COMMITTEE NEWS

FPC Presents Supreme Court CLE During the PBA Midyear Meeting

During the PBA's Midyear Meeting, members of the FPC's leadership joined distinguished jurists in presenting a two-credit CLE entitled “The Impact of the 2018-19 Term of the Supreme Court of the United States on Federal Practice and a Preview of the Top Cases for 2019-20.” Held on Jan. 31 in Nassau, the Bahamas, the CLE included a lively discussion of 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 Co-Vice Chair Nancy Conrad, Riley H. Ross III and Kathryn Lease Simpson. FPC Chair Hon. D. Michael Fisher, U.S. Court of Appeals for the Third Circuit, moderated the discussion.

FPC Co-sponsors Program on the State of the Eastern District of Pennsylvania

On Feb. 18, 2020, Chief Judge Sánchez presented the State of the Eastern District of Pennsylvania and an Introduction of the New Judges of the Eastern District at a program moderated by Nancy Conrad at the Bar Association of Lehigh County. The program was hosted by the Bar Association of Lehigh County Federal Practice Committee and sponsored by the EDPA Chapter of the Federal Bar Association, the Northampton County Bar Association Federal Practice Committee, the Pennsylvania Bar Association Federal Practice Committee and Veritext. Chief Judge Sánchez provided an overview of the Eastern District and Judges Kenney, Wolson, Younge and Gallagher provided a summary of their courtroom policies and procedures.

FPC Executive Council Approves Appointments of Subcommittee Chairs

At the Feb. 17 FPC Executive Council meeting, the two-year appointments of five subcommittee chairs were voted on and approved. The appointments of Brett Sweitzer (Nominations), Kathleen Wilkinson (Educational Programs) and Professor Arthur Hellman (Legislative) were renewed. Stephanie Hersperger – formerly the FPC Secretary – is the new chair of the Newsletter Subcommittee. Mike Lyon is the new chair of the Outreach and Diversity Committee.
Subcommittee. Jennifer Menichini – formerly the chair of the Outreach and Diversity Subcommittee – is the new FPC secretary.

A new chair of the Local Rules Subcommittee will be voted on during the next Executive Council meeting. That position has been ably filled by Jason Asbell, who is stepping down.

**Reminder: Next Committee Meeting, May 18**

The Executive Council will hold its next quarterly meeting on May 18 at 4 p.m.

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. The call-in number is 1-877-659-3786, and the pass-code 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.

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**SUBCOMMITTEES**

**Reports from the Chairs**

**Newsletter**

The Newsletter Subcommittee voted in late January to change how we will “date” the newsletter in publications going forward. Starting with this newsletter, we will be using a “Winter, Spring, Summer, Fall” convention for our newsletters rather than a quarter-based system.

Susan Schwochau

**Nominations**

In addition to putting forth nominations for five of the six subcommittee chairs (see above), the Nominations Committee has identified Jeremy Mercer as a candidate for the position of chair of the Local Rules Committee.

The terms of at-large members of the Executive Council are up for renewal and will be voted on at the May 18 meeting.

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**Welcome New FPC Members!**

The FPC continues to grow! On behalf of the FPC, Chair Judge D. Michael Fisher sends a warm welcome to new members joining in the first quarter of 2020:

- Yangmo Ahn, Cumberland County
- Matthew Banta, Berks County, Stevens & Lee PC
- Nick Barata, Cumberland County
- Johnathan Buchanan, Montgomery County, State Civil Service Commission
- Andrew Estepani, Montgomery County, Elliott Greenleaf
- Thomas Helbig, Montgomery County, Elliott Greenleaf
- Joseph Joyce, Luzerne County, Joyce Carmody & Moran PC
- Aimee Kumer, Montgomery County, Elliott Greenleaf
- Patrick Nightingale, Allegheny County, PKN Law
- Matthew McCullough, Erie County, MacDonald Illig Jones & Britton LLP
- Leah Mintz, Philadelphia County, Duane Morris LLP
- Alexandra Morgan-Kurtz, Allegheny County, Pennsylvania Institutional Law Project
- Lisa Rau, Philadelphia County, Resonate Mediation and Arbitration LLC
- Martin Risch, Cumberland County
- Jamie Schumacher, Erie County, MacDonald Illig Jones & Britton LLP
- Daniel Sharp, York County
- Amanda Slezak, Cumberland County
- Alexandra Sybo, Out-of-State, US Department of Housing & Urban Development
- Alfred Vogt, Allegheny County, Supreme Court of Pennsylvania
- Abigail Wenger, Lancaster County, Lancaster County Court of Common Pleas
- Thomas Zimmerman, Montgomery County, Kane Pugh Knoell Troy & Kramer LLP

We are delighted that you have joined this vibrant and active committee and 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 page 14 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.
The at-large members have been contacted to determine their interest and availability in a renewed term. All other members of the FPC should contact Brett Sweitzer with any interest in serving as an at-large member of the Executive Council.

Brett Sweitzer

FEDERAL PRACTICE NEWS

Links to Information on Courts’ Responses to COVID-19

COURT OF APPEALS:
News, notices and press releases

EASTERN DISTRICT:
Court response information
Standing order extending measures through May 31, 2020

MIDDLE DISTRICT:
Standing orders
Access to courts
Hearings and proceedings (measures extended through May 31, 2020)
Face masks

WESTERN DISTRICT:
Administrative orders related to COVID-19
Access to courts
Hearings and proceedings (measures extended through June 12, 2020)
Face masks

RULES CHANGES

The EDPA Amends Its Local Bankruptcy Rules

The Eastern District of Pennsylvania in February 2020 made several changes to its local bankruptcy rules in order to implement the procedural and substantive changes to the Bankruptcy Code made by the Small Business Reorganization Act of 2019. The amendments – which became effective Feb. 19, 2020 – are based on interim bankruptcy rules (the Interim Rules) prepared by the Advisory Committee on Bankruptcy Rules and approved by the Judicial Conference of the United States for that purpose. The Interim Rules will be withdrawn after similar amendments can be made to the Rules of Bankruptcy Procedure under the normal Rules Enabling Act process. To see a redline of the changes made, go to https://www.paed.uscourts.gov/documents/locrules/bankruptcy/PropIntRules.redline.20191219.pdf.

STATUS OF JUDICIAL VACANCIES

U.S. Court of Appeals, Third Circuit
• There are no vacancies.

U.S. District Court, Eastern District of PA
• 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
• There are no vacancies.

U.S. District Court, Western District of PA
• Nominations have been made to fill the two remaining vacancies. On Dec. 2, 2019, William Scott Hardy was nominated to fill Judge Nora Barry Fischer’s seat. Hearings were held on Jan. 8, 2020. On Feb. 12, 2020, Assistant U.S. Attorney Christy Criswell Wiegand was nominated to fill Judge Peter Phipps’s seat. That nomination was referred to the Committee on the Judiciary.
UPCOMING EVENTS

July 20, 2020 - “U.S. Supreme Court Roundup 2020,” a 3-credit CLE co-sponsored by the FPC, is currently scheduled to be held live at the Wanamaker Building conference center in Philadelphia and simul-cast to other locations. For details see http://www.pbi.org/Meetings/Meeting.aspx?ID=37732.

Oct. 19, 2020 - “To Civility and Beyond: Elevating Civility and Professionalism within the Bench and Bar 2020” – a PBI-sponsored CLE that carries 2 ethics credits and was initially scheduled for April 1, 2020 – has been rescheduled for this date. For details see http://www.pbi.org/Meetings/Meeting.aspx?ID=37265.

CASE SUMMARIES

Summaries of Third Circuit and Pennsylvania district court decisions issued between Jan. 1, 2020, and Mar. 31, 2020, involving issues of potential interest to FPC members.

THIRD CIRCUIT PRECEDENTIAL OPINIONS

Laurel Gardens LLC v. McKenna, 948 F.3d 105 (3d Cir. 2020) (Statutes [RICO] / Personal jurisdiction) – Naming 33 defendants, plaintiffs filed a complaint alleging an enterprise engaged in a pattern of racketeering activity across state lines, the primary objective of which was to inflict severe economic hardship on plaintiffs so as to cause them to stop providing landscaping and snow removal services. The complaint asserted three RICO claims and numerous state-law claims. All but one defendant filed motions to dismiss. One set of defendants – the Isken defendants – moved to dismiss pursuant to Rule 12(b)(2) and 12(b)(6). One defendant (MJL) argued improper venue. The district court denied other defendants’ Rule 12(b)(6) motions but transferred claims against MJL and granted the Isken defendants’ Rule 12(b)(2) motion, agreeing with defendants that the court lacked both specific and general jurisdiction over them under Pennsylvania’s long-arm statute and the Fourteenth Amendment. After the Isken defendants obtained a final judgment pursuant to Rule 54(b), plaintiffs appealed. The Court of Appeals first decided to limit its ruling to the personal jurisdiction issue and to refrain from deciding whether plaintiffs’ claims survived Rule 12(b)(6). Because Rule 4(k)(1)(C) provided that serving a summons or filing a waiver of service established personal jurisdiction over a defendant “when authorized by a federal statute,” the court addressed whether 18 U.S.C. § 1965(b) or § 1965(d) applied. After describing the circuit split on which RICO subparagraph applied and reviewing the language and structure of all of § 1965, the court agreed with the majority approach and concluded that § 1965(b) – which provides for nationwide service and jurisdiction over “other parties” not residing in the district – applied to the question whether the court had personal jurisdiction over the Isken defendants. Because plaintiffs satisfied the requirements of § 1965(b) and of the constitution for the district court to exercise personal jurisdiction over the Isken defendants, and because plaintiffs’ state law claims fell under the doctrine of pendent personal jurisdiction, the court vacated the district court’s dismissal order to the extent that it granted the Isken defendants’ Rule 12(b)(2) motion and also vacated the associated Rule 54(b) order. (Opinion author: Judge R. Cowen)

Danziger & De Llano LLP v. Morgan Verkamp LLC, 948 F.3d 124 (3d Cir. 2020) (Personal jurisdiction) – Danziger (a Texas law firm) sued Morgan (an Ohio law firm) in Pennsylvania state court, seeking a referral fee Morgan allegedly orally promised to pay out of attorney fees collected from a qui tam action filed in the EDPA. Rather than filing a complaint in state court, Danziger filed a writ of summons. After a year and a half of disputing, and ultimately taking, pre-complaint discovery, Morgan asked the court to compel Danziger to file a complaint, and Danziger did so. Its complaint alleged six claims: fraud, conversion, unjust enrichment, breach of contract and tortious interference with both contractual and prospective contractual relations. Morgan removed the case to federal court and moved for dismissal for lack of personal jurisdiction, or alternatively, for transfer to the SDOH. Danziger opposed dismissal and suggested transferring the case to Texas. Without considering transfer, the district court granted Morgan’s motion, concluding that it lacked personal jurisdiction, and it
dismissed the case with prejudice. Danziger appealed. The Court of Appeals concluded that Pennsylvania courts lacked specific jurisdiction because none of Danziger’s claims arose out of, or related to, Morgan’s activities in Pennsylvania. Morgan had not consented to personal jurisdiction by (1) taking part in pre-complaint discovery before removing the case to federal court, or (2) removing the case to federal court instead of filing a preliminary objection in state court. The court also held that removal to federal court did not waive defenses that a defendant would otherwise have in state court. Finally, although district courts lacking personal jurisdiction are generally obligated to consider transfer, in the case, Danziger admitted that the Ohio and Texas statutes of limitations did not bar it from filing its claims there. If a plaintiff may, on its own, refile its case in a proper forum, “the interests of justice” did not demand transfer, and the district court therefore did not abuse its discretion. The district court’s judgment was affirmed. (Opinion author: Judge S. Bibas)

**Holloway v. Att’y Gen., 948 F.3d 164 (3d Cir. 2020)** (Constitution [Second Amendment]) – In 2005, Holloway was again arrested for driving under the influence (a prior arrest was in 2002). He pleaded guilty to violating 75 Pa. Cons. Stat. Ann. § 3802(c) for DUI at the highest blood alcohol content and received a sentence of 60 months “intermediate punishment,” including 90-day imprisonment that allowed him work release, a fine and mandatory drug and alcohol evaluation. In 2016, Holloway tried to buy a firearm but was denied because of his disqualifying DUI conviction. He sued, claiming that § 922(g)(1) was unconstitutional as applied to him and seeking declaratory and injunctive relief. The district court granted Holloway’s motion for summary judgment, concluding that § 922(g)(1) was unconstitutional as applied because (1) his DUI offense was a non-serious crime that had not historically been a basis for the denial of Second Amendment rights, and (2) the government failed to demonstrate that disarming of individuals like Holloway would promote public safety, particularly given his decade of crime-free behavior. The court entered a permanent injunction barring the government from enforcing § 922(g)(1) against him. The government appealed. Applying the two-step framework in **United States v. Marzzarella,** 614 F.3d 85 (3d Cir. 2010),

the Court of Appeals concluded (1) application of § 922(g)(1) to Holloway was presumptively lawful because his DUI misdemeanor conviction carried a maximum penalty of five years’ imprisonment and was thus deemed a disqualifying felony; and (2) Holloway’s DUI conviction represented a serious crime, placing him within the class of “persons historically excluded from Second Amendment protections.” Because Holloway could not meet his burden to overcome the presumptive application of § 922(g)(1), it was constitutional as applied to him. The court reversed the order granting Holloway summary judgment, a declaratory judgment, and an injunction, and it remanded the case for the entry of judgment in favor of the government. (Opinion author: Judge P. Shwartz; one judge dissenting).

**Papera v. Pa. Quarried Bluestone Co., 948 F.3d 607 (3d Cir. 2020)** (Civil procedure [Dismissals and claim preclusion]) – The Paperas’ breach-of-contract action against Pennsylvania Quarried Bluestone was sent to mediation, and in May 2016, they reported the parties had settled their dispute. At the Paperas’ request, the district court filed an order tentatively dismissing the case. That order stated that the case was dismissed without prejudice, that the parties had 60 days to finalize their settlement, and that they could move to reinstate the action if settlement was not consummated in 60 days. The 60-day period lapsed with no settlement and no other action by the parties, and the court administratively closed the case. In September 2016, the Paperas asked about the litigation, and the court told them that it no longer had jurisdiction over the case. A month later they filed a new, nearly identical action that they could move to reinstate the action if settlement was not consummated in 60 days. Because the dismissal order was taken at the end of 60 days. Because the dismissal order was a voluntary dismissal without prejudice, claim preclusion
could not bar the second suit. The summary judgment
der was vacated. (Opinion author: Judge S. Bibas)

**U.S. v. Apple MacPro Comput.,** 949 F.3d 102 (3d Cir. 2020) (Statutes [Recalcitrant witnesses]) – During an inves-
tigation into Rawls’ access to child pornography over the
internet, a search warrant was executed at Rawls’ residence,
yielding an Apple iPhone 5S, an Apple iPhone 6 Plus and an
Apple Mac Pro Computer (the Mac Pro) with two
attached external hard drives, all of which were protected
with encryption software. Pursuant to the All Writs Act, in
August 2015, a magistrate judge ordered Rawls to produce
all the devices, including his two attached external hard
drives, in a fully unencrypted state (the Decryption Order).
After his motion to quash the government’s application
to compel decryption was denied, Rawls was directed
to comply fully with the Decryption Order. He did not
produce all the necessary passwords and, on Sept. 30, 2015,
Rawls was incarcerated for civil contempt. Rawls filed a
motion for a stay of the contempt order and for release,
arguing that 28 U.S.C. § 1826(a) limited the maximum
period of confinement for civil contempt to 18 months. The
district court denied his motion. At the time of the Court
of Appeals’s decision, the government had not initiated
a criminal proceeding against Rawls. All members of the
appellate panel wrote opinions. Two judges concluded that
§ 1826(a)’s 18-month limitation applied to Rawls because
(1) Rawls was a witness for the purposes of § 1826(a); (2)
the proceedings to enforce the search warrant fell within
the statute’s broad description of any “proceeding before or
ancillary to any court or grand jury of the United States;”
(3) the Decryption Order was “an order of the court to
testify or provide other information, including any book,
paper, document, record, recording or other material;”
and (4) § 1826(a) applied to the detention of any material
witness, even if that person was also a suspect in connection
with other offenses. The district court’s order was reversed,
and Rawls was ordered released. (Opinion author: Judge J.
Fuentes; one judge dissenting)

**Greater Phila. Chamber of Commerce v. City of Phila.,**
949 F.3d 116 (3d Cir. 2020) (Constitution [First Amend-
ment]) – In 2017, the city of Philadelphia enacted an
ordinance to address the disparity in the pay of women
and minorities (the wage gap). The “Inquiry Provision” of
the ordinance prohibited an employer from asking about a
prospective employee’s wage history, while the ordinance’s
“Reliance Provision” prohibited an employer from relying
on wage history at any point in the process of setting or
negotiating a prospective employee’s wage. The Greater
Philadelphia Chamber of Commerce sued, individually and
on behalf of some of its members, alleging that both provi-
sions infringed on their freedom of speech. Plaintiffs moved
for a preliminary injunction. The district court concluded
that the Reliance Provision withstood the First Amendment
challenge because it did not impact speech, but it granted
the Chamber’s motion as to the Inquiry Provision, conclud-
ing that that provision violated the First Amendment speech
rights of employers. Its conclusion rested on its view that
the city had not presented substantial evidence to support
a conclusion that the Inquiry Provision would help close
the wage gap. Both sides appealed. The Court of Appeals
agreed that the Reliance Provision did not impact speech,
and it affirmed the district court’s denial of a preliminary
injunction with respect to that provision. But the court
disagreed as to the Inquiry Provision. Applying intermediate
scrutiny, the court concluded that the city had presented
more than sufficient evidence to satisfy Central Hudson’s
third prong, i.e., that the legislature had drawn reasonable
inferences based on substantial evidence. The district court’s
grant of a preliminary injunction as to the Inquiry Provision
was vacated, and the case remanded with directions to the
district court to deny the preliminary injunction as to that
provision. (Opinion author: Judge T. McKee).

**UGI Sunbury LLC v. Permanent Easement for 1.7575
Acres,** 949 F.3d 825 (3d Cir. 2020) (Evidence [Expert
testimony in Natural Gas Act condemnation cases]) – UGI
won easements over the landowners’ properties to construct
its pipeline; the only issue remaining in its two cases was
the amount of compensation. Both sides hired valuation
experts. UGI moved *in limine* to exclude the testimony
of the landowners’ expert for failure to meet Rule 702’s
requirements. The district court recognized Rule 702’s
parameters but noted its “wide discretion when deciding
whether those requirements have been met” and added that
“[b]ecause the upcoming trial is a bench – not jury – trial,
because there is a ‘strong preference for admission’ of expert
testimony, and because this Court believes that ‘hearing the expert’s testimony and assessing its flaws [is] an important part of assessing what conclusion [is] correct,’” it would admit testimony of both parties’ experts. The district court also denied UGI’s renewed motion to exclude the expert’s testimony after the bench trials. Relying on the landowners’ expert’s “damaged goods theory,” the district court awarded compensation to the landowners, but not the amounts their expert had proffered. UGI appealed. The Court of Appeals first clarified that Rule 702’s requirements apply equally to jury trials and to bench trials and concluded that in sidestepping Rule 702 altogether and declining to perform any assessment of the expert’s testimony before trial, the district court ignored the rule’s clear mandate. The court agreed with UGI that the expert’s testimony was “speculative and subjective,” that it lacked reliability and did not fit the case (e.g., the expert testified that “I put this all in my little mixing bowl and I come up with what I thought was common sense reasonable[,]” and that his report contained “no examples of properties whose value actually decreased after installation of a natural gas pipeline”). Concluding that the district court abused its discretion in admitting the testimony, the court vacated the judgments. The court also agreed with UGI that the district court’s conclusory valuation of just compensation in both cases lacked the clearly stated basis required by Rule 52. (Opinion author: Judge P. Matey)

**E.O.H.C. v. Sec’y, U.S. Dep’t of Homeland Security**, 950 F.3d 177 (3d Cir. 2020) (Federal court jurisdiction / Immigration) – Having traveled from Guatemala through Mexico, in April 2019 E.O.H.C. and his seven-year-old daughter crossed into the U.S. and turned themselves in to CBP officers. The government began proceedings to remove them to Guatemala. Acting under the “Migrant Protection Protocols” – a policy the DHS announced in December 2018 – both were returned to Mexico and left to fend for themselves in Tijuana while they awaited their hearing in San Diego. The IJ denied asylum and ordered appellants removed, and they were transferred to Pennsylvania to await removal. They appealed to the BIA, which granted an emergency stay of removal pending appeal. The stay order was unclear as to whether it prevented only their removal to Guatemala, and the government flew them to San Diego in order to return them to Mexico. They filed an emergency mandamus petition and preliminary injunction motion in the EDPA, asserting that returning them to Mexico pending their appeal to the BIA would violate the law because: (1) the Protocols were adopted in violation of the APA; (2) it would interfere with their relationship with their lawyer in violation of both the INA and the Constitution; (3) it would violate the U.S.’s treaty obligations; and (4) returning a minor to Mexico would violate the U.S.’s commitments under the 1997 *Flores* settlement agreement. Although the government brought them back to Pennsylvania after they filed their petition, it planned to return them to Mexico if it prevailed in the case. The district court dismissed all four claims, concluding it lacked subject matter jurisdiction. After ascertaining itself that recent developments had not mooted the case, the Court of Appeals addressed solely the jurisdictional issue. It concluded, based on recent Supreme Court decisions, that § 1252(b)(9) of the INA posed no jurisdictional bar when aliens sought relief that courts could not meaningfully provide upon review of a final order of removal. Here, petitioners challenged their temporary return to Mexico. Examining each of petitioners’ claims, the court concluded that only the statutory right-to-counsel claim was properly dismissed, and it reversed the district court’s judgment as to all other claims. (Opinion author: Judge S. Bibas)

**Riccio v. Sentry Credit Inc.,** __ F.3d __, 2020 WL 1527072 (3d Cir. Mar. 30, 2020)(en banc) (Statutes [Fair Debt Collection Practices Act]) – Sentry Credit bought Riccio’s debt and, seeking to collect on it, sent Riccio a letter stating inter alia that “Unless you notify this office within 30 days after receiving this notice that you dispute the validity of this debt or any portion thereof, this office will assume this debt is valid[,]” and providing three means of contact (mailing address, phone number and email address). Riccio filed suit, alleging the letter violated § 1692g(a)(3) by providing her with multiple options for contacting Sentry Credit rather than explicitly requiring any dispute be in writing (as was required under *Graziano v. Harrison*, 950 F.2d 107 (3d Cir. 1991)). The district court granted Sentry Credit’s motion for judgment on the pleadings, concluding that the letter complied with *Graziano*. At issue before the *en banc* court was whether a debt collector’s validation
notice or letter must require all disputes to be in writing, or whether § 1692g(a)(3) permitted oral disputes. Re-examining the statutory language and considering Supreme Court decisions since 1991, the Court of Appeals held that § 1692g(a)(3) permitted a debtor to dispute a debt orally. This brought the Third Circuit in line with other circuits deciding the question. Turning to the issue of whether *stare decisis* justified upholding the precedent established in *Graziano*, the court concluded that *Graziano* should be overruled. Because Sentry Credit's letter perfectly tracked the statutory language, the district court's judgment was affirmed. (Opinion author: Chief Judge D.B. Smith)

**EASTERN DISTRICT OF PA OPINIONS**

**Pace v. Baker-White**, __ F. Supp. 3d __, 2020 U.S. Dist. LEXIS 4984 (E.D. Pa. Jan. 13, 2020) (Torts – Defamation / Statutes [Communications Decency Act]) – Injustice Watch is an investigative journalism nonprofit that runs the Plain View Project (PVP), which is a research project that has identified thousands of Facebook posts and comments by current and former police officers and published them on the PVP website. Pace, an attorney and inspector within the Philadelphia Police Department, sued Injustice Watch and Baker-White, its former employee, for defamation by implication and for putting him in a false light. Pace asserted that PVP’s publication of his two-word comment (“Insightful point”), when viewed in the context of the PVP’s prefatory statements regarding the criteria for inclusion on the website, implied that he is an officer who endorsed violence, racism and bigotry and who undermined public trust in the police by acting on those biases. Defendants moved to dismiss. Judge W. Beetlestone reviewed in detail the cases that involved immunity under the Communications Decency Act and concluded that defendants were not entitled to Section 230 immunity: Pace’s claims did not arise from the selection of Pace’s comment for publication and were instead premised on the inclusion of his and other officer’s comments and posts on the website as prefaced by statements that defendants created explaining why those posts and comments were included. The court dismissed the complaint, however, because it concluded that the statements of which Pace complained were nonactionable opinions and alternatively because Pace, a public official, had failed to plead actual malice.

**Dreibelbis v. Cty. of Berks**, 2020 U.S. Dist. LEXIS 21142 (E.D. Pa. Feb. 7, 2020) (Labor & Employment [Disability discrimination] / Pleading requirements) – Dreibelbis, employed by the county for about 25 years, suffered from a disability during the last two years of her employment that caused her to at times request time off under the FMLA. In response to one of those requests, the county approved intermittent absences and, in particular “[a]n absence of up to three (3) days per episode, one (1) time every four (4) weeks for occurrences of [her] medical condition from April 17, 2018 and expiring on April 16, 2019.” On June 13, 2018, she informed the county that, due to a disability, she would not be coming to work that day and would need to request FMLA leave. The county denied her request for leave, and on June 21, 2018, terminated her employment. She sued, raising claims under the ADA, FMLA and the PHRA. The County moved to dismiss under Rule 12(b)(6), arguing in part that Dreibelbis had not alleged a *prima facie* case and, even if she could establish such a case, the county had a legitimate, nondiscriminatory reason for termination (i.e., she exceeded the number of absences allowed per month). After reviewing relevant case law – which on some issues presented a muddled picture – Judge Judge J. Leeson first concluded that *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002) and its reasoning remained good law in a post-*Iqbal* and *Twombly* world and that *Swierkiewicz* and its reasoning applied with equal force to claims brought under the ADA as to employment discrimination claims under Title VII. Thus, she did not need to allege a *prima facie* claim of discrimination in order to survive the county’s motion to dismiss. Turning to the substance of her claims, the court concluded that Dreibelbis had included sufficient allegations to make out each of her claims, and it denied the county’s motion.

unlawful under § 856(a)(2) of the Controlled Substances Act (CSA) and seeking injunctive relief. Defendants' answer included several affirmative defenses, counterclaims and third-party claims (e.g., seeking declaratory judgments that its proposed operation will not violate § 856(a) and that the DOJ's efforts enforce the statute, threats to prosecute Safehouse, and litigation against Safehouse violated the Religious Freedom Restoration Act). On Oct. 2, 2019, Judge G.A. McHugh concluded that § 856(a) did not prohibit Safehouse's proposed medically supervised consumption rooms because Safehouse did not plan to operate them “for the purpose of” unlawful drug use within the meaning of the statute. The court therefore denied the government's Rule 12(c) motion. Because the parties desired a final judgment, they subsequently agreed to a stipulated set of facts, and filed cross-motions – Safehouse seeking final declaratory judgment under Rules 56 and 57, and the government seeking summary judgment. Because Safehouse had sought declaratory judgment in its counterclaims and third-party complaint, the court rejected the government's argument that Safehouse's motion “for declaratory judgment under [Rule] 57 would be procedurally improper” and thus should be resolved pursuant to Rule 56. Based on the parties’ stipulations, the court concluded that there was nothing procedurally improper in granting the declaratory relief sought by Safehouse and thus it granted Safehouse's motion and denied the government's motion.

Stockdale v. Allstate Fire & Cas. Ins. Co., __ F. Supp. 3d __, 2020 U.S. Dist. LEXIS 33406 (E.D. Pa. Feb. 27, 2020) (Motor vehicle insurance [Household exclusion]) – Stockdale was severely injured in an accident while riding as a passenger in her own car. After obtaining recoveries from the driver of the other car and through her own policy, she made a claim under her parents’ policy for underinsured motorist coverage, on the ground that her parents’ policy provided that Allstate “will pay damages to an insured person for bodily injury which an insured person is legally entitled to recover” and defined “insured person” to include “any resident relative” of the policyholders. Because she lived with her parents at the time of the accident, Stockdale claimed she was eligible to stack the underinsured coverage provided in her parents’ policy (they had elected stacking) with the underinsured coverage provided in her own policy.

Allstate denied the claim, asserting that because Stockdale was not riding in one of the three vehicles covered by her parents’ policy, the “household exclusion” provision in that policy rendered Stockdale ineligible to stack coverage across the two policies. Stockdale sued, asserting individual and class claims. Allstate moved for summary judgment, arguing that the facts here were distinguishable from those of Gallagher v. GEICO Indemnity Co., 201 A.3d 131 (Pa. 2019) (invalidating the household exclusion where such an exclusion operates as a de facto waiver of stacked coverage), and thus that Gallagher did not preclude the application of the household exclusion in the parents’ policy. Stockdale moved for partial summary judgment, seeking $300,000 in stacked underinsured motorist coverage. Concluding that the contrasting facts that Allstate identified were not material and therefore did not meaningfully distinguish the case from Gallagher, Judge W. Beetlestone determined that Gallagher controlled, and the court denied Allstate’s motion and granted Stockdale’s.

Pellegrino v. Epic Games Inc., 2020 U.S. Dist. LEXIS 55623 (E.D. Pa. Mar. 31, 2020) (Trademark) – Epic Games Inc. is a video game developer that created the game “Fortnite Battle Royale.” Pellegrino, a bass saxophone player, sued Epic asserting that it misappropriated his likeness and trademark, i.e., his “Signature Move,” within the Fortnite game (see https://www.youtube.com/watch?v=13zS1m-oqRQ). Pellegrino’s complaint set forth eight causes of action, among them trademark claims under state and federal law, and asserted that Epic’s misappropriation violated Pellegrino’s right to publicity and infringed and diluted his trademark. Epic moved for dismissal under Rule 12(b)(6). Judge J. Padova granted that motion in part and denied it in part. Applying the transformative use test from Hart v. Elec. Arts Inc., 717 F.3d 141 (3d Cir. 2013), the court concluded that Epic’s use of Pellegrino’s likeness was sufficiently transformative to provide it with First Amendment protections that were not outweighed by Pellegrino’s interests in his likeness. Epic’s motion was therefore granted as to Pellegrino’s right of publicity and privacy claims. His unjust enrichment claim was dismissed because Pellegrino alleged that Epic misappropriated his likeness without his permission, rather than that he directly conferred a benefit on Epic. The court next concluded that the complaint did not plausibly allege
that Epic and Pellegrino were competitors and thus it failed to state a claim for unfair competition. Pellegrino’s state trademark law claim was dismissed as preempted by the Copyright Act. His claim for trademark dilution under the Lanham Act failed because the complaint did not plausibly allege that Epic made trademark use of the Signature Move. As to Pellegrino’s other Lanham Act claims, the court agreed with Epic that *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003), barred Pellegrino’s false designation of origin claim but disagreed that *Dastar* also barred Pellegrino’s false endorsement claim. After deciding to dismiss all but one of Pellegrino’s claims, the court denied Pellegrino’s request for leave to file an amended complaint, deciding amendment would be futile. The claims were therefore dismissed with prejudice.

**MIDDLE DISTRICT OF PA OPINIONS**

*Sicklesmith v. Hershey Entertainment & Resorts Co.*, __ F.Supp.3d __, 2020 WL 902544 (M.D. Pa. Feb. 25, 2020) (Labor & Employment [FLSA] /Administrative law) – Sicklesmith, formerly employed by defendant as a restaurant server, filed suit on behalf of himself and others claiming that Hershey violated state and federal wage and hour laws by not paying the state minimum wage for non-tip generating work done before, during, and after their shifts. Defendant’s motion to dismiss raised the question of whether *Auer* [*v. Robbins*, 519 U.S. 452 (1997)] deference should be given to the DOL’s new [as of 2018] interpretation of 29 C.F.R. § 531.56(e), which places restrictions on the amount and types of non-tip-producing work a tipped employee may be required to perform before the full minimum wage must be paid. Applying *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), Judge J. Jones III set forth in detail the steps necessary to determine whether *Auer* deference is to be given to an agency’s interpretation of its own regulations and provided the court’s reasoning for why the DOL’s new interpretation did not merit such deference. The 2018 interpretation was a drastic change to DOL policy, as the DOL shifted its focus from the amount of time spent on untipped work to the temporal proximity of untipped work to tipped work. The 2018 interpretation expressly overruled the DOL’s prior “80/20 rule” after over 30 years of its enforcement, both by the courts and by the DOL. Federal courts have nearly uniformly given deference to the 80/20 rule, even after the promulgation of the 2018 interpretation. As a result, the court concluded that deferring to the 2018 interpretation would cause “unfair surprise” to plaintiffs. The court joined with its sister district courts and also declined to afford *Skidmore* deference to the 2018 interpretation. Finding that the 80/20 rule was a reasonable interpretation of the regulation, the court applied it and denied Hershey’s Rule 12(b)(6) motion.

**WESTERN DISTRICT OF PA OPINIONS**

*Stevenson v. Saul*, 2020 U.S. Dist. LEXIS 1949 (W.D. Pa. Jan. 7, 2020) (Social Security [Circuit split on scope of review]) – Stevenson’s application for disability benefits was partially successful: the ALJ granted benefits for a period up to Oct. 3, 2017, but denied benefits thereafter based upon medical improvement. Stevenson filed a request for review with the Appeals Council and submitted an additional 450 pages of medical records. The Appeals Council denied the request for review. Stevenson then sought review from the district court. The Appeals Council omitted the materials from the official administrative record, and Stevenson urged that her due process rights were violated because the omission prevented the court from determining whether the Council erred in denying the request for review. Although some circuits had held that additional information submitted to the Appeals Council became part of the administrative record so as to bring the Council’s decision into the scope of the court’s review, Judge D. Ambrose was bound by Third Circuit precedent, under which a district court was foreclosed from reviewing the Council’s decision where it was presented with additional evidence yet denied a claimant’s request for review. Limited to reviewing the ALJ’s decision and the record before him, the court concluded that it could not assure itself that the decision to reject Stevenson’s mental impairments as “not severe” at the second step of the analysis was harmless error, particularly when the ALJ did not analyze them elsewhere in the opinion. Stevenson’s motion for summary judgment was granted and the case was remanded for a thorough consideration of Stevenson’s mental health impairment(s).
that their prior convictions were for offenses punishable
jury that it must find that Montgomery and Perrin knew
filed several months after
Rahaif
defendants’ motions would be heard despite having been
Treating
on the § 922(g)(1) counts vacated based on
Rehaif.
Seven months after a jury found Montgomery and Perrin
guilty of all charges, including unlawful possession of a
Montgomery and Perrin moved to have their convictions
treated more than five kilograms of cocaine and more
than 50 grams of cocaine base, Green was sentenced in
2011 as a career offender to 20 years in prison, the man-
tory minimum. After unsuccessfully seeking a reduction in
his sentence, Green filed a petition in 2018 under § 2241
presenting two grounds for relief: (1) he sought to be resen-
tenced without the career offender designation, asserting
“factual innocence of his sentence enhancement due to a
change in law,” and (2) in light of a 2013 memorandum
from then Attorney General Eric Holder announcing a
new Department of Justice policy for § 851 recidivism
enhancements, he would receive a lower sentence today
(Green ignored the fact that the 2013 policy was rescinded
in 2017). Although noting a split of authority among the
circuit courts about whether prisoners may use § 2241 to
challenge a career offender enhancement, Chief Magistrate
Judge C.R. Eddy recommended that Green’s first claim for
relief be dismissed because the Third Circuit had not yet
permitted a petitioner to do so. It was also recommended
that Green’s second claim be dismissed as meritless. Judge
K. Gibson adopted the recommendations and dismissed the

Mar. 2, 2020) (Motion for new trial based on Rehaif) –
Seven months after a jury found Montgomery and Perrin
guilty of all charges, including unlawful possession of a
firearm under § 922(g)(1), the Supreme Court issued its
decision in Rehaif v. United States, 139 S. Ct. 2191 (2019)
(holding that the “word ‘knowingly’ [in § 924(a)(2)] applies
both to the defendant’s conduct and to the defendant’s
status.”). At that time, they had not yet been sentenced.
Montgomery and Perrin moved to have their convictions
on the § 922(g)(1) counts vacated based on Rehaif. Treating
their motions as lodged under Rule 33 and as asserting a
jury instruction error, Judge M. Hornak first concluded that
defendants’ motions would be heard despite having been
filed several months after Rehaif was decided. There was no
dispute that there was error – the court did not instruct
the jury that it must find that Montgomery and Perrin knew
by more than one year and in fact the court had instructed
the jury that it did not need to find that defendants knew
their prohibited status. There was no dispute that the error
was plain. The court focused therefore on whether the error
affected the defendants’ substantial rights and, in particu-
lar, what information it could consider during its review.
The court concluded, based on four Third Circuit deci-
sions addressing jury instructions with missing elements,
that considering evidence not presented to the jury would
require speculation that was inconsistent with both due
process and Third Circuit case law. Limiting its review to
the trial record, the court ultimately granted both defen-
dants’ motions.

Dist. LEXIS 41532 (W.D. Pa. Mar. 10, 2020) – (Stat-
utes-RICO [Personal jurisdiction]) – In this incredibly
complex case, three corporate plaintiffs sued five corporate
and eight individual defendants alleging, among numerous
other claims, that defendants conspired to launder stolen
corporate-bond funds between 2010 and 2014 through
c Corporations in Hong Kong, Washington State and Pittsburgh
in violation of § 1962(c) of the RICO statute. Before the
court were three discovery motions and two motions to
dismiss that challenged subject matter jurisdiction, personal
jurisdiction and venue, in addition to the sufficiency of the
allegations under Rule 12(b)(6). After resolving issues raised
in the discovery-related motions (largely against defen-
dants), Judge W. Stickman IV concluded (1) § 1332(a)(3)
controlled the issue of whether diversity jurisdiction existed;
(2) the court could exercise diversity jurisdiction; (3) plain-
tiffs’ allegations on the elements of § 1962(c) were sufficient
under Rules 9(b) and 12(b)(6), i.e., they stated a plausible
civil RICO claim; and (4) because their RICO claim could
proceed, the court could also exercise federal question juris-
diction (and supplemental jurisdiction over state-law claims)
even if diversity jurisdiction was lacking. Turning to issues
of personal jurisdiction, the court held that it could exercise
specific jurisdiction over defendants through Pennsylvania’s
long-arm statute under the traditional minimum contacts
test and, in the alternative, under special tests for intentional
torts and conspiracy claims as well. It also concluded that,
applying the Third Circuit’s decision in Laurel Gardens LLC
v. McKenna, 948 F.3d 105 (3d Cir. 2020) (see Third Circuit
Precedential Opinions above), it could exercise statutory jurisdiction under RICO over defendants as well. Because the court rejected defendants’ arguments that the case should dismissed under the common law conflict-of-laws doctrine of forum non conveniens, the defendants’ motions to dismiss were denied in their entirety.

Matthews Int’l Corp. v. Lombardi, 2020 U.S. Dist. LEXIS 47785 (W.D. Pa. Mar. 19, 2020) (Claim splitting and consolidation) – Lombardi, a former Matthews employee, allegedly decided to leave Matthews, join a competitor and take other Matthews employees and customers with him. Matthews filed one lawsuit against Lombardi alleging that he violated various contracts and seeking money damages. It filed a second lawsuit a month later, alleging Lombardi’s (and other defendants’) actions violated trade-secret acts and the common law and seeking injunctive relief as well as damages. Lombardi moved to dismiss the second suit without prejudice, asserting that Matthews had engaged in improper claim splitting – both actions involved the same court and the same relevant defendant, and both relied on the same operative facts and legal principles. The court disagreed, however, that consolidation of the two matters was inappropriate. That the two lawsuits did not seek the same scope of relief was not a bar to consolidation. Rather than dismissing the second action, the court consolidated the cases to promote judicial efficiency.

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
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- **Brett G. Sweitzer**, Defender Association of Philadelphia, Philadelphia
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A special thank you also goes to Susan Etter, Diane Banks and Suzanne Christ of the Pennsylvania Bar Association.
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