PBA NEWS

PBA Virtual Midyear Meeting 2021

The PBA held its midyear meeting on Jan. 27, 28 and 29 via a live webcast due to the COVID-19 pandemic. The program provided 12 CLE credits, including 1 credit for ethics and included hot topics in civil litigation, ethics/malpractice avoidance, an inside look into Pennsylvania appellate courts, 2019-20 term U.S. Supreme Court’s impact on federal practice, post-COVID-19 practice update, discovery and jury selection in the post-COVID-19 era, judicial roundtable and dialogue with the legislature. The panels included distinguished judges, practitioners and governmental officials from the Pennsylvania Commonwealth. As in past years, the panelists and the topics and discussions were excellent, and the meeting was well attended and received.

PBA President Statement Denouncing Violence at the U.S. Capitol

PBA President David E. Schwager has issued a statement strongly denouncing the violence at the U.S. Capitol on Jan. 6, 2021. President Schwager stated:

“We stand with other organized bar associations to condemn today’s assault on the U.S. Capitol. Storming our nation’s Capitol to disrupt the process to certify the Electoral College victory of President-elect Joe Biden and Vice President-elect Kamala Harris is criminal conduct.

All duly-elected leaders of this country of all political parties, including the President of the United States, must come together to condemn the violent storming of protestors into the sacred halls of the U.S. Capitol, including the chambers of Congress.

Prior claims of election impropriety were investigated. Multiple courts, including the U.S. Supreme Court and our courts in Pennsylvania, weighed in on multiple lawsuits. All were thrown out because no significant voter fraud was found.

We must come together as a country to recognize that the 2020 election was conducted fairly and cease the veiled comments and unfounded theories that are meant to incite anger and, as seen today, violence.

We must remember that our democracy depends upon our following of the rule of law.

We must remain focused on the messages we send to not only our fellow citizens but to people around the world. We must demonstrate to the world that our role as the leader among the democracies of the world remains intact.

We must have a peaceful transition of power from one president to the next. As of Jan. 20, Joe Biden will be our president and Kamala Harris will be our vice president. This is the will of the clear majority of American voters and the individual states that make up the Electoral College.”

COMMITTEE NEWS

Reminder: Next Executive Council Quarterly Meeting – Feb. 15, 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, the committee’s staff liaison, at susan.etter@pabar.org.

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

The FPC continues to grow! On behalf of the FPC, Chair Hon. D. Michael Fisher sends a warm welcome to new members joining the committee:

- Darth Newman, Esq.
- Philip Press, Esq.
- Ryan Sypniewski, Esq.
- Joseph Sengoba, Esq.
- Julia Jacovides, Esq.
- Michele Davis, Esq.
- Robert Duminiak, Esq.

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

Nominations Subcommittee
The appointment or reappointment of at-large Executive Council members will take place at the May 2021 meeting. Anyone who is interested in such an appointment may contact Brett Sweitzer directly at Brett_Sweitzer@fd.org.

Newsletter Subcommittee
We 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.

The Impact of the 2019-20 Term of the Supreme Court of the United States on Federal Practice

Once again, as part of the PBA Midyear Meeting, the Federal Practice Committee presented the program “The Impact of the 2019-20 Term of the Supreme Court of the United States on Federal Practice.” The two-hour program, held on Jan. 28, 2021, was moderated by the Honorable D. Michael Fisher, Senior Judge, U.S. Court of Appeals for the Third Circuit and Chair of the PBA Federal Practice Committee.

Distinguished panelists included the Honorable D. Brooks Smith, Chief Judge, U.S. Court of Appeals for the Third Circuit; the Honorable Juan R. Sánchez, Chief Judge, U.S. District Court for the Eastern District of Pennsylvania; the Honorable John E. Jones III, Chief Judge, U.S. District Court for the Middle District of Pennsylvania; the Honorable Mark R. Hornak, Chief Judge, U.S. District Court for the Western District of Pennsylvania; Anne N. John, Esquire, of John and John Law and PBA Immediate Past President; Nancy Conrad, Esq., of White and Williams LLP; and Riley H. Ross III, M.A., J.D., of Mincey Fitzpatrick Ross LLC.

The program involved a lively discussion of recent United States Supreme Court cases and their possible impact on Federal Practice. The program once again received rave reviews.

Thank you again to the panelists of this program for their hard work and commitment to continuing education on Federal Practice.
FEDERAL PRACTICE NEWS

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

RULE CHANGES

Federal Rule of Civil Procedure 30(b)(6)
On Dec. 1, 2020, an amendment to Federal Rule of Civil Procedure 30(b)(6) took effect which requires attorneys to confer regarding the subject matter of an organization’s oral deposition. Specifically, Rule 30(b)(6) provides, in part, that “Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination.”

The Advisory Committee Notes for this Amendment state that it was enacted to address problems that have emerged in some cases. For instance, notices or subpoenas directed to organizations often contained overly long or ambiguously worded lists of matters for examination. Another recurring problem was that witnesses designated as the corporate designee would be inadequately prepared for deposition.

It was the intent of the committee that by requiring the noticing party and the organization to confer prior to the deposition, the matters for the deposition would be clarified so that an appropriate witness could be identified and adequately prepared. This would lessen disagreements.

While the noticing party and the organization or its attorney are required to confer in good faith, an agreement need not be reached. However, if the good faith attempt to agree upon such depositions is performed early in the proceeding, any disagreements may be raised and addressed in the parties Rule 26(f)(3) discovery plan and at the Rule 16 pre-trial conference.

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).
• United States Senators Bob Casey and Pat Toomey announced they were accepting applications to fill this position. The deadline for submitting applications was Feb. 8, 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.

UPCOMING EVENT

Feb. 17, 2021 – Pennsylvania Bar Foundation will be co-hosting Magic, Mind Reading and Mystery, a virtual winter fundraiser with the PBA COVID-19 Task Force, at 6:00 p.m. https://bit.ly/3cagWAw
CASE SUMMARIES

Summaries of Third Circuit and Pennsylvania district court decisions issued between Nov. 1, 2020 and Jan. 31, 2021 involving issues of potential interest to FPC members.

THIRD CIRCUIT PRECEDENTIAL OPINIONS

Doe I v. Governor of Pennsylvania, 977 F.3d 270 (3d Cir. Oct. 14, 2020) (Constitution [Second Amendment])
– Under the Pennsylvania Uniform Firearms Act (PUFA), “[any] person who has been ... committed to a mental institution for inpatient care and treatment” under the Mental Health Procedures Act (MHPA) § 302 is prohibited from possessing firearms. § 6105(c)(4). There are three post-deprivation remedies to those who seek recovery of their firearm rights. Plaintiffs were separately evaluated on an emergency basis pursuant to MHPA § 302 and were found in need of inpatient treatment. Unable to purchase firearms, they challenged PUFA § 6105(c)(4)’s constitutionality on its face, arguing that it deprived those who were certified committable under MHPA § 302 of their Second Amendment rights without procedural due process. The district court granted summary judgment to defendants, holding that although those committed under MHPA § 302 have a protected liberty interest in the right to bear arms, PUFA § 6105(c)(4) provided sufficient procedural protections before depriving them of their Second Amendment rights without procedural due process. The district court granted summary judgment to defendants, holding that although those committed under MHPA § 302 have a protected liberty interest in the right to bear arms, PUFA § 6105(c)(4) provided sufficient procedural protections before depriving them of their Second Amendment rights without procedural due process. Making explicit that it will defer to the relevant statute’s reasonable standards and designations as to who is vested with authority to determine that one is a danger to oneself or the public, and on what grounds that person may do so, the Court of Appeals concluded that once a person has been involuntarily committed under MHPA § 302, that person has joined the class of those historically without Second Amendment rights. Because plaintiffs had no Second Amendment rights, they could only make two possible challenges to the statutes at issue. As they brought neither challenge, the court affirmed the district court’s grant of summary judgment to defendants. (Opinion author: Judge J. Roth).

U.S. v. Melvin, 978 F.3d 49 (3d Cir. Oct. 16, 2020) (Modification of supervised release) - Melvin pleaded guilty to all counts of a seven-count indictment charging him with possession and transfer of a machine gun, being a felon in possession of a firearm, engaging in an illegal firearms business and conspiracy. He was sentenced to 121 months of imprisonment and three years of supervised release. Melvin was released from prison in July 2017 and began his three-year term of supervised release on Nov. 28, 2017. With 15 months of supervised release yet to be completed, Melvin filed a motion for early termination of his term of supervised release pursuant to 18 U.S.C. § 3583(e). The district court denied the motion, adopting the government’s view that the applicable legal standard required a showing of new, unforeseen, or extraordinary or exceptional circumstances for a term of supervised release to be terminated. The Court of Appeals vacated the district court’s order because of its reliance on non-precedential decisions for the proposition that early termination “is warranted ‘only when the sentencing judge is satisfied that something exceptional or extraordinary warrants it,’” or “upon a showing of ‘new or unforeseen circumstances[].’” The district court’s requirement found no support in the statutory text. To address the presence of language in non-precedential decisions suggesting otherwise, the court expressly held that a district court need not find that an exceptional, extraordinary, new, or unforeseen circumstance warrants early termination of a term of supervised release before granting a motion under 18 U.S.C. § 3583(e)(1). (Opinion author: Judge D. Porter).

Howell v. Superintendent Albion SCI, 978 F.3d 54 (3d Cir. Oct. 21, 2020) (Habeas corpus) – With no physical evidence, the government relied on the statements of one man – Parnell – to arrest Howell for the December 1982 murder of Allen. The government’s case against Howell rested largely on the testimony of five other individuals (Hearst, Workman, Williams, Jones and Wright – the last two being rebuttal witnesses). A jury convicted Howell of robbery and second-degree murder, and he was sentenced to life imprisonment. In 1999, Parnell wrote several letters in which he confessed to murdering Allen. Howell’s many attempts to obtain relief in state courts failed; his federal habeas petition (filed in 2005) was dismissed on untimeliness grounds. Armed with Parnell’s confession and also Williams’ recantation of her testimony, Howell filed a Rule 60(b)(6) motion to reopen the habeas judgment based on
**McQuiggin v. Perkins**, 569 U.S. 383 (2013) (holding that a showing of actual innocence provides an equitable exception to AEDPA's statute of limitations). That motion was denied. With recantations of Hearst and Jones also in hand (a total of three – Parnell’s associates had murdered Workman to prevent him from testifying against Parnell at Parnell’s murder trial), Howell tried again after the Court of Appeals decided *Satterfield v. District Attorney of Philadelphia*, 872 F.3d 152 (3d Cir. 2017) (stating “if a petitioner can make a showing of actual innocence, McQuiggin’s change in law is almost certainly an exceptional circumstance” entitling a petitioner to relief under Rule 60(b)(6)). The district court again denied the motion, concluding that the recantations were unreliable and that Parnell’s confession was also unreliable. The Court of Appeals addressed whether Howell had made a sufficient showing of actual innocence to gain relief under Rule 60(b)(6). The court concluded that under the circumstances presented (including that the recantations appeared to support Parnell’s confession), the district court erred in categorically rejecting the recantations. It vacated the district court’s order and remanded for an evidentiary hearing on the new evidence so that a more complete record could be developed upon which to decide the Rule 60(b)(6) motion. (Opinion author: Judge K. Jordan).

**PDX North Inc. v. Commissioner, New Jersey Dep’t of Labor & Workforce Development**, 978 F.3d 871 (3d Cir. Oct. 22, 2020) (Civil procedure / Younger abstention) – After conducting several audits, the New Jersey Department of Labor and Workforce Development told PDX that it had misclassified drivers as independent contractors and thus owed unemployment compensation taxes. PDX challenged this determination before the New Jersey Office of Administrative Law (OAL). It also later filed suit in federal court against the department’s commissioner, contending New Jersey’s statutory scheme for classifying workers was preempted by the Federal Aviation Administration Authorization Act and was unconstitutional under the Interstate Commerce Clause. Because it was also being audited, and it, like PDX, classified its drivers as independent contractors, SLS moved to intervene in PDX’s action against the commissioner. Intervention was granted, and SLS filed a complaint alleging nearly identical claims to PDX. The commissioner moved for judgment on the pleadings, contending the case was barred by the *Younger* abstention doctrine. The trial court agreed and dismissed the entire case. Both PDX and SLS appealed, arguing that (1) Fed. R. Civ. P. 12 or judicial estoppel prevented the invocation of the *Younger* abstention doctrine, and (2) the trial court incorrectly applied *Younger* abstention. The Court of Appeals first concluded that it was not an abuse of discretion for the trial court to consider the Rule 12(c) motion or to consider the commissioner’s *Younger* abstention arguments. As to appellant’s second challenge, the court concluded that the OAL proceeding was a civil enforcement action that was quasi-criminal in nature. Although district court did not err in concluding that *Younger* abstention was appropriate as to PDX’s case, the court did err in finding there was an ongoing judicial proceeding as to SLS and in dismissing SLS’s case on *Younger* abstention grounds. SLS was being audited; it was not subject to an ongoing state judicial proceeding. The district court’s judgment was therefore reversed in part and affirmed in part. (Opinion author: Judge A. Scirica).

**Bognet v. Secretary, Commonwealth of Pennsylvania**, 980 F.3d 336 (3d Cir. Nov. 13, 2020) (Federal court jurisdiction / Article III standing / Civil rights / Voting/Elections) – This suit involved the Pennsylvania Supreme Court’s three-day extension of the ballot-receipt deadline for the Nov. 3 general election and its conclusion that a ballot should be presumed to be timely unless “a preponderance of the evidence demonstrates that it was mailed after Election Day” (Deadline Extension and Presumption of Timeliness, respectively). Four registered voters from Somerset County who planned to vote in person and Pennsylvania congressional candidate Jim Bognet filed suit against Secretary Boockvar and each Pennsylvania county’s board of elections alleging that defendants’ implementation of the Deadline Extension and Presumption of Timeliness violated the Elections Clause of Article I, the Electors Clause of Article II, and the Equal Protection Clause. Plaintiffs moved for a temporary restraining order and preliminary injunction. The district court denied the motion because plaintiffs either lacked standing or because granting the request would alter election rules on the eve of an election, contrary to
*Thorne v. Pep Boys Manny Moe & Jack Inc.*, 980 F.3d 879 (3d Cir. Nov. 20, 2020) (Federal court jurisdiction [Article III standing]) – A federal regulation requires a tire dealer to help customers register their new tires with the manufacturer and prescribes three methods for doing so. After buying tires from a Pep Boys store in 2017, Thorne filed a class action complaint alleging that Pep Boys failed to pursue any of the three methods when, or after, it sold her the tires, and that its violation of registration obligations made it liable to her on federal and state-law causes of action. Her first complaint was dismissed without prejudice for lack of standing. She then filed an amended class action complaint, bringing eight causes of action under federal warranty and state law and seeking money damages, restitution, injunctive relief and attorneys’ fees. She alleged that Pep Boys deprived her of the benefit of the bargain when it sold her tires without helping to register them because unregistered tires are worth less than registered tires. Thorne alternatively alleged intangible harm because her unregistered tires increased the risk to her person or property if she was unreachable if her tires were ever recalled. She did not allege any performance problems, physical defects or recall associated with her tires. The district court dismissed Thorne’s amended complaint on Article III standing grounds “without leave to amend.” The Court of Appeals concluded that Thorne had not alleged a tangible, economic injury that was sufficient for standing purposes and had not met the Article III standing requirements for intangible, concrete harms under *Spokeo*. Even if Thorne could show an intangible but concrete injury, the chain of events necessary for any harm to materialize was speculative. Although the court agreed with the district court that Thorne lacked Article III standing to pursue claims for any of the forms of relief she requested, it vacated the dismissal and remanded for a without-prejudice dismissal. (Chief Judge D.B. Smith).

*Folajtar v. U.S. Attorney General*, 980 F.3d 897 (3d Cir. Nov. 24, 2020) (Constitution [Second Amendment]) – Folajtar pleaded guilty in 2011 to willfully making a materially false statement on her tax returns, a federal felony that is punishable by up to three years’ imprisonment. In 2018, she filed suit asserting that applying 18 U.S.C. § 922(g)(1) (prohibiting those convicted of a crime punishable by more than one year in prison from possessing firearms) to her violated her Second Amendment right to possess firearms. The district court granted the government’s Rule 12(b) (6) motion, and Folajtar appealed. The Court of Appeals examined precedents of the Supreme Court and of the Third and other circuits, history and the general deference courts accord to a legislature’s policy determination of what is serious (i.e. falls within the historical class of offenses that render felons excluded from Second Amendment protections) and held that the Legislature’s designation of an offense as a felony is generally conclusive in determining whether that offense is serious. The court stressed that this was not a blanket rule categorically foreclosing an as-applied challenge to § 922(g)(1) for a felony conviction, and it did not rule out the possibility of an exceptional federal or state felony unmoored from the bar’s historical underpinnings. In this case, however, Folajtar’s felony was a serious crime that was not so exceptional as to fall outside the historical bar. As a result, Folajtar was not protected by the Second Amendment, and her as-applied challenge to § 922(g)(1) failed. The court affirmed the district court’s dismissal. (Opinion author: Judge T. Ambro; one judge dissenting).

*Spanier v. Director, Dauphin County Probation Services*, 891 F.3d 213 (3d Cir. Dec. 1, 2020) (Habeas corpus) – Spanier, Penn State’s former president, was convicted in 2017 of child endangerment for his role in a 2001 decision not to report to authorities Jerry Sandusky’s suspected child sex abuse. After his unsuccessful direct appeal, Spanier filed
a petition for a writ of habeas corpus under § 2254. His challenges to his conviction were tied to two post-2001 events: (1) the amendment in 2007 to the 1995 version of Pennsylvania child endangerment statute and to the applicable statute of limitations, and (2) the Pennsylvania Supreme Court deciding, in Commonwealth v. Lynn, 114 A.3d 796 (Pa. 2015), that a priest’s post-2007 conviction of child endangerment was not erroneous because the priest’s pre-2007 conduct fit within the plain language of the 1995 statute. Spanier argued that his conviction violated the Ex Post Facto Clause and the Due Process Clause because the jury instruction regarding child endangerment at his trial included language from the 2007 version of the statute. Although the district court rejected Spanier’s argument that application of the new statute of limitations violated due process, it agreed that the Ex Post Facto and Due Process Clauses had been violated and granted the petition. The Commonwealth appealed. In this comprehensive opinion, the Court of Appeals first explained that because Spanier’s argument was directed at the state court’s reliance on a court decision – i.e., Lynn – to uphold his conviction, it urged a due process error rather than an ex post facto error. The court next considered U.S. Supreme Court decisions up to 2018 (when the Superior Court affirmed Spanier’s conviction) to assess whether the state court’s decision, based on its interpretation of Lynn, was contrary to, or involved an unreasonable application of, clearly established federal law. Because those decisions did not clearly point to a due process violation under the circumstances in this case, Spanier could not show that Supreme Court precedent required a contrary outcome to the state’s court decision. The court, after also determining that there was not a reasonable likelihood that the jury convicted Spanier based on the contested jury instruction language and that the district court correctly ruled that the statute of limitations issue was not a basis for habeas relief, reversed the district court’s grant of the petition. (Opinion author: Judge D.M. Fisher).

U.S. v. Nasir, 982 F.3d 144 (3d Cir. Dec. 1, 2020) (En Banc) (Criminal Law & Procedure / Sentencing) – Nasir was indicted for violating a part of the crack house statute, for possession of marijuana with intent to distribute and for being a felon in possession of a firearm. At trial, pursuant to Old Chief v. United States, 519 U.S. 172 (1997), he entered into a stipulation with the government that, prior to the date when he allegedly possessed the firearm, he had been “convicted of a felony crime punishable by imprisonment for a term exceeding one year, ... ”. A jury convicted him on all three counts, and the district court sentenced him to 210 months, having determined that he qualified as a career offender. The Court of Appeals’ opinion is noteworthy for its treatment of two of Nasir’s arguments (it rejected three others): (1) he should not have been sentenced as a career offender because one of his prior felony convictions was for an inchoate crime, which did not qualify as a “controlled substance offense”; and (2) his conviction for being a felon in possession of a firearm could not stand under Rehaif v. United States, 139 S. Ct. 2191 (2019). As to Nasir’s challenge to his sentence, the court concluded that, in light of the limitations on deference to administrative agencies set forth in Kisor v. Wilkie, 139 S. Ct. 2400 (2019), inchoate crimes were not included in the definition of “controlled substance offenses” given in section 4B1.2(b) of the sentencing guidelines. The en banc court overruled United States v. Hightower, 25 F.3d 182 (3d Cir. 1994) (concluding that the commentary to 4B1.2 was binding and thus that inchoate crimes were covered by sections 4B1.1 and 4B1.2 of the sentencing guidelines), vacated Nasir’s sentence, and remanded for resentencing without his being classified as a career offender. As to the Rehaif issue, the majority viewed the court as faced with a case in which there was no evidence at all on an essential element of the felon-in-possession charge (i.e., knowledge of his status as a person prohibited from having a gun, now required under Rehaif), and yet the case was submitted to the jury and there was a conviction. This raised “the difficult and dividing issue in this case”: whether an appellate court on plain-error review is restricted to the trial record or is instead free to consider evidence that was not presented to the jury. The majority concluded that basic constitutional principles required that only what the government offered in evidence at the trial could be considered. The pre-trial stipulation was insufficient on its own to prove that Nasir had knowledge, at the time he possessed the firearm, of his status as a person prohibited to possess a firearm. The court vacated Nasir’s conviction for being a felon in possession and remanded for a new trial on that charge. (Judge K. Jordan writing for
the nine-judge majority; one judge wrote a partial dissent, joined by six other judges).


A jury found Rad guilty of conspiring to commit false header spamming (Count I) and conspiring to commit false domain name spamming, each in violation of the CAN-SPAM Act. He was sentenced to a total of 71 months in prison, including 35 months attributable to Count I. The DHS initiated removal proceedings, and argued before the IJ that Rad’s CAN-SPAM Act convictions were aggravated felonies, i.e., crimes that involved fraud or deceit in which the loss to the victim or victims exceeded $10,000. The BIA ultimately (after two reviews) ordered Rad removed. Although the BIA conceded that “the precise quantum of victim loss [was] not readily ascertainable,” it presumed “the amount of loss ... exceeded $10,000” based on an inference drawn from the 35-month sentence associated with Count I. Addressing the scope of the CAN-SPAM Act, the Court of Appeals rejected a reading of the Act that would criminalize a broad range of day-to-day activity and concluded that the Act should be read as reflecting and reinforcing longstanding norms. The court next addressed whether the least culpable violations of the two CAN-SPAM provisions Rad was convicted under entailed deceit and concluded that they did. The BIA’s conclusion as to the deceit portion of the aggravated felony was affirmed. In addressing victims’ loss, however, the BIA overlooked crucial differences between loss determinations in the course of an immigration proceeding and those in the course of a sentencing hearing (e.g., the two frameworks required that losses be connected to different types of conduct, elaborated different tests for deciding when an offender’s gains serve as a proxy for victims’ losses, and held the government to different burdens of proof). Therefore, the court granted Rad’s petition and vacated the BIA’s removal order. Although the court considered not giving the BIA a third opportunity to review, the court remanded the case to allow the BIA to examine an avenue for attributing victim losses that it never considered: that Rad’s conspiracy offenses may reflect intended, rather than actual, losses. The court joined the BIA and two sister circuits in recognizing that a conspiracy or attempt to commit fraud or deceit involving over $10,000 in intended losses qualified as an aggravated felony. (Opinion author: Judge C. Krause).

**EASTERN DISTRICT OF PA OPINIONS**

**United States v. Hopper**, 2020 WL 6146621 (E.D. Pa. Oct. 20, 2020) (Suppression, Identification) -- After he was arrested and charged with carjacking, as well as related crimes, the defendant moved to suppress his identification after a “show-up.” The defendant argued that allowing the victim to identify him at trial would violate due process because the show-up procedure was unnecessarily suggestive, created a substantial risk of misidentification, and tainted all subsequent identifications. The district court agreed, ruling that the identification was not sufficiently reliable to overcome the show-up’s suggestiveness. Three factors compelled the court’s holding: First, the victim had, at best, a very poor opportunity to view the criminal at the time of the crime. Second, the victim’s “degree of attention” was equally poor. Third, the victim’s initial description of the carjacker would have fit innumerable people.

**United States v. Bryant**, 2020 WL 6381386 (E.D. Pa. Oct. 30, 2020) (Suppression, Automobile, Credibility) – The defendant moved to suppressed evidence, including a gun, ammunition and narcotics, after police searched his vehicle. The district court suppressed all of the evidence recovered, finding that the arresting officer’s testimony as to material facts leading to the search lacked credibility. Thus, there was no reasonable, articulable suspicion or probable cause to search the car and seize the evidence.

**Cigar Assoc. of America v. City of Philadelphia**, 2020 WL 6703583 (E.D. Pa. Nov. 13, 2020) (Preliminary Injunction, Preemption) -- The Cigar Association of America sought a preliminary injunction against the City of Philadelphia, enjoining it from enforcing Ordinance 180457. The ordinance prohibits all sale of flavored tobacco products, with minor exceptions. The association argued that Pennsylvania law preempted the ordinance. The district court agreed that state law preempted the ordinance. Because the association demonstrated a likelihood of success on the merits, would be irreparably harmed absent an injunction and because the balance of the equities and the public interest weigh in favor...
of an injunction, the court granted the motion for a preliminary injunction.

**Mikeladze v. Raymours Furniture Co.,** 2020 WL 7240379 (E.D. Pa. Dec. 8, 2020) (Employment Contracts, Arbitration) -- Mikeladze sued Raymours, his employer, alleging wrongful termination of employment arising out of retaliation. Raymours filed a motion to dismiss and argued that, according to the employment contract, Mikeladze’s claims had to be brought in arbitration and a shortened statute of limitations barred them. The district court denied Raymours’s motion and ruled that Mikeladze sufficiently alleged that he had no meaningful opportunity to learn of the arbitration and statute of limitations provisions in the contract. Mikeladze speaks very little English. The individual, who was supposedly translating the documents, did not inform Mikeladze of the arbitration provisions. Moreover, Mikeladze alleged that the contract was presented to him on an exclusively take it or leave it basis.

**Newchops Rest. Comcast LLC v. Admiral Indem. Co.,** 2020 WL 7395153 (E.D. Pa. Dec. 17, 2020) (Insurance Contracts) – Newchops sought a declaration that Admiral must cover Newchops’ business losses, which resulted from the mandatory closing of their restaurants pursuant to pandemic shutdown orders. The district court ruled that loss or damage had to be physical or structural, not merely economic, to be covered under civil authority provision or business income provision. Furthermore, even if Newchops had suffered covered losses under either or both the civil authority and business income provisions, the virus exclusion in Newchops’s insurance policy precluded coverage.

**PARKER V. WOLF**

**MIDDLE DISTRICT OF PA OPINIONS**

**Pub. Interest Legal Found. v. Boockvar,** 2020 WL 6144618 (M.D. Pa. October 20, 2020) (Preliminary Injunction) -- Two and a half weeks before a national election of critical importance, plaintiff filed a motion for preliminary injunction alleging that the voter rolls improperly included 21,206 Pennsylvanians who were supposedly deceased. Plaintiff had conducted its own investigation and asked the court to accept its findings. The court interpreted the request as a motion for permanent injunction. The court noted that although plaintiff had reason to believe that the deceased individuals were on Pennsylvania’s voter rolls as early as May 2020, nonetheless, it waited until the “eleventh hour” to file its suit. This all but ensured that defendant and the court would have to accept plaintiff’s list as true in crafting an appropriate order to cleanse the rolls. The court explained that neither the court, nor the defendant, had the capacity to timely verify plaintiff’s allegation that over 21,000 deceased individuals remained on Pennsylvania’s rolls, or that the names of those individuals were accurate. The plaintiff spent months compiling the list. The court explained that it strained credulity for the plaintiff to believe that defendant could perform this same work in less than two weeks. The court refused to cast aspersions or to speculate as to plaintiff’s motives in delaying its filing. However, the court also declined to order defendant to engage in mass purging of its voter rolls based solely on plaintiff’s uncorroborated and untimely list of purportedly ineligible voters. The court further noted that plaintiff could not point to a deficiency that rendered defendant’s program unreasonable, but instead argued that its list of “apparently” deceased individuals spoke for itself. The court opined that those numbers told a very different story, leading to the serious question of how many voters on plaintiff’s list were, in fact, deceased. The court concluded that it would not disenfranchise eligible voters based upon the data presented by plaintiff, and defendant had no time to independently verify the list—a situation squarely as a result of plaintiff’s delay. Without proper notice or investigation, the court would not deprive the electorate of its voice.

**Parker v. Wolf,** 2020 WL 7295831 (M.D. Pa. Dec. 11, 2020) (Preliminary Injunction and Article III Standing) – Plaintiffs, comprised of Pennsylvania residents, filed a motion for preliminary injunction asking the court to enjoin Gov. Wolf and Secretary Levine from proceeding with their COVID-19 Contact Tracing Program and Mask Mandate. The plaintiffs’ request was based on four theories: (1) the Contact Tracing Program violated their First Amendment right of association and/or expression; (2) the Contact Tracing constituted a “house arrest” and an unlawful search and seizure under the Fourth Amendment; (3) the Mask Mandate violated their First Amendment right against compelled speech; and (4) the Mask Mandate violated
their Fourteenth Amendment right to privacy. The court denied the request for a preliminary injunction. In doing so, the court explained that in order to obtain a preliminary injunction, a plaintiff must establish that (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) an injunction is in the public interest. However, before addressing the request for a preliminary injunction, the court has an independent duty to ensure that the moving party has Article III standing.

Citing to United States Supreme Court precedent, the court explained that in order to have standing, the plaintiff must suffer an injury that is “concrete, particularized and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.” Allegations of future possible injury are insufficient. Applying this well-established law to the facts before it, the court concluded that the plaintiffs could not establish standing. The court denied the motion as the plaintiffs lacked standing to enjoin enforcement of either the Contact Tracing Program or the Mask Mandate since they have not suffered an injury sufficient to warrant judicial review.

**Donald J. Trump for President Inc. v. Boockvar,** 2020 WL 6821992 (M.D. Pa. Nov. 21, 2020), aff’d sub nom., 830 Fed. Appx. 377 (3d Cir. 2020) (Motion to Dismiss and Article III Standing) – Plaintiff filed a lawsuit requesting that the court find a number of ballots in Pennsylvania invalid and not count them. The court denied the plaintiffs’ motion for a preliminary injunction and granted the defendant’s motion to dismiss. In a thorough and detailed opinion, the court found that the voters lacked standing to pursue their action and the campaign lacked associational standing to pursue its action. Moreover, there was a rational basis for the secretary’s decision to provide counties with discretion to use notice-and-cure procedure for procedurally defective mail-in-ballots, and therefore, the secretary’s decision did not violate voters’ rights under the Equal Protection Clause. Lastly, the court found that the campaign failed to allege that its poll watchers were treated differently than any opposing party’s presidential candidate poll watchers. As such, the plaintiff could not establish an equal protection claim for allegedly excluding watchers from canvassing.

**Snider v. Pennsylvania DOC,** 2020 WL 7229817 (M.D. Pa. Dec. 8, 2020) (Motion to Dismiss and ADA) – In this case, the plaintiff was a mentally ill state inmate who filed a lawsuit alleging violations of the Americans with Disabilities Act and Section 1983 claims for violation of the First, Fifth, Sixth, Eighth and Fourteenth Amendment. The defendants filed a motion to dismiss, which the district court granted in part and denied in part. While the court dismissed various claims, it denied the motions to dismiss with respect to the claims for discrimination under the ADA, as well as for violating his civil rights knowing of his mental illness, and for intentional infliction of emotional distress. The court’s conclusion was noteworthy: “Experienced medical and criminal justice thought leaders have been warning society for years of the criminal justice system’s need to properly manage mentally ill incarcerated persons mindful of the effects of isolation and lack of treatment for the mentally ill. Society often puts the mental illness of its incarcerated persons to the side and avoids thoughtful analysis. But Joel Snider’s case, like the claims of Messrs. Porter and Geness recently before our Court of Appeals and scheduled to be before juries in the first half of 2021, highlights these concerns. We are obligated by our oath to study his claims regardless of how much the challenged state actors would prefer a more organized presentation. Mr. Snider is unable to pay for an attorney and no judge has been recently able to persuade a lawyer to voluntarily represent Mr. Snider to date. Lacking or refusing to accept legal direction results in Mr. Snider repetitively filing lawsuits and asserting theories largely unmoored to the Law. The state actors then move to dismiss arguing they cannot or will not understand his allegations as either unwieldy or confusing. But when you study his plead[ed] facts, Mr. Snider states a claim against the Commonwealth, through its Department of Corrections, for discrimination under the Disabilities Act under our governing Circuit precedent. Among his hundreds of allegations, and assuming his allegations to be true at this stage, he also states claims against some but not all the named individual state actors for violating his civil rights knowing of his mental illness and for intentional infliction of emotional distress. We must dismiss several claims as lacking a basis after three attempts at pleading. It is now time to move into discovery on these claims.”
WESTERN DISTRICT OF PA OPINIONS

In re Moschell, 2020 WL 5998166 (Bankr. W.D. Pa. Oct. 9, 2020) (Collateral Estoppel, Dischargeability of Debt in Bankruptcy) – A debtor and creditor owned a home as tenants in common, but the debtor signed a deed for her interest to the creditor. The creditor eventually sold the home, and the bank sent a refund check for the remaining escrow funds, which the debtor cashed. The creditor filed a complaint in state court seeking damages for conversion. The state trial court entered judgment against debtor. Later in bankruptcy court, the parties disputed whether the amount owed was dischargeable in bankruptcy or whether an exception to discharge applied in accordance with 11 U.S.C. § 523. The bankruptcy court determined that the creditor’s successful conversion claim was not entitled to collateral estoppel effect under § 523 because the intent requirements of conversion were not identical to the scienter requirements necessary for § 523. In particular, the state trial court’s ruling was not entitled to collateral estoppel effect because the ruling did not contain facts or conclusions to prove a § 523 claim, as there was no showing of fraudulent intent, and the conversion suit did not establish that the debtor’s conduct was willful and malicious.

Armstrong Telecommunications, Inc. v. CHR Sols. Inc., 2020 WL 6498888 (W.D. Pa. Nov. 5, 2020) (Rule 67) – A dispute arose between a telecommunications carrier and an engineering services company over a contract to distribute broadband services to rural markets in New York. Due to COVID-19, the court informed the parties that a jury trial would not be scheduled soon. Armstrong then sought permission to use Federal Rule of Civil Procedure 67 to deposit disputed funds into the court to halt the accrual of any interest claimed by CHR. The court explained that accrual of interest and penalties may be stopped by the deposit of funds using Rule 67. The rule’s purpose is to “relieve the depositor of responsibility for [a] fund in dispute while the parties hash out their difference[s].” The court reasoned that neither party should “solely benefit or suffer” from contract interest accruals when the circumstances caused by the pandemic “could not have been contemplated at the time of contracting.” Therefore, “the fairest and most equitable interim disposition” was to allow Armstrong to deposit the funds in escrow, with no additional contract interest to accrue, pending resolution of the dispute.

PeriphaGen Inc. v. Krystal Biotech Inc., 2020 WL 7040908 (W.D. Pa. Dec. 1, 2020) (Federal Defend Trade Secrets Act/ Case First Impression) – On a motion to dismiss, and as a matter of first impression, the court considered whether the Federal Defend Trade Secrets Act permits third-party contribution claims. The court considered the language of the act, its legislative history, the underlying purpose and structure of the statute, and the likelihood that Congress intended to supersede or supplant existing state law remedies. The court also considered contribution issues in the context of other federal statutory schemes, including the Lanham Act and the Securities and Exchange Act. The court also cautioned that, when a statute creates a right to private action but fails to provide expressly for a right to contribution, there is a presumption that the silence reflects congressional intent not to create a right to contribution. The court ultimately determined that “the Federal Defend Trade Secrets Act, like the Lanham Act, neither contemplates nor permits third-party contribution claims.”

In re EQT Corp. Sec. Litig., 2020 WL 7059556 (W.D. Pa. Dec. 2, 2020) (Pleading Requirements in Federal Securities Laws Cases) – Plaintiffs filed a putative class action suit against a natural gas production company and some of its senior officers, alleging violations of federal securities laws, including misrepresentations and omissions in connection with the company’s performance and its merger with a competing gas company. Claims included alleged violations of Sections 10(b), 14(a), 20A, and 20(a) of the Securities Exchange Act of 1934 (the “Exchange Act”) (15 U.S.C. §§ 78j(b), 78t-1, 78n(a), and 78t(a)); SEC Rules 10b-5 and 14a-9 (17 C.F.R. §§ 240.10b-5 and 240.14a-9); and Sections 11, 12(a)(2), and 15 of the Securities Act of 1933 (the “Securities Act”). Defendants moved to dismiss under Federal Rule of Civil Procedure 12(b)(6). The court outlined the necessary elements for these claims, with a thorough analyses as to whether plaintiffs adequately pled material representations, scienter, a connection between the misrepresentations and the purchases/sales of the securi-
ties, reliance upon the misrepresentations or omissions, economic loss, and causation. The court explained the heightened pleading standards for Section 10(b) liability, including commentary on “forward-looking statements,” “cautionary statements,” “mixed statements of present fact and future projections,” “statements of corporate optimism” and the “truth-on-the-market defense” in connection with private securities fraud claims. In a comprehensive opinion, the court denied the motion to dismiss, finding that the plaintiffs sufficiently pled all of their claims to survive a motion to dismiss.

**DePasquale v. Progressive Specialty Ins. Co., 2020 WL 7074599 (W.D. Pa. Dec. 3, 2020) (Discovery with Overlay of COVID-19)** – Defendant filed a motion for leave to re-depose plaintiff. Where the parties have not stipulated to a deposition, and the proposed deponent has already been deposed, a party must obtain leave of court to depose that individual. The decision is within the trial court’s discretion. The court denied the motion, finding that the requested discovery could be obtained in a less burdensome manner. The court reasoned that COVID-19 presented challenges for a second deposition, defendant already had an opportunity to discover this information at the time of the first deposition, and plaintiff offered to answer written interrogatories instead. Therefore, the court allowed defendant to submit interrogatories but would not grant leave for a second deposition.

**Franks v. Nationwide Prop. & Cas. Ins. Co., 2020 WL 7142687 (W.D. Pa. Dec. 7, 2020) (Preemption, Bad Faith Claims, Medical Expense Payments/Auto Insurance Policy)** – Plaintiff filed a complaint for breach of contract and bad faith under 42 Pa.C.S. § 8371, alleging that defendant breached its insurance contract by denying payment of her medical bills and that defendant lacked a reasonable foundation for its decision. Although § 8371 provides a cause of action for bad faith under an insurance policy, defendant moved to dismiss, in part, on grounds that 75 Pa.C.S. § 1797(b)(4) – part of the Pennsylvania Motor Vehicle Financial Responsibility Law – provides the exclusive remedy for claims of nonpayment of medical expenses under an auto insurance policy. The court explained that the Pennsylvania Supreme Court has not ruled on whether § 1797 preempts the general provisions of § 8371.” The court did not rule on the issue, however, finding that plaintiff had not pled sufficient facts to afford a meaningful analysis of the preemption issue.

**In re Zimmer, 2020 WL 7343416 (Bankr. W.D. Pa. Dec. 14, 2020) (Moving Party’s Intent and Motion to Dismiss Chapter 7 Bankruptcy Case)** – The Morris creditors moved to dismiss a Chapter 7 bankruptcy case on grounds of the debtor’s lack of good faith. The Morris creditors alleged that the debtor falsely claimed that he was a resident of the Western District of Pennsylvania, where the bankruptcy case was filed, played a “shell game” regarding his multiple addresses as part of a scheme to frustrate creditors’ judgment enforcement efforts, and failed to schedule estate assets. The court explained that there is no absolute right of an interested party to obtain dismissal of a Chapter 7 bankruptcy case. The decision is left to the discretion of the court, based on the “best interests” of the debtor and the creditors. The court denied the motion to dismiss, placing considerable emphasis on the creditors’ intent in filing the motion, which was to prevent distribution of estate funds to the IRS and to “rewrite” an otherwise enforceable settlement agreement. Dismissal of the Chapter 7 bankruptcy case, therefore, was not in all of the creditors’ best interests.

**Thank You**

The chair of the FPC Newsletter Subcommittee extends a sincere thank you to the following Federal Practice Committee members and others who contributed to this edition of the PBA Federal Practice Committee newsletter:

- **Hon. D. Michael Fisher**, U.S. Court of Appeals Third Circuit, Allegheny
- **Philip Gelso**, Law Offices of Philip Gelso, Luzerne
- **Melinda Ghilardi**, Munley Law PC, Lackawanna
- **Susan Schwochau**, Allegheny
- **Jeremy Mercer**, Porter Wright Morris & Arthur, LLP, Allegheny
- **Mark McCormick-Goodhart**, Jones Day, Allegheny
- **Matthew Sullivan**, Sullivan | Simon, LLC, Philadelphia
- **Thomas Wilkinson Jr.**, Cozen O’Connor, Philadelphia

A special thank you also goes to Susan Etter, Diane Banks, and Melisa Spinelli of the Pennsylvania Bar Association.
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