Your Vote is Needed

Please mark your calendar for an important Federal Practice Committee meeting by phone on Tuesday, Sept. 1, at 4:00 p.m. The call-in number is 1-877-659-3786 and the passcode 6677829609#.

The fantastic news: our committee has grown to more than 150 members. However, when trying to conduct votes on important PBA business issues, it is often a challenge to get a quorum. To address this issue, Committee Chair Hon. D. Michael Fisher asked our Vice Chairs, Nancy Conrad and Melinda Ghilardi, to examine various existing PBA operating procedures or bylaws and develop operating procedures that would meet the needs of our Committee. Details about the operating procedures will be shared through the Federal Practice Committee listserv. Please provide your input, suggested changes and vote via email or by participation in the Sept. 1 call. It is critical that we have your vote on the operating procedures so we can submit them to the PBA Board of Governors for approval at the September meeting.

Judicial Vacancies

U.S. Court of Appeals, Third Circuit

• There are two vacancies.
• The nomination of U.S. District Judge Luis Felipe Restrepo of the Eastern District of Pennsylvania is set to go before the full U.S. Senate for a confirmation vote. Restrepo’s nomination was approved by the Senate Judiciary Committee on July 9. The Senate confirmation vote has not yet been scheduled.

U.S. District Court, Western District of PA

• On July 30, 2015, President Obama nominated Judge Susan P. Baxter, Judge Robert J. Colville and Judge Marilyn J. Horan to fill the three vacancies in the United States District Court for the Western District of Pennsylvania.

U.S. District Court, Eastern District of PA

• On July 30, 2015, President Obama nominated Judge John M. Younge to fill the vacancy in the United States District Court for the Eastern District of Pennsylvania.

4th Annual U.S. Supreme Court Roundup Aug. 25

The PBA Federal Practice Committee is co-sponsoring with PBI the 4th Annual U.S. Supreme Court Roundup on Aug. 25, 2015 in Philadelphia with a live Webcast and simulcast in various locations. The program begins at 9:00 a.m. and ends at 12:15 p.m. Federal Practice Committee Chair Hon. D. Michael Fisher served as the course planner for this program, which includes Committee member Rob Byer on a panel of knowledgeable judges, professors and practitioners. Please see the flyer on page 14 of this newsletter for additional information and a link to the PBI website to register.

Save the Date:

Thursday, Sept. 10, 2015, 4:30 p.m.

A Dialogue with the Judges of the Northern Tier: Advice and Guidance on Federal Practice

*The Honorable James Knoll Gardner, Lawrence F. Stengel, Jeffrey L. Schmehl, Edward G. Smith, Joseph F. Leeson, Jr. and Henry S. Perkin*

The Barristers’ Club, 1114 W. Walnut Street, Allentown, PA

Reception following the one-hour CLE Program.

For information contact Nancy at cle@lehighbar.org or 610-433-6401, Ext. 16.

All are invited to this joint program of the Federal Practice Committees of the bar associations of Lehigh and Northampton Counties, the Judge Donald E. Wiedand Barristers Inn, the PBA Federal Practice Committee, and the Federal Bar Association, Eastern District of Pennsylvania Chapter.
**Third Circuit Precential Opinions**

Summaries of interesting federal-practice precential opinions issued by the United States Court of Appeals for the Third Circuit between April and June, 2015.

**Shalom Pentecostal Church v. Secretary, United States Dep't of Homeland Security, 783 F.3d 156** (3d Cir. 2015) (Immigration/Administrative Law) – The United States Citizenship and Immigration Service (CIS) denied the plaintiff-church's petition to obtain a visa under the special immigrant religious worker provisions of the Immigration and Nationality Act (INA) for plaintiff-Brazilian national, concluding only that the church had failed to establish, pursuant to new regulations, that the Brazilian national had been "performing full-time work in lawful immigration status" as a religious worker for at least the two-year period immediately preceding the filing of the petition.” Plaintiffs challenged the denial on the ground that the regulations’ requirement that work be “in lawful immigration status” was *ultra vires* to the INA. The district court agreed with plaintiffs, granted their motion for summary judgment, struck the regulations, and ordered the CIS to grant the petition. The Government appealed. After disposing of the Government’s challenges to plaintiffs’ constitutional, statutory, and prudential standing to seek review of the petition’s denial, the Court of Appeals on its review of the INA’s provisions affirmed the district court’s grant of summary judgment, but reversed its order that the CIS grant the petition. The Government appealed. After disposing of the Government’s challenges to plaintiffs’ constitutional, statutory, and prudential standing to seek review of the petition’s denial, the Court of Appeals on its review of the INA’s provisions affirmed the district court’s grant of summary judgment, but reversed its order that the CIS grant the petition and instructed the court to remand to the CIS to address in the first instance whether the remaining criteria in § 1101(a)(27)(C) were satisfied.

**Kaymark v. Bank of America, N.A., 783 F.3d 168** (3d Cir. 2015) (Statutes [FDCPA]) – Following *McLaughlin v. Phelan Hallinan & Schmieg, LLP*, 756 F.3d 240 (3d Cir. 2014), the Court of Appeals reversed in part the district court’s Rule 12(b)(6) dismissal of plaintiff’s putative class action complaint, which asserted, among other things, that the body of a foreclosure complaint that listed certain not-yet-incurred fees as due and owing violated several state and federal fair debt collection laws and breached a mortgage contract. The district court’s dismissal of plaintiff’s breach-of-contract and state law claims was affirmed because plaintiff failed to plead actual loss as a result of the alleged misrepresentations.

**In re: Blood Reagents Antitrust Litig., 783 F.3d 183** (3d Cir. 2015) (Class Action) – The district court’s grant of class certification, which relied on *Behrend v. Comcast Corp.*, 655 F.3d 182 (3d Cir. 2011), was vacated in light of the Supreme Court’s reversal of Behrend in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), so that the district court could consider in the first instance the implications of the Supreme Court’s opinion. In addition, the Court of Appeals held that a plaintiff cannot rely on challenged expert testimony, when critical to class certification, to demonstrate conformity with Rule 23 unless the plaintiff also demonstrates, and the trial court finds, that the expert testimony satisfies the standard set out in *Daubert*.

**Chavez-Alvarez v. Warden, York County Prison, 783 F.3d 469** (3d Cir. 2015) (Habeas Corpus – Alien Detainee) – In 2012, the government charged petitioner, a Mexican citizen, with being removable, arrested him, and ordered him detained pursuant to 8 U.S.C. § 1226(c). By the time the district court denied his habeas corpus petition, petitioner had been detained for nearly 22 months without a bond hearing. The Court of Appeals held that, although the government may detain an alien without holding a bond hearing, as the detention lengthens in duration, the alien’s liberty interests begin to outweigh the government’s presumptions that an alien will flee or is dangerous, requiring an individualized assessment of whether detention without a bond hearing remains necessary. Concluding based on the record that by the time Petitioner had been detained for one year, the burdens to his liberties outweighed any justification for using presumptions to detain him without bond to further the goals of the statute, the Court of Appeals reversed the district court’s order and remanded with the instruction to enter an order granting the writ of habeas corpus and to conduct a bond hearing within a specified time period.

**Siluk v. Mervin, 783 F.3d 421** (3d Cir. 2015) (Civil Rights—§1983) – After reviewing the language and history of the Prisoner Litigation Reform Act, the Court of Appeals rejected the “simultaneous recoupment” position of the
majority of other circuit courts (under which recoupment of 20% of a prisoner's monthly income is taken for each civil case and each appeal) and concluded that § 1915 permits the recoupment of only 20% of a prisoner's monthly income for filing fees, regardless of how many civil actions or appeals the prisoner elects to pursue (“sequential recoupment”).

**Doe v. Governor of the State of New Jersey, 783 F.3d 150 (3d Cir. 2015) (Constitution – First Amendment)** – Following *King v. Governor of the State of New Jersey, 767 F.3d 216* (3d Cir. 2014), the Court of Appeals affirmed the district court's Rule 12(b)(6) dismissal of a minor's and his parents' First Amendment and Due Process challenges to New Jersey's statute that prohibits licensed counselors from engaging in “sexual orientation change efforts” (defined as the practice of seeking to change a person's sexual orientation).

**Chavez-Alvarez v. United States Attorney General, 783 F.3d 478 (3d Cir. 2015) (Immigration)** – Petitioner, a Mexican citizen, had pleaded guilty to five violations of the Uniform Code of Military Justice, one of which was sodomy, and in his general court martial received an un-apportioned general sentence of 18 months confinement. The BIA affirmed the determination that petitioner was removable on the basis of sodomy being an “aggravated felony.” The Court of Appeals granted the petition and remanded to the BIA for further proceedings because the government had failed to satisfy its burden of showing by clear and convincing evidence that the petitioner had been convicted of an aggravated felony; the record provided no basis for concluding that petitioner's general, un-apportioned sentence included a term of imprisonment of at least one year for a crime of violence.

**Langbord v. United States Dep't of Treasury, 783 F.3d 441 (3d Cir. 2015) (Statutes [CAFRA])** – The district court granted partial summary judgment, concluding that Civil Asset Forfeiture Reform Act's (“CAFRA”) 90-day requirement did not apply where the government had not previously sent plaintiffs a notice of forfeiture proceedings; thus, the government was not obligated, within 90 days of plaintiff's “seized asset claim,” to either (1) return ten gold “double eagle” coins it had been given solely for purposes of authentication or (2) file a complaint for judicial forfeiture. The Court of Appeals reversed, concluding based on its interpretation of statutory language, that the 90-day requirement was triggered by the filing of the seized asset claim, and because the government did not file a complaint for judicial forfeiture within the statutory time limit, it had to return the coins. As a result of the Court of Appeals' conclusion with respect to summary judgment, all post-summary judgment orders – including those based on a jury verdict – were vacated.

**Vargas v. City of Philadelphia, 783 F.3d 962 (3d Cir. 2015) (Civil Rights-§1983)** – The Court of Appeals affirmed the district court's grant of summary judgment to defendants, concluding that even if there was a Fourth Amendment seizure when police officers prevented plaintiff from approaching her daughter during a medical crisis, that seizure was reasonable under the community caretaking exception to the Fourth Amendment. The officers were responding to a volatile situation that they did not initially know involved a medical emergency, and any brief seizure that may have occurred was a result of the officers' concern for the safety of everyone involved.

**Frank C. Pollara Group, LLC v. Ocean View Investment Holding, LLC, 784 F.3d 177 (3d Cir. 2015) (Torts)** – Despite disclaiming any contractual relationship, defendants sought summary judgment on plaintiff’s intentional and negligent misrepresentation claims on the ground that the gist-of-the-action doctrine barred those claims. The district court denied the motion. After a jury awarded compensatory and punitive damages to plaintiff, defendants appealed, challenging the district court's denial of their motion for summary judgment and the jury verdict.
The Court of Appeals declined to review the summary judgment decision, concluding that the summary judgment motion did not present a pure question of law and that defendants had failed to properly preserve the issues they endeavored to raise (i.e., they did not include their gist-of-the action challenge in their Rule 50 motions). As to the defendant’s jury verdict challenge, the Court held that if a party fails to object to an inconsistency in a general verdict before the jury is excused, that party waives any objection in that regard. Concluding that defendants had waived their objection, the Court affirmed the district court’s judgment.

800 River Road Operating Co., LLC v. NLRB, 784 F.3d 902 (3d Cir. 2015) (Labor) – Company sought review of the NLRB’s determinations that it had committed unfair labor practices in the course of a union election when, among other things, it had withheld benefits from election-eligible employees. Specifically disapproving of the reasoning that the Board had repeatedly relied on in finding benefit discrimination to violate § 8(a)(3) (and § 8(a)(1)), the Court of Appeals vacated the agency’s determination in part and remanded the case, requiring “the Board to modify its longstanding mode of analysis in order to comply with the Supreme Court’s equally longstanding precedent to the contrary.”

U.S. v. Merlino, 785 F.3d 79 (3d Cir. 2015) (Criminal Law & Procedure) – The Court of Appeals vacated the district court’s order revoking supervised release and imposing a prison term, holding that 18 U.S.C. § 3583(i) is a jurisdictional statute requiring that a warrant or summons must issue before the expiration of supervised release in order for a district court to conduct revocation proceedings. Because the summons was issued after the termination of supervised release, the district court lacked subject-matter jurisdiction to revoke supervised release.

Lehman Brothers Holdings, Inc. v. Gateway Funding Diversified Mortgage Servs., L.P., 785 F.3d 96 (3d Cir. 2015) (Contract – Indemnification/De Facto Merger) – The Court of Appeals affirmed the district court’s judgment, based on a bench trial, that defendant was liable to plaintiff because a de facto merger had taken place between defendant and a party to an indemnification contract with plaintiff. Defendant appealed, raising among other arguments, that the district court’s conclusion that defendant had abandoned an argument during a telephonic hearing on cross-motions for summary judgment had no basis in the record. Defendant failed to order a transcript of the hearing, contrary to Rule 10. Although plaintiff filed the transcript with its appellee brief, the Court of Appeals deemed the defendant’s argument forfeited as a result of its Rule 10 violation.

Templin v. Independence Blue Cross, 785 F.3d 861 (3d Cir. 2015) (Labor & Employment (ERISA)) – Concluding that (1) the catalyst theory of recovery of attorney fees is available to parties seeking attorney fees under ERISA; (2) evidence that litigation activity pressured a defendant to settle or render to a plaintiff the requested relief, rather than evidence that judicial activity encouraged the defendants to settle, was all that was necessary to be eligible for an award of fees; and (3) the district court misapplied the factors laid out in Ursic v. Bethlehem Mines, 719 F.2d 670 (3d Cir. 1983), the Court of Appeals reversed the district court’s denial of plaintiffs’ request for fees and remanded so that the district court could properly apply the Ursic factors and determine whether it would exercise its discretion to award those fees.

Resch v. Krapf’s Coaches Inc., 785 F.3d 869 (3d Cir. 2015) (Labor & Employment (FLSA)) – Because plaintiffs are members of a class of employees who could reasonably be expected to drive interstate routes as part of their duties and because the parties agreed that defendant was an employer under the jurisdiction of the DOT, the Court of Appeals agreed with the district court that the MCA exemption to the FLSA applied and that plaintiffs are ineligible for FLSA overtime wages. The district court’s grant of summary judgment to defendant was affirmed.

Free Speech Coalition Inc. v. United States Attorney General, 787 F.3d 142 (3d Cir. 2015) (Constitution) – The district court largely rejected plaintiffs’ First and Fourth Amendment challenges to the recordkeeping, labeling and inspection requirements set forth both in statutes obligating producers of visual depictions of “actual sexually explicit conduct” and of “simulated sexually explicit conduct” to
maintain records of the age of the performers in those
depictions (8 U.S.C. §§ 2257 and 2257A) and in their
accompanying regulations, 28 C.F.R. §§ 75.1 – 75.9,
and upheld the statutory and regulatory scheme with one
exception: the regulatory requirement that advance notice
not be given of record inspections at private residences was
to be in violation of the Fourth Amendment. The Court of
Appeals affirmed in part and vacated in part, concluding
that the district court properly rejected plaintiffs’ First
Amendment claims, but erred in concluding that the
warrantless searches authorized by 28 C.F.R. § 75.5 fell
within the administrative search exception to the warrant
requirement applicable to closely regulated industries. Thus,
the Court of Appeals vacated a portion of the district court’s
judgment and remanded for entry of a judgment declaring
that the warrantless searches authorized by § 75.5 as applied
to plaintiffs violate the Fourth Amendment. In light of
its decision regarding the § 75.5, the Court also vacated a
portion of the district court’s judgment with respect to the
First Amendment claims so that the district court could
consider § 75.5(c)(1)’s constitutionality under the First
Amendment.

In re: In the Matter of the Grand Jury Empaneled on May
9, 2014, 786 F.3d 255 (3d Cir. 2015) (Constitution) – The
district court’s order holding Corporation in contempt for
noncompliance with a grand-jury subpoena was affirmed,
the Court of Appeals holding that (1) the collective-entity
doctrine applies to a one-person corporation and thus that
person may not rely on the Fifth Amendment to avoid
compliance with a subpoena directed to the corporation,
and (2) the subpoena was not overbroad in violation of the
Fourth Amendment.

In re: Jevic Holding Corp., 787 F.3d 173 (3d Cir. 2015)
(Bankruptcy) – The bankruptcy court approved a structured
settlement that deviated from § 507 priorities in leaving
out truck drivers who had an undisputed WARN claim
against the debtor. The Court of Appeals affirmed the
district court’s affirmation of the bankruptcy court’s action,
concluding that the Bankruptcy Code permits a structured
dismissal, even one that deviates from the § 507 priorities,
when a bankruptcy judge makes sound findings of fact that
the traditional routes out of Chapter 11 are unavailable and
the settlement is the best feasible way of serving the interests
of the estate and its creditors.

Bonkowski v. Oberg Industries, Inc., 787 F.3d 190 (3d
Cir. 2015) (Labor & Employment (FMLA)) – Although it
rejected the district court’s definition of an “overnight stay”
purposes of determining whether an individual is eligible
for FMLA leave, the Court of Appeals affirmed the district
court’s grant of summary judgment to the defendant,
holding that “an overnight stay” means a stay in a hospital,
hospice or residential medical care facility for a substantial
period of time from one calendar day to the next calendar
day, as measured by the individual’s time of admission and
his or her time of discharge.

Sesay v. United States Attorney General, 787 F.3d
215 (3d Cir. 2015) (Immigration) – Concluding that,
absent a waiver from the Executive Branch, the INA
precludes asylum or withholding of removal for any alien
who provided material support to a terrorist organization
— whether that support be voluntarily or involuntarily —
the Court of Appeals upheld the BIA’s affirmation of the
determination that petitioner was ineligible for asylum or
withholding of removal.

United States v. Kolodesh, 787 F.3d 224 (3d Cir. 2015)
(Criminal Law & Procedure) – Rejecting defendant’s
challenges to his conviction and sentence for Medicare fraud
—including his argument that under Paroline v. United
States, 134 S. Ct. 1710 (2014), he could not be held jointly
and severally liable for the full amount of restitution — the
Court of Appeals affirmed the district court’s judgment.

WL 3634779 (3d Cir. June 12, 2015) (Insurance) – A
victim of an insured’s drunk driving obtained a jury award
of $15,000 in compensatory damages and $50,000 in
punitive damages and, after obtaining an assignment of
the insured’s rights against his insurer, sued the insurer in
federal court to recover the $50,000 punitive damage award
that the insurer refused to pay. Predicting that Pennsylvania’s
Supreme Court would conclude that punitive damages are
not recoverable in a later breach of contract or bad faith suit
against the insurer, the Court of Appeals reversed the district
court’s denial of the insurer’s motion in limine seeking to prevent introduction of the punitive damage award, vacated the district court’s judgment and remanded for a new trial, at which the $50,000 punitive damage award could not be introduced as evidence.

**In Re: Commonwealth’s Motion to Appoint Counsel Against or Directed to Defender Association of Philadelphia, 2015 WL 3634888 (3d Cir. June 12, 2015), as amended (June 16, 2015) (Federal Jurisdiction)** – The Commonwealth of Pennsylvania and various Pennsylvania counties sought, through disqualification motions in state court, to bar attorneys from the Capital Habeas Unit of the Federal Community Defender Organization for the Eastern District of Pennsylvania (“Federal Community Defender”) from representing clients in state post-conviction proceedings, absent an authorization order from the federal court, alleging that appearance in state proceeding involved the misuse of federal grant funds. The Federal Community Defender removed the motions under the federal officer removal statute and sought to dismiss the actions on preemption grounds. The Federal Community Defender removed the motions under the federal officer removal statute and sought to dismiss the actions on preemption grounds. The Commonwealth sought remand. Resolving a split between the MDPA (granting motions to remand) and EDPA (denying motions to remand and granting motions to dismiss), the Court of Appeals held that the actions were properly removed under the federal officer removal statute, and that the actions – purportedly under state law – were preempted by federal law. The Court reasoned, in part, that even if the Federal Community Defender is not authorized to use grant funds to appear in state court, the disqualification proceedings interfered with the regulatory scheme that Congress has created. The judgments of the MDPA were reversed and the cases remanded with instructions to grant the motions to dismiss.

**Hansler v. Lehigh Valley Hosp. Network, 2015 WL 3825049 (3d Cir. June 22, 2015) (Labor & Employment (FMLA))** – The Court of Appeals reversed the district court’s dismissal under Rule 12(b)(6), concluding that plaintiff plausibly alleged that her submitted medical certification was insufficient (rather than invalid, as the district court concluded), and because the employer was obligated to provide the plaintiff with an opportunity to cure deficiencies in an insufficient certification, plaintiff’s additional assertion that she was fired without being provided such an opportunity stated an interference claim. The Court also concluded that dismissal of plaintiff’s retaliation claim was premature.

**King Drug Co. of Florence, Inc. v. Smithkline Beecham Corp., 2015 WL 3967112 (3d Cir. June 26, 2015) –** The Court of Appeals concluded that the Supreme Court’s decision in *FTC v. Actavis*, 133 S. Ct. 2223 (2013), covers, in addition to reverse cash payments, a settlement in which the patentee drug manufacturer agrees to relinquish its right to produce an “authorized generic” of the drug (“no-AG agreement”) to compete with a first-filing generic’s drug during the generic’s statutorily guaranteed 180 days of market exclusivity under the Hatch-Waxman Act as against the rest of the world, and holding that a no-AG agreement, when it represents an unexplained large transfer of value from the patent holder to the alleged infringer, may be subject to antitrust scrutiny under the rule of reason. Because the Court found the plaintiffs’ allegations sufficient to state such a claim under the Sherman Act, the Court vacated the district court’s dismissal under Rule 12(b)(6).

**Jensen v. Pressler & Pressler, 2015 WL 3953754 (3d Cir. June 30, 2015)** – The Court of Appeals affirmed the district court’s grant of summary judgment to defendants, concluding that (1) a false statement in a communication from a debt collector to a debtor must be material in order to be actionable under § 1692e of the Fair Debt Collection Practices Act; and (2) the use of an incorrect name for the Superior Court clerk on an information subpoena that was to list name of the clerk was not a material misstatement.

**Eastern District of PA Opinions**

**Summaries of notable district court decisions involving federal practice issued between April and June, 2015.**

**Streamline Business Services, LLC v. Vidible, Inc., et al., 2015 WL 3477675 (EDPa 6/2/15)**

**Background:** Streamline brought a breach of contract diversity suit against AOL and technology startup Vidible.
Streamline alleged that it entered into an oral contract with Vidible, in which Streamline contributed customer relationships and Vidible contributed products, and the two split revenue evenly. According to Streamline, the parties performed as agreed for six months, until Streamline’s alleged share of gross revenue generated reached $100,000 per month. Vidible then allegedly tried to change the way revenue was calculated. Streamline refused and Vidible allegedly stopped payments. AOL and Vidible moved to dismiss in part for failure to state a claim, arguing that AOL, which purchased Vidible after the case was filed, was not liable for Vidible’s pre-acquisition actions and should be dismissed. They also moved to dismiss Streamline’s breach of contract, unjust enrichment and breach of fiduciary duty claims against Vidible on the basis that Streamline failed to adequately allege that a joint venture existed between the parties.

Holdings: The Court granted the motion to dismiss as to AOL but denied the motion as to Vidible. AOL acquired Vidible months after the lawsuit was filed, and Vidible continued to exist as a corporate entity and AOL subsidiary. No Pennsylvania or New York law existed to support Streamline’s contention that an acquiring corporation can be held liable for the acts or omissions of the acquired corporation prior to the acquisition. However, Streamline pled adequate facts to allege the existence of a joint venture between itself and Vidible. In reaching its decision, the Court noted that the recognized factors to create a joint venture should not be read too strictly when ascertaining whether such a relationship exists, as a joint venture remains an amorphous concept. Keeping this in mind, the Court held that Streamline pled sufficient facts to allege the existence of a joint venture.

2015 WL 2365600 (EDPa 5/18/15)

**Background:** Dougherty sued the District and three District officials on the basis that he was discharged on April 27, 2011, because he spoke to law enforcement and the press about an investigation. Dougherty argued that defendants violated his First Amendment rights and the Pennsylvania Whistleblower Law. A jury returned a verdict for Dougherty on his First Amendment claim and found that his protected activity was a substantial factor in his suspension and discharge. However, the jury returned a verdict for the defendants on the whistleblower claim. The Court awarded back pay from April 27, 2011 to the date of trial and front pay from the date of trial to Aug. 31, 2016, noting that the defendants played a “substantial part” in Dougherty’s loss. Economic damages in the amount of $318,520 were also awarded to place Dougherty in the position he would have been in, had he not engaged in protected activity. The defendants challenged the Court’s authority to award economic damages on Dougherty’s First Amendment claim.

**Holdings:** The Court found that substantial evidence existed to show that Dougherty was suspended because the defendants did not want individuals to speak to the press about an investigation. When Dougherty was suspended, he earned $140,000 per year, and an individual who worked in an equivalent job earned $175,000 per year. Further, if Dougherty had not been discharged, he would have become vested in the retirement system in October 2013 and would have earned a pension benefit. The Court also rejected the defendants’ argument that the court lacked the authority to decide issues of fact related to damages, especially because the parties previously stipulated that the Court would serve as the factfinder for the purposes of an award of economic damages.


**Background:** Plaintiffs sued Delaware County Detective M. Palmer and numerous other police officers, as well as the Chester Police Commissioner, for violation of their civil rights by excessive use of force and false detainment. The defendants moved to dismiss and argued that allegations that defendants violated the law were conclusory and were insufficiently specific, pursuant to 2007 and 2009 decisions of the United States Supreme Court, *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal*. *Twombly* and *Iqbal* require that plaintiffs plead sufficient facts to state a plausible claim. Plaintiffs filed an objection that relied solely on cases decided prior to *Twombly* and *Iqbal* — even though those cases were no longer valid — and that ignored key decisions of the Third Circuit. The Court granted the motion to
dismiss and, in its order, required plaintiffs’ counsel to show cause why sanctions should not be granted in light of their failure to acknowledge the rules set forth in Twombly and Iqbal.

Holdings: The Court concluded that counsel’s answer its order to show cause was non-responsive and left the Court in the “unpleasant position of either ignoring a blatant violation of Rule 11 or imposing a sanction.” Therefore, the Court ordered counsel to attend a six-hour continuing legal education course in federal civil procedure as a sanction. The Court said it hoped “this sanction will serve as a ‘blinking red light’ that other attorneys in their motion practice before this Court must recognize the post-Twombly and post-Iqbal regime.”

Tilton v. GlaxoSmithKline, LLC, Civil Action No. 14-1267 (Casemaker) (EDPa 4/21/15)

Background: Tilton sued her employer, GlaxoSmithKline (“GSK”), alleging gender and age discrimination, as well as hostile work environment in violation of Title VII, the Age Discrimination in Employment Act, and the Pennsylvania Human Relations Act. The Court previously ordered the parties to complete discovery by Sept. 5, 2014, and later granted Tilton leave to depose nine witnesses by March 3, 2015. On Feb. 2, 2015, Tilton wrote a letter to the Court requesting leave to depose seven new witnesses. On Mar. 2, 2015, Tilton filed a motion to modify the scheduling order, requesting leave to depose the seven new witnesses and to conduct additional document discovery. Plaintiff claimed that good cause for the modifications existed because they would enable her to file a meaningful opposition to GSK’s motion for summary judgment, and recent depositions revealed that GSK had not produced relevant documents. GSK opposed the motion, contesting the existence of good cause.

Holdings: The Court denied the motion, finding that Tilton failed to demonstrate good cause to modify the scheduling order. It noted that a movant is required to “show that a more diligent pursuit of discovery was impossible” and that “attorney error does not support good cause.” The Court further noted that Tilton filed her motion one day before the already-extended deposition deadline and mailed her letter approximately a month earlier, but documents discovery concluded on Sept. 5, 2014. While Plaintiff alleged new witnesses were identified in document review, Tilton should have been aware of the identities of those witnesses for months. Further, Tilton did not describe the missing documents or explain how they related GSK’s motion for summary judgment. She did not provide excerpts or descriptions of deposition testimony that allegedly revealed that documents were not produced. These omissions, the Court found, undermined Tilton’s claim of good faith.


Background: Marykate Gray alleged that on Oct.10, 2011, she took ibuprofen in the girls’ locker room at Great Valley High School. A gym teacher asked if she was using drugs, which Gray denied. The gym teacher informed Michael Flick, the assistant principal, and he searched the girls’ locker room for drugs. Marshall Hoffritz, a school administrator, forcibly removed Gray to his office and searched her backpack. Although Gray attempted to retreat, was visibly upset, and twice refused an order to remove her bra, Jane Trimble, a social worker, allegedly grabbed Gray’s wrists and forcibly touched her buttocks, inner thighs, abdomen, torso, chest and breasts while searching for drugs. The school nurse allegedly examined Gray’s eyes, ears, nose and mouth. Gray sued, claiming that defendants violated her civil and constitutional rights, committed an assault and battery, and that Gray suffered difficulty concentrating, emotional distress, nightmares, nausea and panic attacks as a result of the forcible strip search. The defendants moved to dismiss for failure to state a claim on which relief can be granted.

Holdings: The defendants’ motion was granted in part and denied in part. The Court held that no private cause of action existed under the Article I, Section 8 of the Pennsylvania Constitution and dismissed that claim for damages. Next, six of the individual defendants who worked for the District were immune from allegations of negligent infliction of emotional distress, absent allegations that they engaged in crime or actual fraud. The Court also dismissed state law tort claims against individual defendants who
did not participate, directly or indirectly, in the alleged strip search. However, the Court disagreed that Trimble was entitled to qualified immunity. Gray adequately alleged that Trimble subjected her to an unreasonable search, in violation of the Fourth Amendment, and the Court therefore denied Trimble’s motion to dismiss that count. The Court further held that Gray’s complaint also adequately pled allegations of assault, battery, intentional infliction of emotional distress and false imprisonment against Trimble.

**Middle District of PA Opinions**


**Background:** United States brought action against Commonwealth of Pennsylvania, alleging that Pennsylvania had engaged in pattern or practice of unlawful discrimination against females applying for employment as entry-level troopers with Pennsylvania State Police. Pennsylvania moved to dismiss for lack of subject matter jurisdiction and for failure to state claim.

**Holdings:** The District Court, Sylvia H. Rambo, J., held that: (1) the United States is authorized to bring a pattern or practice claim of disparate impact discrimination under Title VII against a state employer, and (2) United States alleged that Pennsylvania’s employment practice had disparate impact on women. Motion denied.


**Background:** Former university students brought action against university and county under § 1983 alleging illegal searches of dormitory rooms in violation of the Fourth Amendment right to be free from unreasonable search and seizure. Defendants moved to dismiss.

**Holdings:** The District Court, Matthew W. Brann, J., held that: (1) students stated claim for unreasonable search and seizure; (2) a fact issue existed as to whether students gave voluntary consent to search; (3) university’s document preservation letter was not retaliation; (4) students failed to state municipal liability claim for failure to train against county; (5) students stated municipal liability claim against university; and (6) students stated breach of contract claim. Motion granted in part and denied in part.


**Background:** Inmates who engaged in written and oral advocacy, prisoner advocacy groups, and entities that relied on prisoners’ speech brought action seeking declaratory judgment that Pennsylvania Revictimization Relief Act, that authorized civil actions seeking injunctive and other relief when an offender engaged in any conduct which perpetuated the continuing effect of the crime on the victim, violated the First and Fifth Amendment, and sought preliminary and permanent injunctive relief. After actions were consolidated, the District Court, Christopher C. Conner, Chief Judge, ––– F.Supp.3d ––––, 2015 WL 999194, dismissed action against district attorney.

**Holdings:** Following bench trial, the District Court held that: (1) the Act was content based; (2) the Act impermissibly infringed on free speech; (3) the Act was unconstitutionally vague; (4) the Act was unconstitutionally overbroad; and (5) permanent injunction enjoining enforcement of Act was warranted. Relief was granted.


**Background:** State prisoner, a young adult offender, brought action alleging that prison had violated the Individuals with Disabilities Education Act (IDEA) by failing to provide him with a free appropriate public education, and appealing a ruling to the contrary by an administrative hearing officer. Parties filed cross motions for judgment on the supplemented administrative record.

**Holdings:** The District Court, John E. Jones III, J., held that: (1) the prison violated IDEA, and (2) the prison was required to provide compensatory education as remedy. Ordered accordingly.

**Background:** Following entry of summary judgment of infringement of patent covering design of electrical conduit fitting, patent owner moved for summary judgment on damages arising from the sales of competitor’s product.

**Holdings:** The District Court, Christopher C. Conner, Chief Judge, held that: (1) competitor was estopped from re-litigating lost profit damages, and (2) competitor was estopped from re-litigating reasonable royalty damages. Motion granted.


**Background:** Individual Chapter 11 debtor filed adversary complaint against his former law firm, alleging that the firm violated the automatic stay by seeking discovery, post petition, from non-debtor co-defendants in a pending state-court action. Firm filed motion to dismiss for failure to state a claim.

**Holdings:** The Bankruptcy Court, Robert N. Opel, II, J., held that: (1) debtor failed to state a plausible claim for relief under the subsection of the Bankruptcy Code permitting the recovery of damages resulting from a willful stay violation, and (2) debtor’s new request for injunctive relief had to be brought in an adversary proceeding. Motion granted.


**Background:** Unsecured creditor, proceeding pro se, brought adversary proceeding against Chapter 7 debtor seeking to except debt from discharge or deny debtor’s discharge. Debtor moved to dismiss.

**Holdings:** The Bankruptcy Court, Mary D. France, Chief Judge, held that: (1) creditor’s complaint would be dismissed for failing to comply with bankruptcy rules; (2) creditor failed to adequately plead claim for objection to discharge based on inadequacy of financial records; and (3) creditor was not entitled to jury trial. Motion granted.

**Western District of PA Opinions**

**Bonds v. GMS Repair & Maintenance, Inc.**, 2015 U.S. Dist. LEXIS 42992 (WDPA 4/1/15)

**Background:** The defendant filed a motion to dismiss 25 opt-in plaintiffs for their failure to respond to written discovery authorized by the Court.

**Holdings:** The District Court, Terence F. McVerry, J., granted in part and denied in part the defendant’s motion to dismiss. On Nov. 25, 2014, the Court entered an order permitting the defendant to serve written discovery on all named and opt-in plaintiffs. The following day, the defendant served interrogatories on all 160 plaintiffs. The defendant only received responses from 117 of the party-plaintiffs. The parties agreed to dismiss seven of the plaintiffs who failed to respond. The defendant then sought to dismiss the remaining 25 non-responsive opt-in plaintiffs. The Court noted that “there is scant case law concerning the appropriate sanction for opt-in Plaintiffs who fail to respond to individual discovery authorized by the court in an [Fair Labor Standard Act] action.” The Court found that those courts that have addressed the issue have generally provided notice to the non-responsive opt-in plaintiffs of the available sanction for their apparent refusal to participate in the discovery process or have issued a rule to show cause why their claims should not be dismissed. The Court decided to follow that approach and ordered the non-responsive opt-in plaintiffs to promptly comply with the outstanding discovery request and produce a written explanation for their prior failure to respond to the discovery requests.


**Background:** Plaintiff, in state court, brought a breach of fiduciary duty claim against and sought to appoint received for defendant, who was a creditor of an entity that had entered bankruptcy proceedings. Defendant removed pursuant to 28 U.S.C. § 1452(a) and 28 U.S.C. § 1334(b), which gives the district court “original but not exclusive jurisdiction of all civil proceedings arising under title 11, or
arising in or related to cases under title 11.” Plaintiff moved to remand to state court.

**Holdings:** The District Court, Cathy Bissoon, J., granted to the motion to remand. The Court held that the claims did not arise in a bankruptcy case, but they were “related to” a title 11 bankruptcy proceeding. However, the Court was required to abstain from hearing the case due to operation of 28 U.S.C. § 1334(c)(2). Abstention is required where “(1) the proceeding is based on a state law claim or cause of action; (2) the claim or cause of action is ‘related to’ a case under title 11 and does not ‘arise under’ title 11 or ‘arise in’ a case under title 11; (3) federal courts would not have jurisdiction over the claim but for its relation to a bankruptcy case; (4) an action is commenced in a state forum of appropriate jurisdiction; and (5) the action can be timely adjudicated in a state forum of appropriate jurisdiction.”


**Background:** The plaintiff filed a motion to join additional defendant and a motion to dismiss for lack of jurisdiction due to the addition of the new defendant.

**Holdings:** The District Court, Mark Hornak, J., denied the plaintiff’s motions. The plaintiff originally filed a claim against his insurance company for breach of contract and bad faith. The plaintiff rented a house which the tenant “vandalized” by “gutt[ing] it down to the bar studs.” The insurance company denied coverage. After the defendant filed a motion for judgment on the pleadings, the Court allowed the plaintiff to file an amended complaint. The plaintiff filed an amended complaint which included the tenant who allegedly “vandalized” the property. Inclusion of the tenant in the lawsuit would divest the Court of diversity jurisdiction. Under Third Circuit precedent, the Court had discretion as to whether to allow the joinder of the tenant. The Court analyzed the following factors to determine that the plaintiff should be allowed to join the additional defendant: (i) whether the motion to join is designed to defeat jurisdiction; (ii) whether the plaintiff has been dilatory; and (iii) whether the plaintiff will be injured if joined is not allowed. As to the first factor, the Court found the motion to join was designed to defeat jurisdiction because the plaintiff knew of the potential claims against the tenant at the onset of the case and still failed to include them in his original complaint. As to the second factor, the Court found that the plaintiff’s five-and-a-half month delay in seeking to join the tenant evidenced that he was dilatory. As to the third factor, the Court found that the plaintiff would not be “significantly injured” by having to litigate his claims against the tenant in a separate state court proceeding.


**Background:** Plaintiff filed claims for breach of contract and bad faith denial of insurance benefits against defendant insurance company. Plaintiff claimed that he was an “insured” on his mother’s policy, issued by defendant, which covered his extraordinary medical expenses. His own policy, under which he was a “named insured,” did not cover extraordinary medical expenses. Defendant moved to dismiss for failure to state a claim on grounds that Pennsylvania’s Motor Vehicle Financial Responsibility Law (MVFRL), 75 Pa. Cons. Stat. § 1713, prohibited recovery from defendant because its policy was lower priority.

**Holdings:** The District Court, Robert C. Mitchell, M.J., recommended dismissal of the complaint with prejudice, holding that: [1] because plaintiff’s mother’s policy was a lower priority policy under the MVFRL, defendant did not breach its contract by refusing to pay benefits to the plaintiff; and [2] the bad faith denial of insurance benefits claim could not be sustained following the dismissal of the breach of contract claim. Joy Flowers Conti, C.J., adopted the report and recommendation on May 13, 2015.

**In re Milo’s Kitchen Dog Treats Consolidated Cases,** — F.Supp.2d —, 2015 U.S. WL 2341220 (WDPA 5/14/15)

**Background:** After reviewing certain Facebook messages between the plaintiff and a purported class member, the Court held that the communications were not protected by the attorney-client privilege under the common interest doctrine.
Holdings: The District Court, Maureen P. Kelly, M. J., issued a supplemental order requiring the plaintiff to produce un-redacted copies of the Facebook messages between herself and a purported class member. The plaintiff claimed that the redacted portions of the messages revolved around “specific advice given by class counsel as to the litigation and its progress” and, therefore, were protected under the common interest doctrine. The Court noted that the common interest privilege protects from disclosure communications made by parties with a common interest to each other in furtherance of a joint defense to litigation. In order to involve the joint defense agreement or common interest privilege the party asserting the privilege must demonstrate that: [1] the parties have a common interest in the litigation or a jointly shared litigation strategy; [2] the communication were made pursuant to such agreement; and [3] the continued confidentiality of the communications. The Court held that although the plaintiff and the purported class member have a common interest in the litigation, there was no evidence presented that the plaintiff and the purported class member agreed to a joint defense effort or a shared litigation strategy. Moreover, there was no evidence that the purported class member formally opted-in to the prospective class at the time or formally engaged counsel to represent her. Finally, it was unclear whether the messages, having been posted on Facebook, were not disclosed to other third parties.


Background: Defendant was charged with possession of “ecstasy” tablets with intent to distribute. Prior to trial, defendant filed three motions in limine to [1] exclude evidence already suppressed by the court; [2] preclude the expert testimony proffered by the government regarding quantities of ecstasy normally found for personal use and for distribution; and [3] admit exculpatory evidence pursuant to Rule 404(b) of the Federal Rules of Evidence.

Holdings: The District Court, Kim R. Gibson, J., [1] granted the motion to exclude evidence already suppressed; but [2] denied defendant’s motions to preclude expert testimony and admit exculpatory evidence. With respect to the proffered expert testimony, the Court found that the government was not offering the testimony to show defendant’s mental state, which would be prohibited, and that the special agent was qualified by his extensive experience to testify as an expert on drug trafficking. With respect to the admission of exculpatory evidence, the first item proffered was the “Presentence-Investigation Report” (PSIR) of the passenger in defendant’s car, who previously had plead guilty to possession with intent to distribute. Defendant argued that, in the PSIR, the passenger admitted that “he alone was responsible for possessing with the intent to deliver the ecstasy tablets.” The Court denied the motion to admit the evidence, holding that “the fact that [the passenger] plead guilty to the offense charged in the indictment does not establish that he alone committed the crime charged.” Moreover, defendant’s proffered evidence that the passenger was charged in a similar crime in Indiana “in no way disproves defendant’s guilt on the charged offenses presently before this Court.”


Background: The defendants removed the case notwithstanding the fact that one of the defendants was not a diverse party. The Court, sua sponte, remanded the case back to state court.

Holdings: The District Court, Mark Hornak, J., held that the none diverse defendant was not fraudulently joined. Therefore, the Court remanded the case back to state court. The doctrine of fraudulent joinder represents an exception to the requirement that removal be predicated solely upon complete diversity. In order for the joinder to be considered fraudulent, there must be “no reasonable basis in fact or colorable ground supporting the claim against the joined defendant or no real intention in good faith to prosecute the action against the defendant or seek a joint judgment.” The plaintiff brought breach of contract and bad faith claims against his insurance provider and the agent who filled out his application. The defendant argued that the plaintiff could not maintain a breach of contract action against the agent because he was not a party to the insurance contract. The Court found that, although the agent was not a party to the insurance contract, the plaintiff may still have a separate breach of contract action against the agent for...
failure to procure insurance. The Court’s holding did not mean that the claim would survive in state court, but simply that the claim was not fraudulent.


**Background:** The plaintiff sued the defendants for among other things, fraud, identity theft, breach of contract and invasion of privacy. The defendants filed a motion to dismiss the plaintiff’s claims, arguing that they were time-barred.

**Holdings:** The District Court, Cathy Bissoon, J., denied the defendants’ motion to dismiss. In 2009, the plaintiff contracted with the defendants in order for the defendants to negotiate a franchise agreement on behalf of the plaintiff. The defendants informed the plaintiff that negotiations failed and returned the plaintiff’s deposit. In 2012, the plaintiff became aware of certain fraudulent lease agreements that were executed in his name. In 2013, he contacted the defendants, who sent the plaintiff “revised” lease agreements that contained “indicia of further fraud.” The Court held that a party may raise a limitation defense only when the bar is apparent on the face of the complaint. The Court found that statute of limitations was tolled in this case because the plaintiff in the exercise of reasonable diligence would not have learned of the fraud until 2013. Therefore, the Court denied the defendants’ motion to dismiss.


**Background:** Defendant filed a notice of intent to serve record subpoenas on a third party, which plaintiff moved to quash on the grounds that discovery had closed. Defendant opposed the motion to quash, arguing that plaintiff lacked standing to challenge the subpoenas.

**Holdings:** The District Court, Kim R. Gibson, J., denied the motion to quash, holding that the plaintiff lacked standing to challenge the subpoenas and did not have a property right or privilege in the documents that would allow it to fall within an exception to the general rule that “a party does not have standing to quash a subpoena served on a third party.”


**Background:** Plaintiffs — who were all defendants in a state court action — filed motion to stay proceedings in state court on the basis that the claims asserted therein were subject to a contractual arbitration provision.

**Holding:** The District Court, Susan Paradise Baxter, M.J., recommended that the motion to stay be denied because [1] neither the state court nor the District Court has determined whether the claims fall within the arbitration provision of the contract, and thus plaintiffs’ reliance on the stay provision of Section 3 of the Federal Arbitration Act, 9 U.S.C. § 3, was premature; and [2] the exceptions provided by the federal Anti-Injunction Act, 28 U.S.C. §2283, did not allow the court to stay the state proceedings because (i) the case did not involve a removal action nor did it implicate the court’s *in rem* jurisdiction, and (ii) the case did not implicate issues of res judicata such that a stay would be necessary or appropriate, because no court had decided whether the claims should be compelled to arbitration. Terrence F. McVerry, J., adopted the report and recommendation on July 6, 2015.
4TH ANNUAL
U.S. SUPREME COURT ROUNDUP

Live in Philadelphia | Tue., Aug. 25, 2015
Live Webcast | Tue., Aug. 25, 2015
Simulcast | Tue., Aug. 25, 2015

Allentown, Greensburg, Hollidaysburg, Honesdale, Indiana, Lebanon Mansfield, Mechanicsburg, Media, Mill Hall, New Castle, Norristown Pittsburgh, Plymouth Meeting, West Chester, Wilkes-Barre

9:00 AM to 12:15 PM; CHECK-IN BEGINS AT 8:30 AM

OYEZ! DELVE INTO THE SUPREME COURT’S MINDSET
You’ll learn about important rulings on issues such as free speech and same sex marriage equality; the Affordable Care Act; religious freedom; as well as updates on habeas and criminal law.

AVOID READING THOUSANDS OF PAGES OF OPINIONS
Let the experts fill you in on the essentials and how they will impact your practice as well as our culture and society. Let our panel do the heavy lifting to get you the critical facts and parse the analysis so you take away the most relevant information and know why it matters.

HEAR FROM AN ALL-STAR PANEL ON THE 2014 TERM’S MOST SIGNIFICANT DECISIONS
Take advantage of this unique opportunity to listen to vigorous discussion amongst renowned scholars and practitioners as they elucidate the Supreme Court’s October 2014 term.

SCHEDULE

9:00 – 9:25
First Amendment

9:25 – 9:55
Fourth Amendment

9:55 – 10:20
Separation of Powers/Federalism

10:20 – 10:35
Break

10:35 – 11:00
Qualified Immunity

11:00 – 11:30
Criminal Law/Habeas

11:30 – 12:15
Major Cases

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Thank you

A sincere thank you to the following Federal Practice Committee members for their work and contributions to this edition of the PBA Federal Practice Committee Newsletter:

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