PBA Virtual Annual Meeting, May 19-21

The PBA will host an all-virtual event, May 19 through May 21. The three days of meetings and events begins on May 19 with PBA’s Commission on Women in the Profession’s Annual Conference, “Center Stage 2021: Women in Law and Politics.” A virtual awards luncheon will include the presentations of the Anne X. Alpern, Lynette Norton and H. Robert Fiebach Promotion of Women in the Law awards. The WIP conference will conclude with a networking session to highlight the start of Kathleen D. Wilkinson’s term as the sixth female PBA president.

On May 20, hundreds of lawyers involved in PBA committees and sections will gather virtually during our Committee/Section Day. Check the schedule to see if your committee(s) and/or section(s) are meeting. Go to 2021AnnualMeeting.pdf (pabar.org).

During the lunch hour on May 20, there will be virtual presentations of awards. On May 21, our virtual three-day gathering will conclude with the meeting of the PBA House of Delegates.

The PBA’s charitable affiliate, the Pennsylvania Bar Foundation, also is forgoing its traditional live auction this year. Instead, it is raising funds to support the James W. Stoudt Memorial Scholarship Fund that provides three scholarships (two of which are specifically designated to support minority law students) for students attending accredited Pennsylvania law schools. The foundation’s objective this year is to raise $15,000. To contribute to this worthy effort, visit the Foundation of Treasures Giving Page.

PBA Joint Task Force Report


The PBA assembled this Joint Task Force to address the disruption in the delivery of legal services in the face of the COVID-19 pandemic that reached the shores of the United States in the spring of 2020. The Task Force also was created to mitigate the impact on delivery of legal services caused by any future emergencies that occur on a small or large scale.

The Task Force’s report provides background and recommendations to enable the continued effective and efficient delivery of legal services within Pennsylvania. The Task Force report was approved by the PBA Board of Governors. A copy of the report may be found here.

COMMITTEE NEWS

Reminder: Next Executive Council Quarterly Meeting – May 17, 2021 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. The Zoom connection information has been provided to committee members by email. If you need the information, please contact Susan Etter, (susan.etter@pabar.org) the committee’s staff liaison.

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.
Federal Practice Institute 2021
Planning for the Federal Practice Institute 2021 is under-way. A new case scenario has been developed and it will provide an engaging platform for federal practice tips and traps. Members of the bench and bar will provide insight and comment on the case from intake to appeal. And, while we are planning for a full day in person program, we will shift to a virtual program if necessary. Details will follow about the Fall program. Ideas and recommendations are welcome and can be forwarded to the FPI Planning Committee Chair, Nancy Conrad, at Conradn@whiteand-williams.com.

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 the Committee:
- Julian Truskowski, Esq.
- Kelly Dell, Esq.
- Susannah Bultron, Esq.
- Sarah Hirst, Esq.
- Cary Flitter, Esq.
- Jennifer Bruce, Esq.
- Hon. (Ret.) Judith Fitzgerald

We are delighted that you have joined this vibrant and active committee and hope that 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 12 for subcommittee contact information. You can also contact Executive Council members with any ideas you may have on how the FPC can best pursue its mission of promoting communication and cooperation among members of the federal judiciary and lawyers who practice in federal courts, and enhancing the knowledge and professional capabilities of lawyers who practice law in the U.S. District Courts in Pennsylvania.

SUBCOMMITTEES
Reports from the Chairs
Newsletter Subcommittee
We continue to welcome anyone interested in assisting with the newsletter to join our Subcommittee. If you are interested, please contact Stephanie Hersperger directly at Shersperger@pionlaw.com.

FEDERAL PRACTICE NEWS
Judge C. Darnell Jones II of the United States District Court, Eastern District of Pennsylvania took senior status effective March 15, 2021. Judge Jones has served on the court since 2008. Judge Jones was nominated by President George W. Bush and confirmed by the United States Senate on Sept. 26, 2008. Prior to his taking the seat in the district court, Judge Jones was a judge on the First Judicial District, Philadelphia Court of Common Pleas from 1987 to 2008, serving as President Judge from 2006 to 2008. Judge Jones will continue to serve on the district court from the James A. Byrne U.S. Courthouse, 601 Market Street, Philadelphia.

Links to Information on Courts’ Responses to COVID-19
Court of Appeals:
Notice Regarding Operations to Address the COVID-19 Pandemic

Eastern District:
Court Response, Guidelines, Notices and Standing Orders for COVID-19

Middle District:
Court Response, Orders, Guidelines for COVID-19

Western District:
Court Operations and Administrative Orders for COVID-19
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).
• There is a vacancy due to the retirement of Judge C. Darnell Jones II (March 15, 2021).

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

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

CASE SUMMARIES

Summaries of Third Circuit and Pennsylvania district court decisions issued between Jan. 1, 2021, and March 31, 2021, involving issues of potential interest to FPC members.

THIRD CIRCUIT PRECEDENTIAL OPINIONS

United States v. Safehouse, 985 F.3d 225 (Jan. 12, 2021) (Criminal law) – Arguing that its operation would be unlawful under § 856(a)(2) of the Controlled Substances Act (CSA), the government brought a declaratory judgment action against Safehouse and its president seeking to enjoin the operation of a proposed safe injection site for opioid users in Philadelphia that included a consumption room – a place that users could go to inject themselves with drugs that they brought to the site. Defendants’ answer included several affirmative defenses, counterclaims and third-party claims (e.g., seeking declaratory judgments that its proposed operation would not violate § 856(a)). The district court denied the government’s motion for judgment on the pleadings, finding that Safehouse’s purpose was to offer medical care, encourage treatment and save lives – not to facilitate drug use – and as such, the statute did not apply. It entered judgment in favor of Safehouse. The government appealed, urging that (1) because Safehouse knew users would come to the site “for the purpose of unlawfully ... using a controlled substance,” § 856(a)(2), the operation of the site violated federal law, and (2) that Safehouse itself did not have the purpose that its visitors use drugs did not remove it from the reach of the statute. The Court of Appeals agreed with the government. After rejecting Safehouse’s counterclaim that Congress lacked the power to criminalize its local, noncommercial behavior, the court reversed and remanded the case so the district court could consider Safehouse’s counterclaim that enforcing § 856(a)(2) against Safehouse would violate the Religious Freedom Restoration Act. (Opinion author: Judge S. Bibas; one judge dissenting in part and dissenting in judgment).

United States v. Harra, 985 F.3d 196 (Jan. 12, 2021) (Criminal law) – Four former executives of Wilmington Trust Corporation were charged with conspiracy to defraud the U.S., commit securities fraud and make false statements to regulators; securities fraud; and making false statements to the SEC and Federal Reserve. Every charged offense involved the alleged falsity of the bank’s reporting of “past due” loans. The executives urged that their statements were not actually false because the SEC’s and Federal Reserve’s reporting instructions were ambiguous and, under an objectively reasonable interpretation of those instructions, they were not required to report certain loans as “past due.” A jury found them guilty on all charges. The executives’ appeals raised a question of first impression: Must the prosecution prove a statement false under each objectively reasonable interpretation of an ambiguous reporting requirement,
or is it enough for the prosecution to prove that a statement is false under one reasonable interpretation, as long as a defendant accepted that interpretation when he/she made the statement? The Court of Appeals held that where falsity turns on how an agency has communicated its reporting requirements to the entities it regulates and those communications are ambiguous, fair warning demanded that the government prove a defendant’s statement false under each objectively reasonable interpretation of the relevant requirements. Whether a reasonable person in the defendant’s position could interpret the reporting requirement only in the way urged by the government or also in a way that would make the defendant’s responses true was for the jury to decide. Here, the reporting requirements were ambiguous. Reviewing the evidence, the court concluded that the government had failed to prove beyond a reasonable doubt that defendants’ reports of “past due” loans were false under each reasonable interpretation of the requirements. The court reversed defendants’ false statement and certification convictions and remanded on those counts for the entry of judgments of acquittal. Because it could not say with confidence that the erroneous jury instruction as to falsity did not contribute to the jury’s verdict on the conspiracy and securities fraud counts, the court vacated defendants’ convictions on those counts and remanded for a new trial. (Opinion author: Judge C. A. Krause).

**United States v. Alexander**, 985 F.3d 291 (Jan. 15, 2021) (Appellate jurisdiction) – Alexander was charged with conspiracy to defraud the United States, theft of government property and aggravated identity theft. The indictment described a scheme whereby Alexander and her numerous co-defendants filed false tax returns using stolen identities to obtain illegal tax refunds. One of the grand jurors was an alleged victim of this scheme. This juror’s full name was listed in the original indictment as a victim of a co-defendant. The alleged victim participated in the original grand jury’s deliberations and voted along with the other 18 jurors to return a true bill. After the government learned of the issue involving the alleged victim’s participation, it filed a superseding indictment, which was returned by a new grand jury about a month before trial was scheduled to begin. The government disclosed the grand jury defect to three defendants who had already pleaded guilty under the original indictment. Alexander and another co-defendant filed motions to dismiss both indictments, arguing that the defect in the original grand jury violated the Fifth Amendment’s Grand Jury Clause and Fed. Rule Crim. Proc. 6(d), and that the superseding indictment was time-barred because it was issued after the statute of limitations expired and could not relate back to the defective original indictment. The district court denied the motions. Alexander appealed and asserted that the Court of Appeals had jurisdiction under the collateral order doctrine. The Court of Appeals dismissed the appeal for lack of jurisdiction, concluding that the interlocutory order that Alexander challenged did not resolve an important issue completely separate from the merits and was not effectively unreviewable on appeal from a final judgment. (Opinion author: Judge M. A. Chagares).

**Bracey v. Superintendent Rockview SCI**, 986 F.3d 274 (Jan. 20, 2021) (Habeas corpus / Federal court jurisdiction) – Convicted of murder in 1995, Bracey discovered in 2010 that the government had failed to disclose completely the benefits that two cooperating witnesses had received for testifying at his trial. Bracey filed a federal habeas petition asserting *Brady* claims. The district court dismissed the petition as untimely under § 2244(d)(1)(D) (requiring petitions to be filed within one year of “the date on which the factual predicate of the claim ... could have been discovered through the exercise of due diligence.”), and in 2013, the Court of Appeals denied a COA. After *Dennis v. Sec’y*, 834 F.3d 263 (3d Cir. 2016) (holding that a defendant has no burden to “scavenge for hints of undisclosed *Brady* material” even if the material could be found in public records), was issued, Bracey moved for reconsideration under Rule 60(b). The district court denied that motion. The Court of Appeals certified three questions: (1) whether a COA is required in an appeal from the denial of a Rule 60(b) motion seeking reconsideration of the dismissal of a federal habeas petition on procedural grounds (i.e., whether *Morris v. Horn*, 187 F.3d 333 (3d Cir. 1999), remained good law); (2) if a COA is required, whether one should be granted in this case; and (3) if a COA is granted, whether the district court abused its discretion in denying Bracey’s Rule 60(b) motion without considering *Dennis*’ effect on its previous decision dismissing Bracey’s habeas petition. The court answered...
Each of these questions in the affirmative, and it vacated and remanded to the district court for an appropriate consideration of Bracey's Rule 60(b) motion. (Opinion author: Judge C. A. Krause; one judge dissenting in part).

**Martinez v. UPMC Susquehanna**, 986 F.3d 261 (Jan. 29, 2021) (Labor & Employment [Age Discrimination]) – In 2016, a hospital hired Martinez, a board-certified orthopedic surgeon with four decades of experience, on a three-year contract as the hospital's sole orthopedic surgeon. Although UPMC Susquehanna (UPMC) said it would continue the contract in 2017 when it bought the hospital, a month later it fired Martinez, explaining that his termination had nothing to do with his performance and that it was “moving in a different direction” and [Martinez’s] services were no longer needed.” UPMC soon afterward posted an opening for an orthopedic surgeon. Martinez applied three times but never got a response. The hospital hired two other doctors. In his age-discrimination suit, Martinez alleged that both were “significantly younger,” “less qualified” and “less experienced” than he was. The district court granted UPMC’s motion to dismiss because “significantly younger” was a legal conclusion and Martinez had not pleaded the two new doctors’ specific ages and specialties. The Court of Appeals reversed, holding that “significantly younger” was a factual conclusion and that, as such, Martinez did not have to allege his replacements’ exact ages or specialties in order to survive a motion to dismiss. (Opinion author: Judge S. Bibas).

**Gibbs v. City of Pittsburgh**, 989 F.3d 226 (Mar. 3, 2021) (Labor & Employment [Disability discrimination]) – Gibbs applied to be a Pittsburgh police officer. After he got a conditional job offer, he had to “[b]e personally examined by a Pennsylvania licensed psychologist and found to be psychologically capable [of] exercise[ing] appropriate judgment or restraint in performing the duties of a police officer.” 37 Pa. Code §203.11(a)(7). Two of three psychologists who interviewed him concluded that he was unfit to serve. Denied a final offer as a result, Gibbs filed suit against the city under the ADA and the Rehabilitation Act, alleging, *inter alia*, that (1) he has ADHD; (2) although his ADHD was under control, the psychologists thought it was a handicap and fixated on it in rejecting him, never exploring whether his ADHD would interfere with the job; (3) five other police departments had hired him; (4) he would have been hired but for the biased psychologists’ test; and (5) although he had misbehaved as a child, before he was treated for ADHD, Pittsburgh had hired other applicants with similar childhood issues not caused by ADHD. The district court granted the city’s Rule 12(b)(6) motion, concluding that Gibbs was not qualified to be a Pittsburgh police officer because “[p]assing [the psychological test] was a ‘prerequisite,’ regardless of how able Gibbs was to perform the essential functions of the job.” It also faulted Gibbs for not alleging that the city itself was biased but focused instead on the psychologists that it had hired. The Court of Appeals reversed, rejecting the district court’s rationales and concluding that Gibbs had plausibly alleged that the psychologists had discriminated against him. (Opinion author: Judge S. Bibas).

**Earl v. NVR Inc.**, 990 F.3d 310 (Mar. 5, 2021) (Statutes [Pennsylvania’s UTPCPL]) – Earl entered into an agreement with NVR for the purchase of a house that NVR was to build. Before and while the house was under construction, NVR made representations about its construction, condition and amenities. After Earl moved in, she encountered a number of material defects and found that a number of the promised conditions and amenities that she had relied upon had also not been provided. NVR did not fix the problems as it promised it would, and Earl pursued two claims against it: 1) violation of the Unfair Trade Practices and Consumer Protection Law (UTPCPL); and 2) breach of implied warranty of habitability. Relying on *Werwinski v. Ford Motor Co.*, 286 F.3d 661 (3d Cir. 2002), the district court concluded that Earl’s UTPCPL claim was barred by the economic-loss doctrine and the gist-of-the-action doctrine, and it granted NVR’s Rule 12(b)(6) motion with respect to both claims. Earl appealed, challenging only the dismissal of the UTPCPL claim. The Court of Appeals concluded that *Excavation Techs. Inc. v. Columbia Gas Co. of Pa.*, 985 A.2d 840 (Pa. 2009), *Knight v. Springfield Hyundai*, 81 A.3d 940 (Pa. Super. Ct. 2013), and *Dixon v. Nw. Mut.*, 146 A.3d 780 (Pa. Super. Ct. 2016), constituted intervening authority that modified state law as it existed at the time *Werwinski* was decided. The court therefore held that the economic-loss doctrine no longer may serve as a bar to UTPCPL.
claims. Because the court also concluded that the gist-of-the-action doctrine did not apply to the facts as they were alleged in this case, it vacated the district court’s dismissal and remanded for further proceedings. (Opinion author: Judge L. F. Restrepo).

**O’Hanlon v. Uber Technologies Inc.**, 990 F.3d 757 (Mar. 17, 2021) (Arbitration / Appellate jurisdiction) – Motorized-wheelchair users living in the Pittsburgh area alleged on behalf of themselves and similarly situated others that Uber discriminated against individuals with mobility disabilities in violation of Title III of the ADA by not offering a “wheelchair accessible vehicle” (WAV) option in the Pittsburgh area. Plaintiffs asserted that but for the unavailability of WAVs, they would download the Uber app and use its ride-sharing service. Uber moved to compel arbitration, contending that even though plaintiffs had never registered for an Uber account or accepted its Terms of Use (which included an arbitration agreement), they could be compelled to arbitrate because (1) they could not establish standing to sue unless they “step[ped] into the shoes” of “actual Uber Rider App users who all are bound by Uber’s Terms of Use,” and (2) plaintiffs “necessarily rel[ied]on Uber’s service contract to bring suit and should therefore be estopped from avoiding [the]obligation[ ]” to arbitrate. The district court rejected both arguments and denied Uber’s motion. In this interlocutory appeal, Uber argued that the Court of Appeals could not reach the merits of the motion to compel arbitration without first deciding whether plaintiffs had standing to bring their underlying ADA claim (which Uber asserted they could only have if they agreed to the Terms of Use). If plaintiffs did have standing, Uber further contended that plaintiffs were equitably estopped to arbitrate because (1) they could not establish standing to sue unless they “step[ped] into the shoes” of “actual Uber Rider App users who all are bound by Uber’s Terms of Use,” and (2) plaintiffs “necessarily rel[ied]on Uber’s service contract to bring suit and should therefore be estopped from avoiding [the]obligation[ ]” to arbitrate. The district court rejected both arguments and denied Uber’s motion. In this interlocutory appeal, Uber argued that the Court of Appeals could not reach the merits of the motion to compel arbitration without first deciding whether plaintiffs had standing to bring their underlying ADA claim (which Uber asserted they could only have if they agreed to the Terms of Use). If plaintiffs did have standing, Uber further contended that plaintiffs were equitably estopped to arbitrate. The Court of Appeals concluded that (1) under Griswold v. Coventry First LLC, 762 F.3d 264 (3d Cir. 2014), its appellate jurisdiction was confined to a review of the denial of the motion to compel arbitration and did not include review of the district court’s standing determination; (2) standing was not inextricably intertwined with the arbitrability issue so as to fall within the court’s pendent appellate jurisdiction; and (3) Uber’s equitable estoppel argument was meritless because there was no evidence that plaintiffs availed themselves of Uber’s service agreement prior to or in the course of litigation or received any benefit under that agreement.

Because plaintiffs had never accepted the Terms of Use, the district court’s denial was affirmed. (Opinion author: Judge C. A. Krause).

**Conboy v. United States Small Bus. Admin.**, 992 F.3d 153 (Mar. 19, 2021) (Frivolous appeal) – In this appeal from the district court’s grant of summary judgment to defendants, counsel for appellants (1) simply took the summary judgment section of the district court brief opposing defendants’ motion and copied and pasted it – with only minor changes – into his appellate brief, (2) presented no argument as to how the district court erred, and (3) cut-and-pasted his response to a motion for sanctions under Fed. R. Civ. P. 11 and 37 to create his response to an appellee’s Fed. R. App. P. 38 motion. “Because the substance of this appeal [was] as frivolous as its form,” the Court of Appeals affirmed the district court’s grant of summary judgment and granted the motion for damages under Fed. R. App. P. 38. (Opinion author: Judge T. M. Hardiman).

**Simko v. United States Steel Corp.**, 992 F.3d 198 (Mar. 29, 2021) (Labor & Employment [Exhaustion of ADA claims]) – Simko, who suffers from hearing loss, signed an EEOC charge in May 2013, asserting that U.S. Steel discriminated against him in violation of the ADA by denying his request for an accommodation and denying him a particular position. Simko was discharged on Aug. 19, 2014 based on a safety violation. In November 2014, the EEOC received an undated handwritten letter and set of documents from Simko that included a handwritten note that urged that he was discharged in retaliation for his filing of the 2013 discrimination charge. The EEOC did not take any action in response to Simko’s correspondence until about a year later. By letter dated Dec. 18, 2015, the EEOC investigator communicated to Simko’s counsel that the EEOC had notified U.S. Steel “that an amended charge was going to follow.” On Jan.22, 2016, Simko’s counsel filed an amended EEOC charge. On June 28, 2019, Simko filed his lawsuit, asserting only a single count of retaliation in connection with his discharge from U.S. Steel. The district court granted U.S. Steel’s motion to dismiss, concluding that Simko failed to file a timely EEOC charge asserting his retaliation claim because his amended charge claiming retaliation was filed 521 days after his termination. Simko
appealed, and the EEOC filed an amicus brief supporting that appeal. The Court of Appeals affirmed, concluding that (1) Simko’s and the EEOC’s argument that the handwritten November 2014 correspondence to the EEOC constituted a timely administrative charge should be rejected because it was not preserved for appellate review; (2) the EEOC’s argument that Simko was entitled to equitable tolling of the statutory filing period because the agency failed to promptly act on the November 2014 correspondence had to be rejected because Simko himself did not make that argument on appeal, and (3) Simko had to file an additional EEOC charge because his original, still-pending disability discrimination charge did not encompass his subsequent claim of retaliation. (Opinion author: Judge M. O. Rendell; one judge dissenting).

EASTERN DISTRICT OF PA OPINIONS

Graber v. Dales, 2021 WL 51441 (E.D. Pa. Jan. 5, 2021) (Qualified Immunity, Discovery before Summary Judgment) – Plaintiff was arrested by a Secret Service agent during the 2016 Democratic National Convention (DNC). He filed a lawsuit alleging false arrest and that he was detained in violation of the First, Fourth and Fourteenth Amendments. He brought the action against Philadelphia police officers under § 1983 and the Secret Service agent pursuant to Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971). Defendants filed a motion for summary judgment on the basis of qualified immunity. Plaintiff responded by filing a declaration pursuant to Fed.R.Civ. P. 26(d) that he was unable to respond to the motion without sufficient discovery. After recognizing that liberal, broad discovery is at odds with qualified immunity, the court nevertheless found that these two competing interests must be balanced. The court explained that discovery may be permitted but it should be tailored specifically to the question of the defendant’s qualified immunity. As such, the court dismissed defendant’s motion for summary judgment, without prejudice, to allow for tailored discovery.

Lloyd v. Covanta Plymouth Renewable Energy LLC, 2021 WL 365855 (E.D. Pa. Feb. 3, 2021) (Doctrine of Primary Jurisdiction, Motion to Dismiss) – Local residents filed a putative class action pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d), against a waste-to-energy processing company for private nuisance, public nuisance and negligence. They also sought compensatory and punitive damages, attorneys’ fees and costs and sought injunctive relief. The defendant filed a motion for partial dismissal for failure to state a claim upon which relief could be granted pursuant to Fed.R.Civ.P. 12(b)(6). The court granted the motion as to plaintiffs’ negligence claim because they failed to allege any physical damage to their property. Plaintiffs’ averment that damage to their property resulted in their loss of its use and enjoyment, and from being prevented from engaging in outside activities, was insufficient. However, the court denied the defendant’s request for an injunction based on the doctrine of primary jurisdiction. Defendant argued that the court should decline jurisdiction, deferring to the Pennsylvania Department of Environmental Protection and the Environmental Hearing Board to regulate waste management. The court explained that primary jurisdiction “applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claims requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.” However, federal courts should only abstain from exercising their jurisdiction in exceptional cases. The court found that it was well-suited to determine the issues of private and public nuisances. Therefore, this was not an exceptional circumstance so as to warrant declining jurisdiction. Lastly, the court found sufficient facts were pleaded to support a punitive damages claim.

Red Spark LP v. Saut Media Inc., 2021 WL 1061205 (E.D. Pa. March 19, 2021) (Arbitration, Service of Process) – Red Spark filed a Petition to Allow for Service by U.S. Marshals to effectuate service on Saut Media as required by Section 9 of the Federal Arbitration Act. The district court granted the petition, determining that the FAA requires the U.S. Marshals Service to serve a petition to confirm an arbitration award against a nonresident adversary. The court noted that the FAA predates changes to the Federal Rules of Civil Procedure, which shifted the burden of service of process from USMS to private parties. Though the Rules’ approach might make more sense than the approach in the FAA, the court does not get to choose which statutes to enforce.
Avicolli v. BJ's Wholesale Club Inc., 2021 WL 1088249 (E.D. Pa. March 22, 2021) (Products Liability, Removal) – Mr. and Mrs. Avicolli sued the seller BJ’s, the manufacturer and distributor of 4E Brands, and 4E Global in the Court of Common Pleas for Philadelphia County, alleging negligence and related claims against the seller BJ’s and the manufacturer. The Avicollis also sued the manager of the BJ’s store. BJ’s removed the case, notwithstanding the store manager’s Pennsylvania citizenship, arguing, in part, the district court had subject matter jurisdiction based on diversity of citizenship because the Avicollis improperly joined the store manager to defeat complete diversity. The Avicollis moved to remand and argued they had a colorable claim against the store manager for negligence based on the participation theory under which employees may be held liable for torts committed by their corporate employer. The district court denied the motion, finding the injured Pennsylvanians did not allege the local store manager played an active role in the alleged injury.

United States v. Mabry, 2021 WL 1111166 (E.D. Pa. March 23, 2021) (Supervised Release) – The defendant filed a motion for early termination of supervised release. The government argued that the waiver in the defendant’s plea agreement barred his motion. The district court ruled that the waiver was not applicable because the defendant’s motion was neither an appeal nor a collateral attack on his sentence. The court then considered the relevant factors under 18 U.S.C. § 3553(a) and ruled that early termination was in the interest of justice because the purpose of supervised release, i.e., successful reentry into the community, was accomplished, as evidenced by the absence of arrests or convictions since the release from custody, steady employment, stable residence, sobriety and the relatively short time left on defendant’s supervised release term.

United States v. Swint, 2021 WL 1210111 (E.D. Pa. March 31, 2021) (Compassionate Release) – The defendant, who is 70 years old, submitted a request for compassionate release to the Warden of USP-Allenwood, where he was serving concurrent life sentences. The warden denied the request. On Feb. 16, 2021, the Federal Community Defender Office filed a counseled Motion to Reduce Sentence. The district court concluded that, taken together, (1) defendant’s excessive sentence of life imprisonment; (2) defendant’s age, time served and declining health; and (3) the increased risks to defendant’s health due to the COVID-19 pandemic present extraordinary and compelling circumstances warranting compassionate release in this case.

SSN Hotel Management LLC v. The Hartford Mutual Ins. Co., 2020 WL 6146621 (E.D. Pa. April 8, 2021) (Insurance, Indemnity) – Plaintiffs modified their operations because of the COVID-19 pandemic and consequent Shutdown Orders. Plaintiffs suffered business income losses and sought indemnity from the defendant insurance provider under an all-risk commercial property policy. After the defendant denied the claims, plaintiffs sued, alleging breach of contract. The district court granted the defendant’s motion for summary judgment. The court held that plaintiffs had not suffered a reduced use or a loss of use of their premises, which sustained no physical damage or because of the presence of a foreign substance on the premises. The properties’ susceptibility to contamination is not a condition that can trigger coverage under a reasonable reading of the insurance policy. The alleged conditions have not operated to completely or near completely preclude operation of the premises as intended. Thus, the properties remained inhabitable and usable, albeit in limited ways.

MIDDLE DISTRICT OF PA OPINIONS

United States v. Guerrier, 2021 WL 51583 (M.D. Pa. Jan. 6, 2021) (Motions in Limine, Use Prior Felony Convictions) – Defendant was charged with multiple violations, including distribution of cocaine and possession of a firearm. Prior to trial, the government filed a motion in limine seeking to introduce evidence of the defendant’s prior convictions under Fed.R.Evid. 609(a)(1)(B). Rule 609 pertains to the use of a witness’s prior convictions for impeachment purposes. The court noted that while Rule 609 permits evidence of a prior felony conviction to impeach a testifying witness, when the testifying witness also is the defendant in a criminal trial, the prior conviction is admitted only “if the probative value of the evidence outweighs its prejudicial effect to that defendant.” To make this determination requires a heightened balancing test, with a predisposition...
toward exclusion. In order to overcome this, the prosecution must show the evidence makes a tangible contribution to the evaluation of credibility and that the usual high risk of unfair prejudice is not present. The prosecution bears the burden of satisfying the heightened balancing test set forth in Rule 609(a)(1)(B). The court further cited to the four factors that the Third Circuit Court has indicated should be considered when weighing the probative value against the prejudicial effect under this heightened test: “(1) the kind of crime involved; (2) when the conviction occurred; (3) the importance of the [defendant’s] testimony to the case; [and] (4) the importance of the credibility of the defendant.” The court then applied this law to the motion in limine before it, and to each of the prior convictions that the prosecution sought to admit at trial. The district court ultimately allowed the admission of two felony convictions from 2003, only for the purposes of impeachment if the defendant testified at trial.

DiMarco v. Borough of St. Clair, 2021 WL 51576 (M.D. Pa. Jan. 6, 2021) (Motion to Dismiss, Section 1983 First Amendment) – Plaintiff, a police officer, filed a First Amendment retaliation claim pursuant to Section 1983 against the borough, the mayor and the chief of police. Plaintiff alleged that, as a result of his complaint, a sergeant position was filled without an examination in accordance with the civil service requirements. He further alleged that the defendants “engaged in a series of unlawful actions to bring [plaintiff] up on unwarranted administrative charges to suspend Plaintiff and make him ineligible for the exam.” The defendants filed a motion to dismiss. The court provided an in-depth analysis of the motion to dismiss a complaint for failure to state a claim in the context of a Section 1983-First Amendment cause of action. The district court granted in part, and denied in part, the motion to dismiss. The district court found that plaintiff properly pleaded a Section 1983 claim for retaliation in violation of the First Amendment in relation to his punishment for participating in a fundraiser and for his posting on a social networking website. However, he failed to establish a viable Section 1983 claim against the mayor in relation to plaintiff’s punishment for his post on a social networking website and for totaling his vehicle while in a pursuit with another vehicle. Plaintiff also failed to identify a municipal custom or policy and, therefore failed to state a municipal liability claim against the borough.

**United States v. Coles,** 2021 WL 65992 (M.D. Pa. Jan. 7, 2021) (Criminal Law, Discovery and Disclosure) – Defendants were indicted by a grand jury for multiple offenses, including conspiracy, commission, and aiding and abetting a Hobbs Act robbery, conspiracy, aiding and abetting, and commission of murder for hire and murder of witnesses, and controlled substance possession and distribution. The defendants filed multiple motions for discovery and disclosure. In deciding these motions, the court provided a detailed review of the principles that guide discovery in criminal cases. As explained by the court, the government’s disclosure obligations arise from the three following primary sources: Fed. R. Crim. P. 16; the Jencks Act, 18 U.S.C. § 3500; and **Brady v. Maryland,** 373 U.S. 83 (1963), and its progeny. The court first discussed Rule 16 and that it establishes six categories of information that the government must produce upon request. However, the court noted there are important caveats to this. The court then addressed the Jencks Act, which protects from disclosure statements or reports made by prospective government witnesses until after they testify on direct examination at trial. The Jencks Act is the sole means of acquiring the statements that it covers. The Jencks Act includes procedures for in camera review and redaction of a statement if the government contests the relevancy of any part of it. Lastly, the court explained that pursuant to **Brady,** the government is obligated to disclose to a criminal defendant any evidence in the government’s possession that is “favorable to an accused” and “material either to guilt or to punishment.” The government must also disclose any “evidence that goes to the credibility of crucial prosecution witnesses.” This is referred to as **Giglio** material based on **Giglio v. United States,** 405 U.S. 150 (1972). Failure to disclose either type of material violates the defendant’s due-process rights. The court then ruled on the disclosure of various requested materials, including acceleration of **Brady** and **Giglio** materials, in light of this legal authority.

after the insurer denied the insured’s claim for business losses during the COVID-19 pandemic under an all-risk commercial insurance policy. The insurer filed a motion to dismiss. In granting the motion to dismiss, the court noted that, while the Third Circuit Court has not yet ruled on any COVID-19 insurance disputes, it was guided by relevant, binding precedent regarding what constitutes “direct physical loss of or damage to property” for insurance coverage purposes. Citing to Port Authority of New York and New Jersey v. Affiliated FM Ins. Co., 311 F.3d 226 (3d Cir. 2002), the court explained that pursuant to the “physical damage” component of the provision, the building, not the business, must be physically unusable. The court stated that to rule that a building without any presence of the COVID-19 virus was rendered physically or functionally unusable such that the plaintiffs sufficiently alleged a “distinct loss” would squarely contradict the Third Circuit’s holding in Port Authority. The court concluded that the insurer properly denied coverage under the business income coverage provision because the policy unambiguously required “physical loss of or damage to property,” which means some physical alteration to or issue with the structure, or some physical contamination inside the building, neither of which are alleged in plaintiff’s complaint.

Adlife Mktg. & Commc’ns Co. Inc. v. Karns Prime & Fancy Food Ltd., 2021 WL 694560 (M.D. Pa. Feb. 23, 2021) (Motion to Dismiss for Failure to Prosecute) – Plaintiff filed this lawsuit on Sept. 23, 2019, alleging a claim of copyright infringement in violation of the Copyright Act, 17 U.S.C. § 101, et seq. The procedural history since the filing of the complaint will not be repeated herein, except to note that it included what defendant contended was plaintiff’s noncompliance with discovery requests and his counsel not having been admitted to practice law in the Middle District of Pennsylvania. The court stayed the case to allow plaintiff to obtain counsel admitted to practice in the Middle District Court, but when plaintiff failed to do so, defendant filed a motion to dismiss for failure to prosecute pursuant to Fed.R.Civ.P. 41(b). After plaintiff did obtain counsel, the court ruled on the motion. In granting the motion, the court explained that Rule 41(b) permits dismissal of an action for “failure of the plaintiff to prosecute or comply with these rules or order of court.” When determining whether to grant such a motion, the court must balance six factors established by the U.S. Court of Appeals for the Third Circuit in Poulis v. State Farm Fire and Casualty Co., 747 F.2d 863 (3d Cir. 1984). The factors include (1) the extent of the party’s personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense. The court explained that not all of the Poulis factors need be satisfied to dismiss a complaint. The court applied the six factors to the facts before it and concluded that the majority of the six Poulis factors weigh heavily in favor of dismissing the action. It therefore granted the motion to dismiss.

WESTERN DISTRICT OF PA OPINIONS

M.S. v. W. Power Sports Inc., 2021 WL 83393 (W.D. Pa. Jan. 11, 2021) (Specific Personal Jurisdiction) – Plaintiff brought a personal injury suit against Western Power, which in turn filed a third-party complaint against lithium ion battery manufacturer Lil Lightning. Lil Lightning moved to dismiss for lack of personal jurisdiction. Plaintiff argued that Lil Lightning shipped its product from Idaho to Western Power’s warehouse in Pennsylvania, satisfying the “personal availment” element for specific personal jurisdiction. The court explained that the Third Circuit requires “some act by which the defendant purposively avails itself of the privilege of conducting activities within ... Pennsylvania.” Efforts to “exploit a national market” that includes Pennsylvania, however, is not sufficient. The court reasoned that Lil Lightning’s sole contact with Pennsylvania was shipping products, at the sole discretion of Western, to Western’s warehouse in Pennsylvania, which serves Western’s nationwide network of distributors. “The record merely reflects efforts by [Lil Lightning] to ‘exploit a national market,’” as opposed to “deliberate targeting of the forum.” The motion to dismiss was granted.

lost business income resulting from reduction of its operations due to COVID-19 and government shutdown orders. The court observed that insurance litigation arising out of COVID-19 has “proliferated in recent months.” The court dismissed the complaint because there was no loss triggering coverage under the policy. In so holding, the court examined the policy’s language “direct physical loss of or damage to the covered property.” The court explained that, although plaintiff supported its arguments with case law from other jurisdictions, those cases were not persuasive. Instead, the “growing body of case law” rejects any “contrived interpretations” of similar policy language “that would provide coverage for economic losses unrelated to physical impact to the covered structure.”

Amalgamated Transit Union Local 85 v. Port Auth. of Allegheny Cty., 2021 WL 164315 (W.D. Pa. Jan. 19, 2021) (First Amendment and Injunctive Relief) – The court granted a preliminary injunction against the Port Authority over a dispute involving employees wearing Black Lives Matter face masks. After receiving a complaint from one employee, the Port Authority prohibited its employees from wearing the masks; it later implemented a “neutral” policy that required its employees to wear one of a few specified face masks and banning all others. Plaintiffs moved for an injunction on First Amendment grounds. The Port Authority argued that its policy was constitutional because allowing employees to wear Black Lives Matter masks would cause disruption in the workplace, likely because other “competing” masks would be worn. The court rejected this argument. “A speculative fear that otherwise innocuous speech could induce others to engage in counter speech, which may, in turn, become disruptive, is not enough to justify censorship by the government, even in the employment context.” The court further reasoned that the Port Authority’s “neutral” policy fared no better — it restricted even more constitutionally protected speech.

Amos Inc. v. Firstline Nat’l Ins. Co., 2021 WL 1375472, (W.D. Pa. Mar. 5, 2021) (COVID-19 Insurance Issues) – Plaintiff sought a declaration of its rights under an insurance contract in regards to business losses from COVID-19. Plaintiff alleged that COVID-19 and the shutdown orders resulted in “physical harm and impact and damages” to its insured premises and that a policy exclusion for virus-related damage was against public policy. Defendant moved to dismiss the complaint, arguing that there was no physical damage to trigger coverage and that the alleged losses fall within the contract’s virus exclusion clause. The court sua sponte declined subject matter jurisdiction. The court reasoned that the existence of coverage for business interruption and the applicability of the virus exclusion clause “implicate[d] novel questions of state law ... best reserved to the state courts in the first instance.” The district court adopted the Report and Recommendation, dismissing the case without prejudice so that plaintiff could file in state court.

Med. Assocs. of Erie v. Zaycosky, 2021 WL 1060216 (W.D. Pa. Mar. 19, 2021) (Forum Selection Clause) – Defendant removed to federal court a case alleging breach of contract and unjust enrichment. Plaintiff filed a motion to remand, citing a forum selection clause in the agreement: “The Court of Common Pleas of Erie County, Pennsylvania, shall have jurisdiction over any dispute which arises under this Agreement.” Defendant argued that the unjust enrichment claim does not arise under the agreement because an unjust enrichment claim, by its very nature, only arises where an agreement does not create an enforceable contract. The court disagreed, finding that the forum selection clause was presumptively valid and that the unjust enrichment claim arises under the agreement. The court remanded the case to state court.

PR Liquidating Tr. v. W. Land Servs., 2021 WL 1197626, (W.D. Pa. Mar. 30, 2021) (Bankruptcy and the Pennsylvania Recording Statute) – Plaintiff holds all assets of several businesses under a Chapter 11 Consolidated Plan of Liquidation. One of those businesses, Montague, in 2008, allegedly engaged defendant Western to identify and purchase oil and gas mineral rights in Pennsylvania on its behalf. Plaintiff alleged that it had “recently come to its attention” that Western did not deed the properties to Montague and instead deeded those properties to one of its affiliates, defendant Austin. Plaintiff brought claims for breach of contract, breach of fiduciary duty, conversion, constructive trust and conspiracy. Defendants moved to dismiss, citing the statute of limitations for each claim. The court agreed, finding that, as a bankruptcy trustee, plaintiff is “put in the debtor's
shoes” and that it was on notice that it paid for property it did not receive at the time the properties were deeded to defendant Austin. “In Pennsylvania, the recording of a deed gives constructive notice that precludes the invocation of the discovery rule.”

THANK YOU

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