Federal Practice Institute in Conjunction With Pitt Law

Left to right, top to bottom: (1) Jeremy Mercer, Judge Mark Hornak, Judge Marilyn Horan, Professor Arthur Hellman, Brendan O’Donnell; (2) Nancy Conrad, Judge Matthew Brann (panel members not pictured – Judge Cathy Bissoon, Marie Milie Jones); (3) Judge D. Michael Fisher, Dean Amy Wildermuth, PBA President Anne John, PBA Executive Director Barry Simpson; (4) Brett Sweitzer, Stephen Kaufman, Michael Novara, Judge Lisa Pupo Lenihan; (5) Stephanie Hersperger, Robert Byer, Judge D. Michael Fisher, Judge Thomas Hardiman, Rebecca Haywood; (6) Judge Gregory Taddonio, PBA President Anne John, Judge Judith Fitzgerald, and Douglas Campbell.
MORE COMMITTEE NEWS

Reminder: Next Committee Meeting – Nov. 14

The Executive Council will hold its next quarterly meeting on Nov. 14, 2019 at 1:30 p.m. in conjunction with PBA Committee/Section Day.

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 if you can. Committee/Section Day will be held at The Red Lion Hotel Harrisburg East, Harrisburg. The call-in number is 877-659-3786, and the passcode is 6677829609#.

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

SUBCOMMITTEES

Reports from the Chairs

Local Rules –

The Committee is analyzing proposed changes to the Federal Civil, Appellate and Bankruptcy Rules (see below). We have the analysis for the changes to the Civil and Appellate Rules covered. We are still seeking assistance with the Bankruptcy Rules. If anyone is interested in participating in this regard, please advise.

Jason Asbell

FEDERAL PRACTICE NEWS

Sex as a Protected Class Before the Supreme Court: How to Understand Sexual Orientation and Transgender Status Without Considering Sex

By Sharon R. López

Title VII explicitly prohibits discrimination on the basis of sex. The Supreme Court of the United States (SCOTUS) is now considering whether sexual orientation and transgender status is a subset of “sex” in the statute. The cases are Bostock v. Clayton County, Altitude Express Inc. v. Zarda, and Harris Funeral Homes, Inc. v. EEOC. These are the first big LGBT cases being heard by the court since Justice Kennedy left SCOTUS. Justice Kennedy was a champion of LGBT protections and his absence on the court leaves many wondering if the outcome of these cases will be protective of LGBT rights in the workplace. All three cases were heard together with oral arguments held on Oct. 8, 2019. I was lucky enough to attend argument along with my law partner, Andrea Farney. Because our practice focuses on employee rights, anti-discrimination work, civil rights litigation and appellate advocacy, we felt compelled to be in the courtroom to see and hear argument on these critical cases. What we did not expect were the amazing attorneys we met while we waited in line to enter the Supreme Court.

Welcome New FPC Members

The FPC continues to grow! On behalf of the FPC, Chair Hon. D. Michael Fisher sends a warm welcome to new members joining in the third quarter of 2019:
• Kallie Crawford, Allegheny County
• Kyle Elliott, Montgomery County, Elliott Greenleaf
• Michael Gehring, Philadelphia County, McAndrews Mehalick Connolly Hulse Ryan and Marone PC
• Austin White, Lycoming County, McCormick Law Firm

We are delighted that you have joined this vibrant and active committee! We hope you will enjoy the benefits of FPC membership, which include automatic receipt of four quarterly newsletters. Please consider participating in any of the FPC’s subcommittees – see below for subcommittee contact information. You can also contact Executive Council members with any ideas 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 U.S. District Courts in Pennsylvania.

1 Sharon R López is the managing partner of Triqueta Law, an employment and civil rights law firm located in Lancaster. She served as the 123rd president of the PBA. She is a member of the Federal Practice Committee, Employment Law Section, GLBT Rights Committee, WIP, Civil & Equal Rights Committee and is past co-chair of the Minority Bar Committee.
We networked in line at the Supreme Court of the United States.

My law partner and I have some experience with high profile Supreme Court cases and getting into the courtroom. We knew from past experience that getting in line at 3 a.m. on Oct.8 would be too late, so we decided to get in line at 2 p.m. the day before argument.

We arrived with our folding chairs and extra clothes. Although we were the first two in line as members of the SCOTUS bar, the general admission line had started over the weekend and was 25 people long when we arrived. The general admission line sported rainbow flags and young people chatting happily amongst themselves. The ACLU organizers were already setting up at the foot of the steps. Counter protesters were also gathering and guarding equipment. I was glad we made the decision to get in line a day early.

The two of us had been waiting in the attorney bar line alone for about six hours when another attorney showed up. We introduced ourselves and discovered he was Ken Bird, the EEOC trial counsel for Aimee Stephens, who was fired from Harris Funeral Homes. By 10:30 p.m., another EEOC lawyer showed up. She ran up to attorney Bird and hugged him. Later I discovered she was an EEOC lawyer as well, but more importantly, she was Rachel See, the board chair of the National Center for Transgender Equality. By 3 a.m. Mitchell Katine arrived. He is one of the Texas lawyers who represented the defendants in the Texas v. Lawrence case that ruled same sex anti-sodomy laws are unconstitutional. The line comprised 25 lawyers at 3 a.m., and I was meeting the legal leaders of the LGBT legal movement. I took advantage of the opportunity to mingle and document the stories of the lawyers who were present. I interviewed each of them between 4 and 5 in the morning. Some of the interviews are available for review here: Mitchell Katine, Rachel See and Ken Bird.

By 7:30 a.m., we were ready to go into the building, and the guards called us up to form a line on the courthouse side entrance. After two more hours of waiting in line, we were escorted to the courtroom and seated in the bar members section, which is immediately behind the advocates’ table. As the clock struck 10 a.m., the justices suddenly appeared, slipping through the red curtains to enter the courtroom.

The facts and history of the sexual orientation cases – Bostock & Zarda.

The same sex employment cases came from two different circuit courts - Bostock from the 11th Circuit and Zarda from the 2nd Circuit - and presented contradictory outcomes and legal analysis.

1. Bostock

Bostock, a gay man, claimed he was fired by the Clayton County Juvenile Court System in Georgia because of his sexual orientation. The county claimed they fired him because of misuse of funds.

Bostock filed a complaint in U.S. District Court for the Northern District of Georgia raising his sexual orientation claim. He later amended the complaint to include a claim of unlawful discrimination based on failing to conform to a gender stereotype. Clayton County moved to dismiss the complaint, arguing that the complaint did not state a viable claim for relief because Title VII does not protect anyone from discrimination based on sexual orientation. The district court granted the motion to dismiss. The Eleventh Circuit affirmed the decision.

2. Zarda

Zarda, an openly gay skydiving instructor, was fired by Altitude Express after a female customer complained that Zarda had come out to her while preparing for a “tandem skydive” during which they would be strapped together. He claimed he was fired because of his sexual orientation and because he did not fit in the sexual stereotype of a man. The district court dismissed both claims. The latter claim was dismissed because Zarda testified under oath that he is masculine and the former because the court found the law did not protect sexual orientation under Title VII of the Civil Rights Act. During Zarda’s litigation of the matter, the EEOC issued Baldwin v. Foxx, in which it found “allegations of discrimination on the basis of sexual orientation necessarily states a claim of discrimination on the basis of sex.” The district court did not find that Baldwin overruled Second Circuit precedent, which had held that sexual orientation was not protected under Title VII. Zarda appealed, and the Second Circuit ultimately reversed the Title VII holding below and found sexual
orientation discrimination is a subset of sex discrimination. The rationale was based on sex stereotyping because a sexual stereotype of being a man or a woman necessarily includes being attracted to the opposite sex.

The facts and history of the gender identity case – Harris.

Aimee Stephens was hired by Harris Funeral Homes (HFH) as Anthony Stephens in 2007. However, in 2013, Stephens wrote HFH's owner and said she identified as a woman and would be presenting as a woman at work. A few weeks later the owner, Rost, terminated Stephen and offered her a severance package, which Stephens declined. HFH argued Stephens violated company dress code and that it would have continued Stephens' employment but for Stephens' insistence on presenting as a woman. HFH also argued that the company owner, Rost, was very religious and interpreted the Bible as teaching that sex is immutable. HFH further argued that maintaining Stephens as an employee would force Rost to violate his faith. All parties accepted the owner's religious sincerity.

Stephens filed a federal complaint under Title VII sex discrimination provisions. The district court found the EEOC, who litigated the case for Stephens, raised a viable sex stereotyping claim under Title VII. Nevertheless, the district court ruled in favor of HFH because of the Religious Freedom & Restoration Act (RFRA). The district court held, “Since Rost cannot in good conscience ‘support the idea that sex is a changeable social construct,’ forcing him to allow a male funeral director to present as a woman while representing Harris Homes ‘would impose a substantial burden’ on Rost’s ability ‘to conduct his business in accordance with his sincerely-held religious beliefs.’”

The Sixth Circuit reversed, finding that the word sex in Title VII necessarily includes gender identity. The Sixth Circuit also reversed the lower court’s reliance on the RFRA, finding there was no substantial burden on Rost’s religious exercise.

The argument in Bostock & Zarda: Is sexual orientation a subset of “sex” for the purposes of Title VII of the Civil Rights Act?

Bostock and Zarda were consolidated because both cases presented the same issue: whether sexual orientation was encompassed in the Title VII prohibition on discrimination “because of sex.” Professor Pamela Karlan of Stanford University argued for the gay men in the Bostock and Zarda cases. Justice Ginsburg opened the questioning by asking how Congress could have had sexual orientation in mind when, in 1964, many states considered same sex relations criminal and a mental health condition. Prof. Karlan immediately redirected the argument to the plain meaning of the word “sex” in the statute and how sexual harassment was not contemplated in 1964 either but was later interpreted to include sexual harassment. She explained the plain meaning of the word “sex” encompasses sexual orientation just as it encompassed sexual harassment.

Chief Justice Roberts pitched the comparator question—that a policy against gay men and lesbian women does not present discrimination because men and women are being treated similarly. “What do you do with the argument that this is a non-discriminatory policy because it applies equally to relationships between women and relationships between men?” Prof. Karlan pointed out that such a policy would fail Title VII because it is the same as having a policy that requires a worker to conform to sex stereotypes, which has already been deemed a violation of Title VII.

Chief Justice Roberts asked Prof. Karlan to address protections for the religious beliefs of the employers and how SCOTUS should protect them if the court found in favor of her clients. Prof. Karlan countered that 1) the court already created a ministerial exception for religious employers, and 2) the jurisdictional requirements of Title VII (15 employees or more) only impact 15% of all employers and therefore the other 85% can discriminate on religious grounds without the limitations of Title VII impacting them.

Jeffrey Harris argued for the employers in the Bostock and Zarda cases. He opened by arguing Congress could not have meant to include sexual orientation in the term “sex,” therefore there is no protection for Bostock and Zarda under Title VII. Justice Sotomayor started the questioning of the employer by asking if someone is being fired for being too effeminate, which is a sexual trait, and someone is fired for being attracted to the same sex, which is also a sexual trait, if there is no BFOQ, isn't that discrimination because of sex?
Justice Breyer asked whether the question of refusing to hire a gay person was more like refusing to hire a person who was Jewish but marrying a Catholic. Harris admitted that would be religious discrimination. Harris tried to argue that Justice Breyer’s scenario did not exist, but Justice Breyer was emphatic that it did and that that type of discrimination is exactly like discrimination against men who are attracted to men and women who are attracted to women. Justice Sotomayor and Kagan followed up with the Manhart test: to determine if there is discrimination under Title VII, you look to see whether the same thing would have happened if you were a different sex and asserted that applying that simple test appeared to result in a ruling against the employers.

The Solicitor General Noel Francisco also argued in support of the employers and on behalf of the government. He argued that if you fire men who are attracted to men and you also fire women who are attracted to women, you are not discriminating because of sex. After a round of questions from Justice Ginsburg regarding this manner of assessing comparators, Justice Kagan pointed out that his briefs and arguments were inappropriately focused on statutory history and interpretation when the “lodestar of this court’s statutory interpretation has been the text of the statute, not the legislative history, and certainly not the subsequent legislative history.” Gen. Francisco responded that the statutory definition of sex does not list sexual orientation as a trait to consider when determining what is sex.

The highlight of the argument was during Prof. Karlan’s rebuttal when Justice Alito asked her if there is sex discrimination if the decisionmaker does not know the sex of the prospective employee at the time of hiring but does know the prospective employee is homosexual. Prof. Karlan responded immediately with a reference to Saturday Night Live’s “Pat.” Justice Alito was not familiar with the skit or the reference, and Prof. Karlan had to explain the androgynous character, Pat. The case was submitted after her rebuttal.

**The argument in Harris Funeral Homes v. EEOC: Does Title VII prohibit discrimination against transgender employees based on (1) their status as transgender or (2) sex stereotyping?**

David Cole argued for the EEOC in support of Aimee Stephens, the transgender employee who was fired by HFH. Justice Gorsuch asked Cole to respond to the Circuit Court judge’s opinion below finding against the EEOC and Stephens, wherein he stated that this was a legislative decision, not a decision for the courts. Cole responded that, “recognizing that transgender people have a right to exist in the workplace and not be turned away because of who they are does not end dress codes or restrooms.” Justice Gorsuch asked if interpreting the statute to include transgender status was not exercising “judicial modesty,” because of the “social upheaval” it would cause. Cole responded that the text of the statute must be read consistently. “How in the world can the court interpret Title VII to say that Ann Hopkins (Price Waterhouse) can’t be fired for being insufficiently feminine, but my client can be fired for being insufficiently masculine?”

Solicitor General Francisco also argued for the government in support of HFH’s position that Title VII does not encompass transgender people in the definition of sex. During his argument, Justice Gorsuch stated, “In Obergefell, this court made very clear that there were good and decent people who had different views with respect to gay marriage, and they should be respected.” Justice Sotomayor responded, “And we can’t deny that homosexuals are being fired merely for being who they are and not because of religious reasons, not because they are performing their jobs poorly, not because they can’t do whatever is required of a position, but merely because they’re a suspect class to some people. They may have power in some regions, but they’re still being beaten, they are still being ostracized from certain things.” She asked when the Supreme Court should intervene to stop “invidious discrimination.” She said gay people are still being fired just because of their sexual orientation. At what point, she asked, do we say that Congress did address this? Many of the attorneys in front of me turned to each other and nodded.

Cole closed the argument with his rebuttal. “She’s not seeking any special protection. She is seeking and all transgender people are seeking the same protection that everybody else gets under the law. This court 30 years ago said in Price Waterhouse: ‘We are beyond the day when an
employer could evaluate employees by insisting that they match the stereotypes associated with their group.”

**Conclusion**

At 12:04 p.m., Chief Justice Roberts announced, “The cases are submitted.” He stood up with his colleagues and exited the courtroom by stepping behind thick red curtains. Attendees in the room stood respectfully until the justices all disappeared but began talking anxiously as soon as the last bit of Justice Ginsburg’s robe was out of sight.

If I am to read the tea leaves on the ruling, I would say it is a very close case. I believe the swing vote in this case will be Chief Justice Roberts. He may decide that the stereotype precedent is too much to overturn and that doing so would negatively impact the public confidence on an independent judiciary. After all, a large part of his job as chief justice is to protect the institution of the court. We will likely have to wait until the end of the term, the last week of June 2020, to find out.

**RULES CHANGES**

**Reminder: Changes in Federal Rules Will Take Effect Dec. 1, 2019**

Numerous rule changes will take effect Dec. 1, 2019. These include amendments to:

- Federal Rules of Appellate Procedure 3, 6, 42, and Forms 1 and 2;
- Bankruptcy Rules 2005, 3007, 7007.1, and 9036; and
- Civil Rule 7.1.

In addition, a new rule – Rule 16.1 of the Federal Rules of Criminal Procedure – will take effect on the same date. As a general matter, rules changes are to govern in all proceedings commenced after Dec. 1 and, “insofar as just and practicable,” all proceedings pending on that date.


**Comments Sought On Proposed Rules Changes**

The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States is seeking comments on proposed amendments to:

- Appellate Rules 3, 6, 42, and Forms 1 and 2;
- Bankruptcy Rules 2005, 3007, 7007.1, and 9036; and
- Civil Rule 7.1.


**STATUS OF JUDICIAL VACANCIES**

**U.S. Court of Appeals, Third Circuit**

- There are no vacancies.

**U.S. District Court, Eastern District of PA**

- On July 31, 2019, Judge John Milton Younge’s nomination to fill Judge Mary McLaughlin’s seat was confirmed by voice vote. Judge Younge assumed office on Aug. 20.
- A nomination has been made to fill two of the three remaining vacancies. On Sept. 9, 2019, Assistant U.S. Attorney Karen Spencer Marston was nominated to fill Judge Legrome Davis’ seat. Her nomination was placed on the Senate executive calendar on Oct. 24. On Oct. 15, 2019, Assistant U.S. Attorney John M. Gallagher was nominated to fill Judge Joel Slomsky’s seat. Hearings were held on that nomination on Oct. 16.
- A nomination has yet to be made to fill the vacancy created when Judge Lawrence Stengel retired (Aug. 31, 2018).

**U.S. District Court, Middle District of PA**

- On May 13, 2019, Jennifer Philpott Wilson, a partner at Philpott Wilson, LLP, was nominated to fill Judge Yvette Kane’s seat. That nomination was placed on Senate executive calendar on June 27, 2019.
U.S. District Court, Western District of PA

- On July 31, 2019, the nomination of William Shaw Stickman IV to fill Judge Joy Flowers Conti's seat was confirmed by yea-nay vote. Judge Stickman assumed office on Aug. 5, 2019. On Sept. 11, 2019, Stephanie L. Haines's nomination to fill Judge David Cercone's seat was confirmed by yea-nay vote. Judge Haines assumed office on Sept. 30, 2019.
- A nomination has been made to fill one of the three remaining vacancies. On March 5, 2019, Judge Robert J. Colville of the Court of Common Pleas of Allegheny County was nominated to fill Judge Arthur Schwab's seat. That nomination was placed on the Senate executive calendar on May 9, 2019.
- Nominations have yet to be made to fill the vacancies created when Judge Nora Barry Fischer assumed senior status (June 13, 2019) and when Judge Peter Phipps was elevated (July 16, 2019).

CASE SUMMARIES

Summaries of Third Circuit and Pennsylvania district court decisions issued between July 1, 2019 and Sept. 30, 2019 involving issues of potential interest to FPC members.

THIRD CIRCUIT PRECEDENTIAL OPINIONS

**GN Netcom, Inc. v. Plantronics Inc.,** 930 F.3d 76 (3d Cir. 2019) (Spoliation sanctions) – GN sued competitor Plantronics, alleging it violated federal antitrust law and Delaware common law. Plantronics initially issued a litigation hold, but Houston, a senior executive, instructed Plantronics employees to delete certain emails that referenced Plantronics's competitive practices or its competitors, particularly those concerning GN or its products. He also deleted his own emails. Other Plantronics executives also acted to hide relevant information from GN. A forensics expert preliminarily determined that Houston had deleted up to 90,574 unrecoverable emails, up to 5,887 of which were likely responsive to GN’s discovery requests. Rather than paying that expert to complete his analysis, Plantronics destroyed back-up tapes of Houston's emails. Gallivan, GN's expert, independently determined that up to 15,000 of Houston's deleted emails were relevant to the litigation. GN moved for a default liability judgment in light of the spoliation. The district court, although finding that Plantronics acted in “bad faith” with an “intent to deprive GN” of documents, denied the motion, opting instead to issue a permissive adverse inference instruction to the jury, fine Plantronics $3 million and order it to pay GN's spoliation-related fees. The district court later also denied GN's motion to present Gallivan's testimony at trial and instead read 17 stipulations to the jury. The jury returned a verdict in favor of Plantronics. GN appealed. The Court of Appeals concluded the district court acted within its discretion when it denied GN's motion for default judgment, but it committed reversible error when it excluded Gallivan's testimony on the scope of Plantronics's spoliation. The district court's judgment was reversed in part and the case was remanded for a new trial. (Opinion author: Judge D.M. Fisher; one judge dissenting in part).

UPCOMING EVENTS

**Nov. 21 & 22:** The PBI will be holding its Business Law Institute 2019 at the CLE Conference Center, Wanamaker Building in Philadelphia. At-large FPC Executive Council member Tom Wilkinson will be presenting a hot topics and trends ethics CLE on Nov. 22. For more information, go to [www.pbi.org](http://www.pbi.org).

**Dec. 6:** The ACBA Bankruptcy and Commercial Law Section will be presenting the 32nd Annual Western District of Pennsylvania Bankruptcy Symposium from 8 a.m. to 5 p.m. at the Westin Convention Center in Pittsburgh. The symposium carries up to 6 CLE credits (with 2 ethics credits available). For more information go to [https://www.acba.org/CLE-Events/Event-Info/sessionaltd/CLE191206_BANKRUPT](https://www.acba.org/CLE-Events/Event-Info/sessionaltd/CLE191206_BANKRUPT).

**Dec. 13:** The Academy of Trial Lawyers of Allegheny County will be holding its 31st Annual Academy Federal Practice Program (approved for 2 substantive and 1 ethics credits) at the Omni William Penn Hotel in Pittsburgh. For more information go to [academy@atlac.org](mailto:academy@atlac.org).
Pennsylvania v. President of the U.S., 930 F.3d 543 (3d Cir. 2019) (Administrative law) – Without issuing a notice of proposed rulemaking or soliciting public comment, the HHS and the Departments of Labor and Treasury (the agencies) issued two new IFRs, which expanded the entities that could invoke an exemption to the ACA’s requirement that group health insurance plans cover contraceptive services as a form of women’s preventive health care. Pennsylvania filed suit against the president, the agencies and others seeking to enjoin the enforcement of the new IFRs. After the agencies promulgated two Final Rules that were virtually identical to the IFRs, Pennsylvania filed an amended five-count complaint, joined New Jersey as a plaintiff, added challenges to the Final Rules, and moved to enjoin them. On the day the Final Rules were to go into effect, district court issued a nationwide preliminary injunction enjoining their enforcement, concluding that the states had standing to challenge the Final Rules and that they had established a likelihood of success on the merits of their procedural and substantive APA claims. The government appealed. The Court of Appeals agreed that the states had standing. As to the merits, the court rejected the government’s arguments that it could forego notice-and-comment procedures and agreed with the district court that the states had demonstrated a likelihood of success in showing that the Final Rules were procedurally defective and thus violated the APA. Because neither the ACA nor RFRA authorized or required the Final Rules, they were also enacted “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,” making them “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” The court ultimately concluded that the district court did not abuse its discretion in issuing a nationwide injunction. (Opinion author: Judge P. Shwartz).

U.S. v. Blunt, 930 F.3d 119 (3d Cir. 2019) (Criminal Law & Procedure [Motions to sever]) – Married couple Blunt and Hall were charged with multiple counts of mail fraud, money laundering and other crimes as a result of their allegedly engaging in a scheme to collect unemployment compensation benefits from federal and state agencies by using the identities of military service people. Scheduled to be tried together, both defendants repeatedly moved for severance, but the district court denied each motion. Ultimately a jury returned guilty verdicts, and both were convicted and sentenced. Both challenged the denial of their motions to sever, among other issues, on appeal. The Court of Appeals concluded that, because Blunt’s testimony was prejudicial to Hall and the evidence elicited from her could only to admitted through her testimony (given her motion represented that she would exercise her spousal privilege in the event that their trials were severed), the district court abused its discretion in denying Hall’s motions. The court also reversed the district court’s denial of Blunt’s motions, reasoning that Blunt should be given the opportunity to exercise her spousal privilege without being forced to choose between said exercise and testifying adversely against her spouse in her own defense. The court vacated Hall’s and Blunt’s convictions and sentences and remanded with the instruction to grant each defendant’s motion on the grounds provided in the opinion. (Opinion author: Judge L.F. Restrepo).

Tennessee Gas Pipeline Co. v. Permanent Easement for 7.053 Acres, 931 F.3d 237 (3d Cir. 2019) (Statutes [Natural Gas Act]) – In this interlocutory appeal, the Court of Appeals addressed one legal question: whether state law or federal law governs the substantive determination of just compensation in condemnation actions brought by private entities under the NGA. The district court had held that federal law governed, making just under $1 million in consequential damages for professional fees and development costs permitted under Pennsylvania law unavailable to the owner of the property Tennessee Gas Pipeline Company — a private entity — sought to condemn. Because federal law did not supply a rule of decision on the precise issue before it, the Court of Appeals filled the void with a common law remedy, opting to incorporate state law as the federal standard. The opinion lays out in detail how the court resolved questions at every step of its analysis. The district court’s order reaching the opposite result was reversed. (Opinion author: Judge J. Greenaway Jr.; one judge dissenting).

U.S. v. Porter, 933 F.3d 226 (3d Cir. 2019) (Criminal Law & Procedure) – After Porter was charged with possession with intent to distribute cocaine base, he moved to suppress
the cocaine base found during a traffic stop, arguing that the search and seizure violated his Fourth Amendment rights. After an evidentiary hearing, the district court denied the motion. Several weeks later, Porter entered an open guilty plea, which the district court found to be intelligent, knowing, voluntary and supported by the facts. At Porter’s sentencing hearing months later, his counsel “respectfully took exception to the court’s rulings” from the suppression hearing “to preserve the record.” After sentencing, the district court informed Porter of his appellate rights. He appealed, challenging the denial of his suppression motion. In its opinion, the Court of Appeals clarified that a claim need not attack subject matter jurisdiction to survive an unconditional guilty plea; instead, whether a claim survived such a plea depended on whether the claim was constitutionally relevant to the defendant’s conviction. The validity of Porter’s conviction could not be affected by an alleged Fourth Amendment violation because the conviction did not rest in any way on evidence that may have been improperly seized; it was instead based on his solemn and unconditional confession of guilt. Any post-sentencing statements from the district court regarding Porter’s appellate rights did not expand those rights. The judgment of conviction was affirmed. (Opinion author: Judge T. Hardiman).

Freedom from Religion Found. Inc. v. County of Lehigh, 933 F.3d 275 (3d Cir. 2019) (Constitution [Establishment Clause]) – Adopted in 1944, the official seal of Lehigh County has included a Latin cross surrounded by nearly a dozen secular symbols of significance to the community. The only explanation of the cross’s inclusion was provided in 1946: it signified “Christianity and the God-fearing people which are the foundation and backbone of [the] County.” The Freedom from Religion Foundation (FFRF) and four of its members filed suit in 2016, alleging that the seal violated the Establishment Clause. The Freedom from Religion Foundation (FFRF) and four of its members filed suit in 2016, alleging that the seal violated the Establishment Clause. After both parties moved for summary judgment, the district court applied the Lemon-endorsement test and denied the county’s motion and granted FFRF’s. Consistent with the Supreme Court’s decision in American Legion v. American Humanist Association, 139 S. Ct. 2067 (2019), the Court of Appeals held that Lemon does not apply to “religious references or imagery in public monuments, symbols, mottos, displays and ceremonies” like the seal. American Legion’s “strong presumption of constitutionality” applied to the seal, and plaintiffs did not show discriminatory intent in the decision to maintain its design or disrespect based on religion in the challenged design. Here, the 1946 explanation for the cross’ inclusion did not doom the seal because the Board of Commissioner’s intent in retaining the seal — to continue “recognizing the history of the county” — was plainly nondiscriminatory. (Opinion author: Judge T. Hardiman).

Jester v. Hutt, 937 F.3d 233 (3d Cir. 2019) (Punitive damages where nominal damages awarded) – Penn Ridge, a horse boarding and breeding facility, agreed to board several of Fantasy Lane Thoroughbred Stable’s horses starting in July 2012, but disputes soon arose between the two. Penn Ridge sued Fantasy Lane in state court for breach of contract and defamation, alleging that Fantasy Lane failed to pay boarding and breeding service fees and that its managing partner had sent to several individuals in the industry defamatory emails about Penn Ridge and its owner’s competence. Fantasy Lane removed the case and brought counterclaims, including four negligence claims for the poor care and mistreatment of its horses, a breach of contract claim relating to the promotion and management of one of its thoroughbreds, and a breach of fiduciary duty claim stemming from stallion season issues. The district court granted Penn Ridge’s motion for partial summary judgment on the negligence claims. The remaining claims went to a jury, which found for Penn Ridge, awarding it $110,000 for the breach of contract damages, $1 in nominal damages on its defamation claim and $89,999 in punitive damages. The district court denied Fantasy Lane’s request for a new trial but granted remittitur, reducing the punitive damages award to $5,500. Both parties appealed. With one exception, the Court of Appeals affirmed the district court’s rulings. The exception was the reduction in the punitive damages award: the district court had erred in treating nominal damages as compensatory damages and in applying a single-digit ratio guidepost. That portion of the district court’s post-trial order was vacated, and the case was remanded for further proceedings. (Opinion author: Judge T. Hardiman).
Weber v. McGrogan, 939 F.3d 232 (3d Cir. 2019) (Appellate jurisdiction [Final order]) – Weber’s pro se complaint stemmed largely from her experiences dealing with New Jersey public officials during a child custody matter. The district court adopted the magistrate judge’s recommendation that Weber’s claims be dismissed under Rooker-Feldman or Younger, ordered the complaint to be dismissed without prejudice and gave Weber 30 days to amend. She filed an appeal but, after receiving notice of possible jurisdictional defects and getting no response from the district court on her request for a final order, Weber withdrew that appeal. After the 30 days had passed, defendants sought dismissal with prejudice. The district court made an electronic entry on the docket that stated: “Civil Case Terminated. (Clerk’s Note: Please see Order Dkt. Entry #119) (sr,) (Entered: 11/30/2016).” Weber again filed an appeal. The Court of Appeals concluded that it did not have jurisdiction because there was no final order. The docket entry was a utility entry and therefore did not suffice, the prior dismissal without prejudice was not a final order because it was not “self-effectuating,” and Weber’s actions in the district court left ample room for doubt about whether the district court’s dismissal of the case was a reviewable, final order (e.g., she did not file a statement regarding an intent to stand on the complaint). The opinion sets out the types of actions necessary to ensure that a dismissal without prejudice is treated as final. (Opinion author: Judge P. Matey).

Malhan v. Sec’y, U.S. Dep’t of State, 938 F.3d 453 (3d Cir. 2019) (Federal court jurisdiction) – Malhan’s wife sued for divorce in 2011 in New Jersey; as of this opinion’s writing, that divorce was still not final. After the family court issued several adverse interlocutory orders and failed to modify his support obligations despite marked changes in the parties’ circumstances, Malhan sued in federal court seeking declaratory or injunctive relief against the New Jersey officials for violating federal law. Three of Malhan’s six counts were the focus of the appeal: (1) a challenge to the disclosure of Malhan’s bank records and the administrative levy of his bank account (Count 2); (2) a claim that defendants were violating Malhan’s right to due process of law by refusing to permit counterclaims and offsets to his child and spousal support debt (Count 5); and (3) a challenge to the threatened garnishment of Malhan’s wages (Count 6). The district court dismissed all six the counts, holding that it lacked jurisdiction under Rooker-Feldman and that to the extent it had jurisdiction, it would decline to exercise it under Younger v. Harris. Addressing the question whether Rooker-Feldman applied given the absence of a final judgment, the Court of Appeals adopted the approach taken by Federacion de Maestros de Puerto Rico v. Junta de Relaciones del Trabajo de Puerto Rico, 410 F.3d 17 (1st Cir. 2005) and held that Rooker-Feldman did not apply when state proceedings have neither ended nor led to orders reviewable by the U.S. Supreme Court. Under this principle, none of the interlocutory orders in Malhan’s state case were “judgments” and so Rooker-Feldman did not deprive the district court of jurisdiction. Addressing Younger abstention, the court reviewed whether Counts 2, 5 or 6 fell within any of the “three exceptional categories” of proceedings described in Sprint Commc’n Inc. v. Jacobs, 571 U.S. 69 (2013). Concluding that they did not, the court reversed the dismissal of those three counts. (It affirmed the dismissal of the remaining counts). (Opinion author: Judge T. Hardiman).

NCAA v. Governor of New Jersey, ___ F.3d ___, 2019 WL 4620326 (3d Cir. Sept. 24, 2019) (Civil Procedure [Recovery on bonds under Rule 65]) – The New Jersey legislature enacted a law in 2014 that repealed certain state law prohibitions on gambling at horserace tracks and casinos. The New Jersey Thoroughbred Horsemen’s Association (NJTHA) immediately announced its intention to conduct sports gambling at Monmouth Park. The NCAA and four professional sports leagues challenged the 2014 law and requested a TRO and preliminary injunction to stop NJTHA from doing so. The district court entered a TRO that barred the NJTHA from conducting sports gambling, concluding that the 2014 law likely violated the federal Professional and Amateur Sports Protection Act (PASPA). The court required plaintiffs to post $1.7 million bond as security, an amount that was later increased to $3.4 million. Just before the TRO was set to expire, the district court ruled in favor of plaintiffs, holding that the 2014 law was “invalid as preempted by PASPA,” and it
entered a permanent injunction against the defendants. Although the Third Circuit affirmed, the U.S. Supreme Court later reversed. After *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461 (2018) (holding that PASPA was unconstitutional) was issued, NJTHA moved in the district court for judgment on the bond. The district court denied the motion, deciding that NJTHA was not “wrongfully enjoined” under Rule 65(c) and even if NJTHA had been, good cause existed to deny its request. The Court of Appeals held that a party is wrongfully enjoined under Rule 65(c) when it turns out that that party had a right all along to do what it was enjoined from doing. Because NJTHA had a right to conduct sports gambling all along, it was wrongfully enjoined. The court next adopted the majority rule regarding damages: there is a rebuttable presumption that a wrongfully enjoined party is entitled to recover provable damages up to the bond amount. Because nothing rebutted that presumption in this case, NJTHA was entitled to recover provable damages up to the bond amount. The district court’s denial of the motion was vacated. (Opinion author: Judge M. Rendell; one judge dissenting).

**EASTERN DISTRICT OF PA OPINIONS**

*Savakus-Malone v. Piramal Critical Care, Inc.*, 2019 U.S. Dist. LEXIS 111998 (E.D. Pa. July 3, 2019) (Labor & Employment [FLSA Joint employer]) – Masis, an LLC that provides labor staffing for its clients, screened Savakus-Malone as a potential Piramal employee. Savakus-Malone was offered, and accepted, the opportunity to work for Piramal as a production operator. While employed at Piramal, Savakus-Malone was told to arrive 15 minutes early, unpaid, to don and doff necessary safety gear, and to stay an extra 15 minutes at the end of each shift, unpaid, to remove that gear. He was also instructed to forego meal breaks, although time allotted for meal breaks was automatically deducted from his hours worked. Sometime after Savakus-Malone complained to representatives from Piramal and Masis regarding incorrect pay, he was fired. Savakus-Malone filed a putative class action alleging that Masis and Piramal were “joint employers” and that their actions violated the FLSA and the PMWA, among other state-law claims. Masis moved for dismissal under Rule 12(b)(6), arguing that it was not a joint-employer under the FLSA. After undergoing a thorough analysis of factors set forth in *In Re Enterprise Rent-A-Car Wage & Hour Empl. Practices Litig.*, 683 F.3d 462 (3d Cir. 2012), as well as of other potentially relevant facts, Judge J. Leeson Jr. concluded that the complaint failed to sufficiently allege that Masis exercised “significant” control over Savakus-Malone to constitute a joint employer under the FLSA or PMWA. These and other claims against Masis were dismissed without prejudice, with the court giving Savakus-Malone an opportunity to amend. Claims against Piramal were left untouched.

*Exeter Twp. v. Gardecki*, 2019 U.S. Dist. LEXIS 115190 (E.D. Pa. July 10, 2019) (Statutes [Stored Communications Act]) – Exeter Township employed Gardecki as an IT administrator, whose duties included providing general computer support services to township employees. Gardecki accessed the township’s cloud-based server and created a copy of it onto a hard drive. The server contained township’s highly sensitive and confidential information as well as township’s electronic data, such as email messages. After his termination, Gardecki retained the copy of the server and stole two additional hard drives that contained township’s confidential information. He stored them at his home in an unsecured location for over 20 months. Exeter Township sued Gardecki. Three claims were asserted in its operative complaint: violation of the federal Stored Communications Act (SCA), violation of the Pennsylvania Stored Communications Act and breach of fiduciary duty. Gardecki moved for dismissal under Rule 12(b)(6), asserting, among other things, that the township failed to allege facts that Gardecki accessed the server and the stored information contained on the server without authorization or by exceeding his authorization. After reviewing the two divergent approaches to the meaning of “access with authorization” or “exceeding authorization to access” taken by other courts, Judge J. Leeson Jr. followed intra-circuit precedent that interpreted the SCA’s language to prohibit unauthorized access of stored communications, but not unauthorized use of the communications. Because the township did not allege that Gardecki accessed the server without authorization or that he accessed the stored information in excess of authorization, it failed to state a claim under the SCA. That claim was dismissed with
prejudice; the remaining state law claims were dismissed without prejudice so that they could be filed in state court.

**Mercado v. Sugarhouse HSP Gaming, L.P.,** 2019 U.S. Dist. LEXIS 122854 (E.D. Pa. July 23, 2019) (Labor & Employment [Pregnancy discrimination]) – Mercado worked as a dealer at Sugarhouse’s casino. Based on her supervisors’ and coworkers’ actions during her pregnancy and after giving birth, Mercado filed claims, *inter alia,* of sex discrimination and retaliation under Title VII and of sex and pregnancy discrimination under state law. Claims of discrimination invoked hostile work environment, constructive termination and failure to promote theories of liability. Defendants moved for summary judgment on all claims; Mercado opposed only as to her state and federal law discrimination claims against Sugarhouse based on the theories of hostile work environment and constructive termination. Judge W. Beetlestone concluded that Mercado had adequately made out her hostile work environment claim. Because she also provided ample indication that Sugarhouse’s anti-harassment policy was either ineffectual or not followed and that Sugarhouse failed to exercise reasonable care to prevent and correct any harassing behavior, defendants had not demonstrated they were entitled to the *Faragher-Ellerth* defense as a matter of law. The court also concluded that defendants had failed to show entitlement to judgment as a matter of law on the constructive discharge claim. Thus, defendants’ motion was granted as to the unopposed claims, but denied it as to the opposed ones.

**Doe v. Univ. of the Scis.,** 2019 U.S. Dist. LEXIS 125592 (E.D. Pa. July 29, 2019) (Statutes [Title IX]) – After an outside investigator concluded it was more likely than not Doe was responsible for having sex with two female accusers without their affirmative consent, the university expelled him. Doe unsuccessfully appealed his expulsion through the university’s internal processes, and his expulsion became effective in early 2019. After an unsuccessful attempt to obtain injunctive relief that would have allowed him to complete his senior year and graduate, Doe filed an amended complaint, which contained a claim for gender discrimination in violation of Title IX and state law claims for breach of contract and intentional and negligent infliction of emotional distress. The university moved to dismiss pursuant to Rule 12(b)(6). Because Doe’s Title IX claim invoked the erroneous outcome, selective enforcement and deliberate indifference theories of discrimination, Chief Judge J. Sánchez analyzed each separately. The court concluded Doe had failed to allege particular facts supporting any of the three theories under Title IX. It also found Doe failed to allege the existence of specific contract provisions the university may have violated during his disciplinary proceedings or conduct sufficiently outrageous to support a claim for the intentional infliction of emotional distress. Doe’s negligent infliction of emotional distress claim was foreclosed by the gist of the action doctrine. The university’s motion was therefore granted in full, and because the court found additional leave to amend would be futile, dismissal was with prejudice.

**Hall v. Millersville Univ.,** 2019 U.S. Dist. LEXIS 151701 (E.D. Pa. Sept. 5, 2019) (Statutes [Title IX] / Torts) – An 18-year-old Millersville University student was murdered in her dorm room by her (non-student) boyfriend after both attended a party at a local fraternity chapter. The victim’s parents, as administrators and personal representatives of their daughter’s estate and in their own right as the decedent’s heirs-at-law, sued the university, the local fraternity chapter, the national fraternity and numerous individuals, asserting claims for deliberate indifference under Title IX and substantive due process violations and state-created danger under § 1983. Their complaint also included survival actions and wrongful death claims against the defendants. Before the court were summary judgment motions filed by the university, the national fraternity, the local fraternity chapter and an individual chapter member. In this opinion, Judge E. Smith addressed in detail issues of social host liability, proximate cause, vicarious liability, duty to rescue and Title IX issues about the university’s knowledge of the harassment/abuse the victim suffered during her time on campus. The court ultimately concluded that (1) under Pennsylvania Supreme Court jurisprudence, the national fraternity was not liable under the social host doctrine for the acts of its chapters; (2) although the social host doctrine undoubtedly applied to the local chapter defendants who served alcohol to minors, no proximate cause existed over such an unforeseeable, extraordinary act of violence that
occurred only after the victim and her boyfriend had left the party; and (3) Title IX claims against the university failed because the boyfriend was not a student but instead the victim’s guest. The defendants’ motions were granted.

**Barenbaum v. Hayt, Hayt & Landau LLC,** 2019 U.S. Dist. LEXIS 154959 (E.D. Pa. Sept. 10, 2019) (Statutes [FDCPA] / Class certification) – Hayt, Hayt & Landau (HHL), acting on behalf of Midland Funding (the owner of Barenbaum’s delinquent account), obtained a default judgment against Barenbaum and later sent him a “Notice of Deposition in Aid of Execution” that directed him to “appear and testify at a deposition” at a specified date and place and to produce documents. Barenbaum appeared in person at the designated location, along with an attorney. An attorney for HHL appeared as well, but there was no court reporter or other individual permitted to administer an oath under the Pennsylvania Rules of Civil Procedure present (HHL had explicitly directed its counsel to NOT administer an oath). The HHL attorney did not ask any questions about Barenbaum’s assets but reported back to HHL that he did not have any to satisfy the judgment. On the day that Barenbaum’s deposition was scheduled, HHL had scheduled 80 other post-judgment depositions, all of which were to be handled by a single attorney in one location in a 2.5-hour period. Only three people showed up. Barenbaum filed a putative class action against HHL alleging violations of the FDCPA. After rejecting HHL’s arguments that the case was moot, Judge B. Schiller addressed the parties’ cross-motions for summary judgment. The court concluded that, although the notice by itself did not violate Section 1692(d), HHL’s deposition notices violated the Section 1692(e) of the FDCPA. It also decided that HHL could not invoke the bona fide error defense because the claimed error was a misinterpretation of state law. The court also granted Barenbaum’s motion for class certification.

**MIDDLE DISTRICT OF PA OPINIONS**

**Diaz v. Berryhill,** 388 F.Supp.3d 382 (M.D. Pa. 2019) (Social Security [Remand or award benefits]) – In 2008, maintenance worker Diaz fell down an elevator shaft while on the job, and he suffered severe spinal, elbow, wrist and neurological impairments as a result. Over the next decade, Diaz sought disability benefits – enduring, in addition to intractable pain from his injuries, three hearings before an ALJ and two appeals (both of which vacated and remanded for further agency consideration). His application was repeatedly denied, despite multiple medical sources finding that his impairments were completely disabling. The commissioner conceded that Diaz was totally and completely disabled for at least four years immediately after his fall and that the latest decision – in July 2018 – was flawed in basic and fundamental ways. The commissioner requested the court to remand the case for a fourth administrative decision; Diaz asked the court to order an award of benefits. Guided by other courts’ decisions, Chief Magistrate Judge M. Carlson awarded Diaz benefits, finding that (1) the delays experienced in this case far exceeded those previously found to have been excessive both in terms of the overall duration of this delay, and the number of instances in which the courts have been compelled to set aside flawed ALJ decisions; (2) the administrative record was fully developed; and (3) substantial evidence on the record as a whole indicated that Diaz was disabled and entitled to benefits.

**Kocher v. Municipality of Kingston,** __ F.Supp.3d __, 2019 WL 38701550 (M.D. Pa. Aug. 13, 2019) (Labor & Employment [ADAAA]) – Police officer Kocher was injured in June 2015 when he twisted his left knee while exiting his patrol car. It was later determined that he had a torn meniscus, and he had surgery in August and also applied for and received workers’ compensation benefits in that month. Before returning to work in late January 2016, Kocher learned of a vacancy for a detective position, that he was second on the list of three certified applicants for that position, and that the person third on that list was selected by the mayor to fill it. Kocher sued Kingston and its mayor, alleging that defendants violated the ADAAA and PHRA by (1) engaging in disability discrimination when they failed to interview and hire him for the detective position; and (2) retaliating against him for requesting a reasonable accommodation and for filing a workers’ compensation claim by not interviewing and hiring him for the detective position. Defendants moved for summary judgment. Judge M. Mannion found that, while the failure to promote
was an adverse employment action, the decision not to interview, which was neither statutorily or contractually required, was not. The court also concluded that, whether the protected activity was a request for reasonable accommodation or the filing of a workers’ compensation claim, there was no causal connection between that activity and the failure to interview and hire Kochar for the vacant position. As to Kochar’s discrimination claim, the court found that he had not produced sufficient evidence that he had a disability at the time that he was not chosen for the detective position and that his temporary knee condition did not substantially limit a major life function. Summary judgment on the statutory claims was granted to defendants; the court declined to assert jurisdiction over a common law retaliation claim.

Wartluft v. Milton Hershey School, __ F.Supp.3d __, 2019 WL 3801491 (M.D. Pa. Aug. 13, 2019) (Civil Rights – Housing) – Parents of a former student, on behalf of themselves and their daughter’s estate, filed a multi-count complaint against the Milton Hershey School and the Hershey Trust Company, as trustee for the Milton Hershey School Trust, alleging that despite knowing that their daughter Abrielle suffered from mental disabilities (depression and suicidal ideations), defendants discharged her from their care under a “shadow policy” that mandated that students be expelled after two mental health hospitalizations. Abrielle committed suicide shortly after her discharge. Defendants moved for judgment on the pleadings. Judge J. Jones III granted the motions in part and denied them in part. With respect to claims under the Fair Housing Act (FHA), the court concluded that (1) the parents had stated sufficient facts in their complaint to demonstrate that they had suffered an injury in fact, but failed to plead that their injuries fell within the zone of interests contemplated by FHA and thus they lacked standing to pursue their claims; (2) the estate had pleaded sufficient facts – including that Abrielle was a “renter” as a result of her performing chores while a resident – to survive a motion for judgment on the pleadings as to the estate’s Section 3604(f)(1) and (f)(2) FHA claims; and (3) plaintiffs’ request for injunctive relief under the FHA was moot as a result of Abrielle’s suicide. The court denied defendants’ motions with respect to a breach-of-fiduciary duty count, concluding that plaintiffs had pleaded the existence of a fiduciary relationship between Abrielle and the school, but granted them as to a civil conspiracy count and a negligence per se count.

Piazza v. Young, __ F.Supp.3d __, 2019 WL 4034432 (M.D. Pa. Aug. 27, 2019) (Torts) – Parents of Timothy Piazza sued 28 fraternity members, asserting 14 counts related to the death of their son as a result of injuries he suffered at the fraternity’s Feb. 2, 2017 “Bid Acceptance Night” that defendants planned or participated in. Defendants moved to dismiss portions of the complaint. In this comprehensive opinion, Judge M. Brann concluded that numerous counts survived defendants’ motion, including (1) negligence claims in Counts 1 and 2; (2) negligence-after-the-fall claims (Count 3) against those defendants alleged to have voluntarily assumed a duty of care vis-à-vis Timothy after he fell and then breached that duty causing him injury, (3) Count 4, which alleged that defendants’ conduct violated Pennsylvania’s anti-hazing law and as a result amounted to negligence per se; and (4) battery claims against six defendants (Counts 7 through 12). The request to dismiss the demand for punitive damages was also rejected. Counts that required dismissal (e.g., Count 3 as to other defendants; Count 5, which alleged negligence per se based on violation of Pennsylvania’s law prohibiting furnishing alcohol to minors) were dismissed without prejudice, and plaintiffs were given the opportunity to amend their complaint. Finally, the court concluded that a limited stay of some discovery and proceedings was warranted as to those defendants who had either pleaded, or had been found, guilty in parallel criminal proceedings and as to those defendants who were currently appealing pretrial rulings in criminal proceedings.

Clarity Sports International LLC v. Redland Sports, __ F.Supp.3d __, 2019 WL 4194190 (M.D. Pa. Sept. 4, 2019) – A sports management company and its principal owner, a National Football League Players Association certified contract advisor, entered into exclusive representation and endorsement/marketing agreements with an NFL player. After that player terminated the representation agreement, the company and owner sued several sports memorabilia
companies (and their principal owners) that had contracted (through a different certified advisor) with the player to participate in a single autograph signing event. Invoking the court’s diversity jurisdiction, the amended complaint alleged two counts of tortious interference with existing contractual relationships. All defendants filed motions to dismiss under Rules 12(b)(1) (challenging the alleged jurisdictional amount) and (b)(6), and two defendants also moved for dismissal under Rule 12(b)(2). Defendants also sought a stay pending the outcome of a grievance plaintiffs had filed and for bifurcation and sequencing of discovery so as to limit discovery to jurisdictional issues. In an opinion provides an excellent summary of the applicable standards and analysis, Judge Y. Kane concluded (1) the damages that plaintiffs claimed were impermissibly speculative for purposes of establishing that the amount in controversy requirement had been met and thus the 12(b)(1) motion would be granted; and (2) the amended complaint did not contain factual allegations to support the conclusion that the named defendants acted in concert with two non-parties in order to interfere with plaintiffs’ representation of the player and thus the 12(b)(6) motion would be granted. In each instance, dismissal was without prejudice to plaintiffs’ right to file a second amended complaint. The court denied all other motions and requests.

WESTERN DISTRICT OF PA OPINIONS

Diamond v. Pa. State Educ. Ass’n, 2019 U.S. Dist. LEXIS 112169 (W.D. Pa. July 8, 2019) (Constitutionality of state statute) – This case involved Janus v. American Federation of State, County, and Municipal Employees, Council 31, 138 S. Ct. 2448 (2018), which overruled Abood v. Detroit Board of Education, 431 U.S. 209 (1977) (upholding state law requiring fair-share fees against a First Amendment challenge). Current or retired Pennsylvania public-school teachers filed a putative class action under § 1983 alleging that Pennsylvania State Education Association, the Chestnut Ridge Education Association, and the National Education Association (union defendants) violated their constitutional rights by forcing them to pay fees to the unions (or, in the case of those objecting on religious grounds, a union-designated charity) as a condition of their employment (fair-share fees) under 71 Pa. Stat. § 575 (permitting those fees to be mandated under a collective bargaining agreement) even though they chose not to join the Pennsylvania State Education Association or its affiliate unions. They named various Commonwealth defendants charged in various ways with enforcing Pennsylvania’s laws as well, urging that they be enjoined from enforcing § 575 in an unconstitutional manner. Defendants filed motions to dismiss under Rule 12(b)(1) and 12(b)(6). Judge K. Gibson dismissed plaintiffs’ claims against the Commonwealth defendants on Eleventh Amendment grounds, as there was no allegation of an ongoing violation of federal law. Alternatively, claims against the Pennsylvania attorney general and the members of the Pennsylvania Labor Relations Board had to be dismissed because they lacked “some connection” with the enforcement of § 575. Claims for declaratory and injunctive relief against the union defendants were moot due to Janus and union defendants’ undisputed compliance with that decision; the voluntary-cessation exception did not apply. Plaintiffs’ claims for repayment of previously paid fair-share fees were dismissed based on the good-faith defense as it was objectively reasonable for union defendants to rely on § 575 and Abood before Janus was issued.

Winnecour v. United States Bank NA (In re Venanzio), 602 B.R. 921, 2019 Bankr. LEXIS 2380 (Bankr. W.D. Pa. July 30, 2019) (Bankruptcy) – Debtor Venanzio filed for bankruptcy relief under chapter 13 in Feb. 20, 2014, and a few days later filed a chapter 13 plan that included in a section headed “Long Term Continuing Debts Cured and Reinstated, and Lien (if any) Retained” pre-petition arrearages to U.S. Bank NA, trustee for Pennsylvania Housing Finance Agency, in the amount of $4,895. No objections to the plan were filed, and the plan was confirmed on Sept. 11, 2014. All nongovernment proofs of claim were due June 23, 2014. The bank filed a proof of claim on June 23, 2015, stating arrears in the amount of $10,453.78. Chapter 13 Trustee Winnecour filed an objection to the bank’s proof of claim in January 2019 and asserted (1) the claim was filed untimely, and (2) the confirmed chapter 13 plan was res judicata as to the amount of arrears to be paid to the bank. The bank did not argue that it had insufficient notice to object to the plan or to otherwise indicate that the arrears stated therein were incorrect. Bankruptcy Judge C. Böhm concluded
(1) because it was untimely, the bank’s proof of claim was disallowed in the amount of $5,558.78; and (2) although the bank would have a valid lien post-bankruptcy, res judicata barred it from claiming a higher amount of arrears than what the confirmed plan determined with finality. Any action or proceeding to collect or enforce a claim for any delinquent prepetition arrears inconsistent with the confirmed and completed plan was therefore disallowed.

Stewart v. Lewis, 2019 U.S. Dist. LEXIS 154345 (W.D. Pa. Sept. 10, 2019) (Federal court jurisdiction [Removal of hybrid cases]) – Stewart, a delivery driver for Amazon, was injured when she twisted her ankle and fell in a home’s driveway. Stewart filed an action in state court against the homeowners, Amazon.com Inc. and Amazon Logistics Inc., asserting that (1) the homeowners were negligent in failing to properly maintain their driveway; (2) the Amazon defendants failed to provide workers’ compensation benefits; and (3) the Amazon defendants owed her unpaid wages as a result of misclassifying her as an independent contractor in violation of the FLSA and Pennsylvania’s Wage Payment and Collection Law (WPCL). Amazon timely removed the case based on the FLSA claim, and it suggested in the notice of removal that 28 U.S.C. § 1441(c)(2) required the court to sever and remand the negligence claim against the homeowners “upon removal.” The homeowners joined Amazon’s request for severance; Stewart opposed it in her motion to remand the entire case. Amazon did not file its own motion to sever and remand state-law claims. Judge J.N. Ranjan concluded that (1) the court would retain jurisdiction over the FLSA claim against Amazon and would exercise supplemental jurisdiction over the claim under the WPCL; (2) § 1441(c)(2) required the court to sever and remand claims that are not within its original or supplemental jurisdiction and thus Stewart’s negligence claim would be severed and remanded; (3) the workers’ compensation claim would be remanded because it was non-removable under § 1445(c) and the court under § 1441(c) now had an independent duty to sever and remand that claim “upon removal,” irrespective of whether Amazon had timely moved for severance of that claim.

United States v. Hopson, 2019 U.S. Dist. LEXIS 159606 (W.D. Pa. Sept. 19, 2019) (Motion for sentence reduction under the First Step Act of 2018) – In 2003, Hopson was charged with seven counts of criminal acts based upon his dealing in large quantities of crack cocaine between 1998 and 2002. Prior to trial on those counts, Hopson was charged in a separate case with tampering with a witness for the upcoming trial by the use of physical force. On the eve of trial, he entered into a plea agreement and pleaded guilty to two of the seven counts (conspiracy to distribute 50 grams or more of cocaine base [count 1] and money laundering conspiracy [count 2]). After he also pleaded guilty in the separate case, all charges were consolidated for sentencing purposes. The mandatory minimum for count 1 was 20 years and the court found he was a career offender, but his guidelines range was driven by the base offense level for the amount of crack cocaine plus enhancements for possession of a firearm and obstruction of justice. Hopson was sentenced in 2006 to 360 months on count 1, to be followed by a 10-year term of supervised release, and to two concurrent terms of imprisonment of 240 months for the other charges. The court in 2016 granted Hopson’s motion to reduce his sentence pursuant to Amendment 782 and resentenced him to a term of imprisonment of 292 months, which was the low end of the advisory guideline range based on his career offender status. Hopson moved for a reduction in sentence to 240 months pursuant to the First Step Act of 2018. Judge J.F. Conti described the First Step Act’s provisions and the analysis required when confronting a motion like Hopson’s. Parties disputed whether Hopson was eligible for relief and, recognizing a split of authority regarding the focus of their dispute, the court assumed arguendo that he was. The court, however, declined to exercise its discretion to reduce Hopson’s sentence.

Capital Flip, LLC v. Am. Modern Select Ins. Co., 2019 U.S. Dist. LEXIS 165422 (W.D. Pa. Sept. 19, 2019) (Insurance) – Racoons had somehow entered the dwelling Capital Flip owned and had caused a substantial amount of damage to its interior. Capital Flip owned and had caused a substantial amount of damage to its interior. Capital Flip made a claim on its dwelling policy – issued by American Modern – contending that the damage to its property was a result of “vandalism or malicious mischief” by the culprit raccoon. American Modern denied the claim. Capital Flip sued, in state court, asserting breach of contract and insurance bad faith. American Modern removed the case and moved for
dismissal under Rule 12(b)(6). At issue was whether (1) the policy was ambiguous because it did not specifically define “vandalism” or “malicious mischief;” and (2) animal damage was included within the policy’s coverage for vandalism and malicious mischief. Judge W. Stickman IV found the policy to be unambiguous and agreed with American Modern that raccoons could not, as a matter of law, engage in vandalism or perpetrate mischief, much less with malice. The court granted the motion to dismiss and claims were dismissed with prejudice.

*Marinkovic v. Battaglia*, 2019 U.S. Dist. LEXIS 162528 (W.P. Pa. Sept. 23, 2019) (Spoliation as a cause of action) – Marinkovic sued several former Armstrong County commissioners in connection with his attempts to purchase county-held properties through a private bidding process. Remaining claims were (1) a First Amendment claim alleging that defendants unlawfully retaliated against Marinkovic by cancelling his outstanding bids on certain properties in response to his constitutionally-protected petitioning activity, and (2) a “class of one” equal protection claim alleging that Marinkovic was the only individual bidding on properties held by the Tax Claim Bureau who was not permitted to see the amount of other buyers’ bids. In a separate case, Marinkovic asserted two causes of action based on defendants’ alleged spoliation of evidence and “deliberate indifference” to the violation of his federal civil rights – claims that arose out of Marinkovic’s grievances regarding discovery conducted in his other case. Defendants moved for summary judgment on the two remaining claims in the first case and for dismissal of the second case for failure to state a claim; Markinkovic moved to reopen discovery in the first case and to “strike” defendants’ exhibits supporting their summary judgment motion. In an opinion that addresses myriad issues, Judge S.P. Baxter denied Marinkovic’s motions and granted defendants’ motions. Of note is the court’s response to Marinkovic’s arguments supporting his spoliation claim and its discussion of the tools available to litigants given Pennsylvania does not recognize an independent action for spoliation.

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