FTC sued Shire, seeking a permanent injunction and equitable monetary relief under §13(b) of the FTC Act and claiming that Shire’s submission of serial, meritless filings had delayed the FDA’s approval of generic alternatives and thus harmed consumers and competition. The district court granted Shire’s motion to dismiss, ruling that the FTC had failed to plead sufficient facts to show that Shire “is violating, or is about to violate” the law. After concluding that §13(b)’s requirements were not jurisdictional, the Court of Appeals determined that the unambiguous language of that section prohibited only existing or impending conduct, rejecting the FTC’s argument the section’s language could be satisfied by showing a violation in the distant past and a vague and generalized likelihood of recurrent conduct. The district court’s dismissal was affirmed. (Opinion author: Chief Judge D.B. Smith)

**U.S. v. Island**, 916 F.3d 249 (3d Cir. 2019) (Criminal Law & Procedure) – Island’s three-year term of supervised release was scheduled to end on June 25, 2016. On Sept. 18, 2015, Island’s probation officer filed a petition of violation, alleging inter alia that Island had “ceased reporting [to his probation officer] as instructed” on July 17, 2015, after which his “whereabouts [were] unknown.” The district court issued a warrant on the basis of that petition the day it was filed. On June 27, 2016, the probation office filed a second petition of violation, alleging that Island had committed a serious violation of his release terms by firing a weapon at two police officers, hitting one. Island was arrested and taken into custody by Delaware County authorities on June 21 (he was convicted in July 2017 of attempted murder and other charges and sentenced by the state court to 33 to 100 years’ imprisonment). A warrant based on a new violation was issued on June 27, 2016. The district court later held a supervised release revocation hearing and imposed a revocation sentence of 24 months, to run consecutively after Island’s state sentence, on the basis of only the second violation petition. On appeal, Island asserted that the district court lacked jurisdiction to revoke his supervised release because the warrant underlying the revocation was issued after June 25, 2016. Joining the majority of other circuit courts, the Court of Appeals held that a supervised release term tolls while a defendant is of fugitive status. As a result, Island could not count toward his supervised release term at least the period between Sept. 18, 2015 and the shooting leading to Island’s apprehension in June 2016. Because the second warrant was issued within the supervised release term properly accounting for fugitive tolling, the court affirmed the district court’s revocation of supervised release. (Opinion author: Judge A. Scirica; one judge dissenting)

**U.S. v. Williams**, 917 F.3d 195 (3d Cir. 2019) (Criminal Law & Procedure [Speedy Trial Act]) – In this appeal, the government conceded that 53 days had elapsed from Williams’s 70-day speedy trial clock. At issue was whether, or to what extent, the time between (1) when the district court ordered that Williams be transported to FMC Butner to undergo a psychological examination to determine his competency to stand trial and (2) when Williams arrived at FMC Butner (a total of 47 days) was excludable. Addressing the interplay between 18 U.S.C. § 3161(h)(1)(A) and 18 U.S.C. § 3161(h)(1)(F), the Court of Appeals held that periods of unreasonable delay of more than 10 days in the transport of a defendant to the site of a psychological examination conducted in the course of a proceeding to determine a defendant’s mental competency were non-excludable for purposes of computing the time within which the government must commence a trial under the Speedy Trial Act. Here, the additional 37 days (47-10) were non-excludable because the government had not overcome the presumption that this period of delay in transporting Williams to FMC Butner was unreasonable. Thus, a total
of 90 days of non-excludable time had elapsed prior to the commencement of trial, in violation of the Speedy Trial Act. Because Williams already had been punished in full, the court determined that dismissal without prejudice would be contrary to the administration of justice. The court reversed the district court’s denial of Williams’s motions to dismiss the indictment, vacated the judgment of conviction and sentence imposed and remanded to the district court with the direction to dismiss the indictment with prejudice. (Opinion author: Judge L.F. Restrepo)

**EASTERN DISTRICT OF PA OPINIONS**

**Katchur v. Thomas Jefferson Univ.**, ___ F. Supp. 3d ___, 2019 U.S. Dist. LEXIS 9564 (E.D. Pa. Jan. 18, 2019) (Civil Rights-Education [Discrimination]) – While completing her undergraduate work in neuroscience at Princeton, Katchur, a white American of European origin, met with Thomas Jefferson University’s director of admissions to discuss her interest in attending Jefferson’s medical school. The director asked about Katchur’s ethnicity, suggested she get a genetic test to see whether she was part African- or Native American, and among other things, told Katchur that she would gain admission to Jefferson in the incoming medical school class if she were African-American, rather than Caucasian. Katchur emailed a complaint to Jefferson’s dean of students and admissions, articulating the “discriminatory behavior” of the admissions director. She was denied admission three months later. She filed a complaint asserting that the university violated Title VI, Title IX, and § 1981 by discriminating against her on the basis of race, gender, national origin and ancestry; creating a hostile educational environment; and retaliating against her for submitting a discrimination complaint. Judge M. Baylson granted in part and denied in part defendant’s motion to dismiss, concluding that Katchur’s race discrimination claims under Title VI and § 1981 could proceed, but that her hostile educational environment claims had to be dismissed because she was not a Jefferson student at the time of the alleged events. The motion was granted without prejudice and with leave to amend as to Katchur’s retaliation claims.

**Guess v. Phila. Hous. Auth.**, ___ F. Supp. 3d ___, 2019 U.S. Dist. LEXIS 11645 (E.D. Pa. Jan. 24, 2019) (Sexual orientation claims versus gender stereotyping claims) – Guess, who was employed by the Philadelphia Housing Authority (PHA) as a Family Self Sufficiency (FSS) coordinator until August 2017, alleged that he was compensated less than three female FSS coordinators and was routinely assigned tasks that were stereotypically male. When he complained about such an assignment, a supervisor responded with a gay slur. Guess was in fact not gay. He filed a claim of “Hostile Work Environment / Harassment Based on Perceived Sexual Orientation” (Count 1) and of compensation discrimination (Count 2). The PHA moved to dismiss. Although concluding that Guess had exhausted administrative remedies, Judge G. McHugh was compelled by *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001) (holding that discrimination because of sexual orientation was not discrimination because of sex for Title VII purposes), to dismiss Count 1 because it was based solely on sexual orientation discrimination. For similar reasons, Count 2 was dismissed to the extent that it was based on such discrimination. Both dismissals were without prejudice to Guess’s right to amend his complaint. The court addressed the argument that sexual orientation discrimination is necessarily a form of gender stereotyping discrimination (recognized as a claim of sex discrimination in *Prowel v. Wise Bus. Forms Inc.*, 579 F.3d 285 (3d Cir. 2009)) and suggested that the time had come to reexamine *Bibby*.

**In re Kennedy**, 2019 U.S. Dist. LEXIS 12625 (E.D. Pa. Jan. 25, 2019) (Abuse of pauper status) – Kennedy filed numerous cases in 2018, receiving *in forma pauperis* status in each. Several asserted claims based on the same sets of facts. All were dismissed, often due to lack of subject matter jurisdiction, lack of standing, or sovereign or judicial immunity. He was warned by more than one judge that continued filing of meritless cases could result in limitations on his ability to file future cases. Nonetheless, he filed two additional cases in 2019, again raising claims that had been dismissed in the past. After reviewing a court’s ability to curb abuses of pauper status, Judge M. Kearney granted Kennedy *in forma pauperis* status and dismissed the cases, but ordered that Kennedy show cause as to why the court should not enjoin him from filing any more civil cases.
surrounding facts addressed in his 11 2018 dismissed cases without paying the filing and administrative fees unless he was in imminent danger. The court also directed the clerk of court to assign future cases filed by Kennedy pro se to its docket.

**Maier v. Bucks County**, 2019 U.S. Dist. LEXIS 25799 (E.D. Pa. Feb. 19, 2019) (Tolling of the statute of limitations) – The Friday before the two-year statute of limitations was due to run out (on the following Monday), Maier’s new counsel called Clerk of Court for the Eastern District of Pennsylvania and asked whether the date of proof of mailing a complaint would be the date of filing on the docket. An unidentified male answered “yes” and, relying on that answer, Maier’s § 1983 complaint was put into the mail on the Monday that marked the end of the limitations period. The complaint was docketed two days later, and two sets of defendants moved to dismiss on the ground that the complaint was untimely filed. Maier urged that given the erroneous information given, equitable tolling should apply. Judge C. Kenney reviewed both Pennsylvania and federal tolling principles and concluded that none applied to this situation. Because the failure to comply with the statute of limitations was apparent on the face of the complaint, the court dismissed all defendants (both those filing motions and those not served) and closed the case.

**William J. Mansfield Inc. v. Udren Law Offices PC**, 2019 U.S. Dist. LEXIS 36541 (E.D. Pa. Mar. 7, 2019) (Attorney withdrawal) – Alleging that Udren was “substantially behind” on paying it and that Udren “ha[s] no funds available to compensate counsel for past or future work,” the law firm representing Udren moved to withdraw as counsel. Judge G. Pratter denied the motion, albeit without prejudice, because (1) Udren, as a corporate entity, could not proceed without counsel; (2) given it was less than a month before trial, the potential for prejudice to the plaintiff and to the court was substantial; (3) Udren’s counsel appeared to still be serving a meaningful purpose in the action; and (4) Udren’s counsel knew or should have known of the risk of nonpayment when taking the case (plaintiff had at the time filed its complaint asserting nonpayment for services and an emergency motion to appoint a receiver).

**United States v. Massimino**, ___ F. Supp. 3d. ___, 2019 U.S. Dist. LEXIS 49703 (E.D. Pa. Mar. 25, 2019) (Motion to quash testimony from trial counsel suffering from mid-severe dementia) – After a four-month trial, Massimino was convicted of RICO conspiracy in 2013. At that time, he was represented by Joseph Santaguida. Years later, Massimino filed a petition under §2255, including as one of the grounds for relief a claim of ineffective assistance of trial counsel. A subpoena was issued to Santaguida, now an octogenarian and retired lawyer suffering from mid-severe dementia. Santaguida’s counsel moved to quash that subpoena. The court had already conducted an evidentiary hearing to develop the record for the § 2255 motion, and that hearing was closed except for Santaguida’s potential testimony. Applying the teachings under both the civil and criminal rules of procedure, Judge E. Robreno concluded that (1) the need for Santaguida’s testimony was minimal and, in any event, Santaguida was now unable to provide meaningful testimony; and (2) requiring him to testify would be unreasonable, oppressive and an undue burden, all for little or no probative value in return. The court granted the motion to quash.

**Fogel v. Univ. of the Arts**, 2019 U.S. Dist. LEXIS 51763 (E.D. Pa. Mar. 27, 2019) (Title IX [Erroneous outcome theory]) – After receiving letters from two women regarding his conduct at two different conferences, Prof. Fogel’s university conducted an investigation and, without conducting a hearing, fired him based in part on the finding that he “had committed serious violations” of the university’s sexual harassment policy. He sued the university, his supervisor and one of the women sending a letter (Prof. Little), alleging inter alia that the university discriminated against him by skewing an investigative process under an erroneous outcome theory to lead to his termination in violation of Title IX. The university moved to dismiss the Title IX claim, arguing Prof. Fogel failed to state a due process claim, and Prof. Little moved to dismiss defamation and invasion of privacy claims against her. Judge M. Kearney first distinguished between a due process claim and Prof. Fogel’s erroneous outcome theory, noting that the university’s entire argument was directed at a theory not in the case. The court concluded that Prof. Fogel had sufficiently pleaded both (1) particular facts
casting doubt on the accuracy of the outcome and (2) particular circumstances suggesting gender bias motivated the erroneous outcome. The university’s motion was therefore denied. The court granted in part and denied in part Prof. Little’s motion, concluding that Prof. Little’s statements to the university’s investigator were subject to a judicial proceeding privilege, but defamation claims based on her statements to third-party conference attendees could proceed to discovery as could Prof. Fogel’s false light invasion of privacy claims against her.

MIDDLE DISTRICT OF PA OPINIONS

Southeastern Pennsylvania Transp. Auth. v. Orrstown Fin’l Servs. Inc., __ F. Supp. 3d __, 2019 WL 568904 (M.D. Pa. Feb. 12, 2019) (Bank examination privilege) – To support its Exchange Act claims against Orrstown Financial Services, Orrstown Bank and others, SEPTA served document requests pertaining to regulators’ enforcement actions against the defendants. Defendants responded that documents would be withheld because they potentially contained confidential supervisory information (CSI), which was protected under the bank examination privilege provided by Board of Governors of the Federal Reserve System (FRB) regulations and which could not be disclosed without the FRB’s express written consent. SEPTA sent a formal waiver request to the FRB pursuant to 12 C.F.R. § 261.22, seeking access to 20 categories of information covering the period from Jan. 1, 2009 to Feb. 2, 2017 (the date of the request). On June 18, 2018, the FRB responded to that request in a detailed letter, which stated that the FRB was unable to process the request in its current form because it did not “comply with the requirements of the Board’s regulations regarding requests for access” to CSI. Rather than alter its request (which it argued would be futile), SEPTA moved to compel production of the withheld documents, urging the court to treat the FRB’s determination as its implicit assertion of the bank examination privilege over all the withheld documents and to override that privilege. Judge Y. Kane declined to do so, finding that because SEPTA refused to respond to the FRB’s letter and to engage with the FRB in an effort to provide the necessary information for it to complete its review of the relevant documents, SEPTA failed to exhaust its administrative remedies. The court denied SEPTA’s motion.

United States v. Delgado, __ F. Supp. 3d __, 2019 WL 587422 (M.D. Pa. Feb. 14, 2019) (Constructive amendment of indictment) – A jury convicted Delgado on six counts, which included sex trafficking of minors and two drug-related crimes. He moved for judgment of acquittal, arguing that the evidence adduced at trial was insufficient to sustain all six counts. He separately moved for a new trial. Chief Judge C. Conner granted in part and denied in part the motion for judgment of acquittal, arguing that the evidence adduced at trial was insufficient to sustain all six counts. He separately moved for a new trial. Chief Judge C. Conner granted in part and denied in part the motion for judgment of acquittal. The court found a fundamental problem with the sex trafficking count: the indictment charged Delgado under Section 1591(a), whereas the government requested (without objection from Delgado) an instruction on Section 1591(c). This transformed the offense from one requiring a specific mens rea into a strict liability offense. Given its review of the evidence, court concluded that it was possible that the jury convicted Delgado based on the improper jury instruction, and it vacated the conviction on Count 1 (but noted that evidence was sufficient to retry him on this count). The court entered judgment of acquittal on the conspiracy to transport a minor to engage in prostitution count because it could identify no evidence that established Delgado’s membership in any alleged agreement regarding such transportation – his membership in the broader prostitution ring did not per se establish that he was a member of this specific conspiracy. The court denied Delgado’s motion for a new trial, concluding Delgado had not shown how the alleged Jencks Act, Brady and Giglio violations had affected the outcome of his trial and could not show prejudice as a result of the government’s improper statements during closing argument.

Harshman v. Superintendent, State Correctional Inst., __ F. Supp. 3d __, 2019 WL 1354048 (M.D. Pa. Mar. 26, 2019) (Habeas corpus [Brady violation]) – Based on circumstantial evidence and the testimony of three jailhouse informants (each of whom testified that they personally had nothing to gain from testifying), in 2001 a jury found Harshman guilty of first-degree murder. His pursuit of post-conviction relief from state courts – a process that
the district court called “lengthy and circuitous” – ended unsuccessfully in 2015. Harshman’s federal habeas petition, like his state-court petition, included a claim that *Brady v. Maryland*, 373 U.S. 83 (1963), had been violated as the state had failed to disclose arrangements the prosecution had made with the two jailhouse informants who had testified that Harshman had admitted to the murder. Chief Judge C. Conner concluded that (1) that state courts’ singular focus on whether a formal “deal” existed that had not been disclosed was an unreasonable application of *Brady* and its progeny; (2) their determination that there was no *Brady* violation relative to the two informants was an unreasonable application of federal law; (3) the state courts failed to apply the correct materiality standard; and (4) they failed to perform the required cumulative prejudice assessment. Because Harshman had demonstrated an unreasonable application of clearly established federal law, the court engaged in its own cumulative materiality analysis and concluded that because he did not receive the “potent impeachment evidence” that had been withheld, Harshman did not receive a trial “resulting in a verdict worthy of confidence.” The court conditionally granted Harshman’s petition, vacated his Pennsylvania murder conviction, and directed the Commonwealth to retry him within 90 days or to provide for his release.

**WESTERN DISTRICT OF PA OPINIONS**

**J.R. v. Penns Manor Area Sch. Dist.,** 2019 U.S. Dist. LEXIS 162 (W.D. Pa. Jan. 2, 2019) (First Amendment) – During school hours, 12-year-old J.R. discussed with some fellow students at Penns Manor Area Junior High School “who they would shoot if they were to do a school shooting.” J.R. told his classmates that he would shoot one of his teachers because she “makes him do school work” and would do so using a pistol. Another student overheard the discussion and reported it. J.R. was suspended the same day and ultimately expelled. He (by and through his parents) filed suit, alleging the school district violated his First Amendment rights and asserting other state-law claims. The school district moved to dismiss. Noting that the Third Circuit had yet to fully address First Amendment protections in the context of threats against teachers in a school environment, Judge N. B. Fischer reviewed Supreme Court and other court decisions and concluded that J.R.’s constitutional rights were not violated. School officials were well within their right to discipline J.R. under the substantial disruption test announced in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). Guided by *Morse v. Frederick*, 551 U.S. 393 (2007), and *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765 (5th Cir. 2007), the court further concluded that even if *Tinker* did not apply, officials had the ability to discipline J.R. for speech that was reasonably perceived as a threat of school violence. Declining to exercise supplemental jurisdiction, the court granted the motion to dismiss in its entirety.

**Davila v. N. Reg’l Joint Police Bd.,** 2019 U.S. Dist. LEXIS 31046 (W.D. Pa. Feb. 27, 2019) (Civil Rights - § 1983 / ICE detainers) – Davila, a U.S. citizen who was born in Mexico, was detained in 2011 for over 14 hours (including time in jail) after she was stopped for a minor traffic violation. Her lawsuit alleged that Officer Bienemann, an employee of defendant Northern Regional Joint Police Board (NRJPB), violated her Fourth and Fourteenth Amendment rights when he (1) extended the length of the traffic stop, without reasonable suspicion or probable cause to do so, in order to investigate her immigration status, (2) detained her because of her ethnicity and/or national origin in violation of the Equal Protection Clause, and (3) caused her to remain unlawfully jailed overnight after learning that she was legally residing in the U.S. (false imprisonment claim). Her claims against the NRJPB included allegations that its customs, policies and/or practices resulted in the deprivation of her Fourth and Fourteenth Amendment rights. All parties filed motions for summary judgment. In this detailed and thorough opinion, Chief Judge M. Hornak explains the reasons for denying in part and granting in part each party’s motion. Bienemann, after going through all of the usual incidents of an ordinary traffic stop, extended the seizure as he took the further step of having Davila’s name submitted to ICE without a reasonable suspicion that her identity or her immigration status was in question. Rejecting his qualified immunity defense, the court granted summary judgment to Davila as to her Fourth Amendment unreasonable seizure claim. Her equal protection claim against Bienemann was allowed to go to the jury, but the court concluded that he was entitled to qualified immunity...
on her false imprisonment claim. Davila prevailed on her claim that on the date she was stopped, the NRJPB maintained a policy of requiring its officers to comply with all ICE detainers without determining whether there was independent probable cause to arrest and that this policy was the cause of her unlawful detention. Her other claims against the NRJPB were dismissed.

**U.S. v. Reyes-Romero**, 2019 U.S. Dist. LEXIS 35327 (W.D. Pa. Mar. 6, 2019) (Attorney fees under the Hyde Amendment) – Reyes-Romero moved for an award of attorney's fees and expenses pursuant to the Hyde Amendment, arguing that the DOJ’s criminal prosecution against him was vexatious, frivolous and/or in bad faith. That prosecution began in 2017 when Reyes-Romero was indicted on one count of unlawful reentry, a charge based on a 2011 removal order. He moved to dismiss, attacking the 2011 removal order on the ground that it was premised on unintelligent waivers of his rights that he executed during his 2011 removal proceedings. In 2018, the district court granted Reyes-Romero's motion to dismiss, holding that the underlying 2011 removal order was wholly contrary to law and ordering the dismissal of the indictment with prejudice. Chief Judge M. Hornak's opinion details the DOJ's actions that led him to conclude that its position in the prosecution of Reyes-Romero was both frivolous and in bad faith and that Reyes-Romero was entitled to a Hyde Amendment award.

**Black Bear Energy Servs. v. Youngstown Pipe & Steel**, LLC, 2019 U.S. Dist. LEXIS 46796 (W.D. Pa. Mar. 21, 2019) (Filing of confidential information under seal) – During discovery, counterclaim defendants were ordered to produce to Youngstown Pipe & Steel (YPS) non-privileged information in an investigation file and to mark the documents produced “Attorneys' Eyes Only.” Among the documents produced and so marked was an ethics report. YPS later attached that ethics report to its motion for partial summary judgment and concise statement of material facts and referred to its contents in that statement. Counterclaim defendants filed an emergency motion in which they argued that the court ordered the ethics report to be marked “Attorneys' Eyes Only,” YPS was required to file it under seal. Judge J. F. Conti rejected movants’ primary argument, noting that the court's ruling that the ethics report must be turned over subject to a confidentiality designation was not tantamount to a ruling that the counterclaim defendants satisfied their burden to overcome the presumption of the public right of access to exhibits to motions for summary judgment. After reviewing the ethics report, however, the court concluded that good cause existed to seal portions of the report and YPS’s concise statement of material facts, because disclosure could subject a third party to the litigation to serious and particularized embarrassment and harm to his personal and business reputation. Counterclaim defendants' motion was thus granted in part and denied in part.

**Vilkofsky v. Rushmore Loan Mgmt. Servs., LLC**, 2019 U.S. Dist. LEXIS 52600 (W.D. Pa. Mar. 28, 2019) (Statutes [RESPA]) – For several years, Vilkofsky wrote to Rushmore Loan Management Services (Rushmore) and Specialized Loan Servicing (SLS), which for a time each serviced Vilkofsky’s mortgage, raising questions as to why his insufficient payments were being returned, the amount he owed had been increased, and other matters, almost always sending his correspondence to an address other than the one his servicer had repeatedly designated for written requests and notices of error. Nonetheless, the servicers responded with answers to his often-repeated questions. Vilkofsky filed suit, alleging that both servicers violated the Real Estate Settlement Procedures Act (RESPA) when they responded late and incompletely to his qualified written requests and notice of errors. Both defendants moved for summary judgment. Judge N. B. Fischer first addressed defendants’ contentions that Vilkofsky’s responses to their concise statements of material facts were deficient, ruling that Vilkofsky had violated local rules in failing to cite to the record after denying defendants’ allegations, with the result that certain alleged facts were deemed admitted. Turning to the merits, the court concluded that Vilkofsky’s responses to their concise statements of material facts were deficient, ruling that Vilkofsky had violated local rules in failing to cite to the record after denying defendants’ allegations, with the result that certain alleged facts were deemed admitted. Turning to the merits, the court concluded that Vilkofsky’s RESPA claims against SLS and Rushmore failed because he never triggered either servicers’ obligations under RESPA, given that he repeatedly sent his letters to addresses other than defendants’ designated addresses. The court alternatively held that both defendants were entitled to summary
From the Web

**Everybody's Found Something to Hate in Proposed Deposition Rules Changes**, at
https://www.law.com/nationallawjournal/2019/02/14/everybodys-found-something-to-hate-in-proposed-deposition-rules-changes/?slreturn=20190304095920

Tom Wilkinson, an at-large member of the FPC Executive Council, also brings the following article to our attention:

**Teva Pharmaceuticals Ordered to Pay $455K in Legal Fees to Former Director**, at

OPEN FORUM

No submissions this quarter.

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.schochau@comcast.net

judgment because there was no evidence of record that SLS or Rushmore failed to perform a reasonable investigation.

**Walney v. SWEPI LP**, 2019 U.S. Dist. LEXIS 55381 (W.D. Pa. Mar. 31, 2019) (Class decertification) – Walney and Bedow alleged, on behalf of themselves and similarly situated leaseholders, that SWEPI LP and its general partner Shell Energy Holding GP breached the terms of the class members’ oil and gas leases by failing to pay bonus monies that were allegedly owed under those leases. In 2015, Judge Conti certified a class action relative to the asserted breach of express contract and breach of contract implied in fact claims, based on the plaintiffs’ theory that “in each and every case at issue, SWEPI had an absolute and unconditional obligation to pay the bonus monies.”

In 2018, Judge Conti concluded that enforceable contracts existed between SWEPI and the various class members but went on to conclude that genuinely disputed issues of material fact precluded a finding that SWEPI had breached its contractual obligations to all class members. Defendants – based in part on Judge Conti’s ruling – moved to decertify the class, and plaintiffs responded by moving to amend the class definition to exclude those “whose continuing inclusion would not permit the continuance of certified [c]lass status” and for summary judgment. The case was later transferred to Judge S. P. Baxter. The court granted defendants’ motion to decertify, concluding that (1) the record showed that SWEPI had several viable defenses to liability that caused the predominance requirement to be no longer satisfied; (2) the typicality requirement was no longer met, (3) the interests of Walney and Bedow were no longer adequately aligned with the interests of all other class members; and (4) continued class treatment was no longer a superior method of adjudicating the parties’ disputes.

Refusing to provide plaintiffs with their requested “failsafe” class, the court denied plaintiffs’ motions.
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• Jennifer Menichini, Joyce, Carmody & Moran PC, Luzerne

Thank You
The chair of the FPC Newsletter Subcommittee extends a sincere thank you to the following Federal Practice Committee members and their associates for their contributions to this edition of the PBA Federal Practice Committee newsletter:
• Hon. D. Michael Fisher, U.S. Court of Appeals Third Circuit, Allegheny
• Hon. Nora Barry Fischer, U.S. District Court for the Western District of Pennsylvania, Allegheny
• Hon. Mark A. Kearney, U.S. District Court for the Eastern District of Pennsylvania, Philadelphia
• Eli Granek, Eckert Seamans Cherin & Mellott LLC, Philadelphia
• Philip Gelso, Law Offices of Philip Gelso, Luzerne
• Melinda Ghilardi, Munley Law PC, Lackawanna
• Jeremy Mercer, Porter Wright Morris & Arthur LLP, Allegheny
• Emily Paulus, White and Williams LLP, Lehigh
• Tom Wilkinson, Cozen O’Connor, Philadelphia

A special thank you also goes to Susan Etter and Diane Banks of the Pennsylvania Bar Association.
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Do you have colleagues or other friends who practice in Pennsylvania's federal courts and who might be interested in joining the FPC? Be sure to forward to this newsletter (and the attached membership form) to them!

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Let the experts fill you in on the essentials and how they will impact your practice. Allow our panel to do the heavy lifting to get you the critical facts and parse the analysis so you take away the most relevant information and know why it matters.

HEAR FROM AN ALL-STAR PANEL ON THE 2018-19 TERM’S MOST SIGNIFICANT DECISIONS
Take advantage of this unique opportunity to listen to vigorous discussion amongst scholars and practitioners as they elucidate the Supreme Court’s October 2018 term.

COURSE PLANNERS

Hon. D. Michael Fisher
U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT, PITTSBURGH

Rebecca Ross Haywood, Esq.
PNC FINANCIAL SERVICES GROUP, INC., PITTSBURGH

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