COMMITTEE NEWS

The Impact of the 2014-15 Term of the Supreme Court of the U.S. on Federal Practice and a Glimpse at the Impact of the 2015-16 Term

On June 1, 2016 the PBA Federal Practice Committee will provide a CLE Program at the Montgomery Bar Association. The program is part of the Committee’s ongoing efforts to provide quality educational programs to its members and to invite non-members to join our committee. The program has been developed by Committee Chair, Hon. D. Michael Fisher, U.S. Court of Appeals for the Third Circuit, and organized by committee member Colin J. O’Boyle, both of whom will serve on the panel of speakers that also includes: Petrese B. Tucker, Chief Judge, United States District Court for the Eastern District of Pennsylvania; Christopher C. Conner, Chief Judge, United States District Court for the Middle District of Pennsylvania; Theodore McKee, Chief Judge, U.S. Court of Appeals for the Third Circuit; Mark Kearney, Judge, United States District Court for the Eastern District of Pennsylvania; and Committee Co-Vice Chair, Nancy Conrad of White and Williams. The program will review the impact of the Supreme Court decisions from the 2014-15 term as well as a preview/review of the cases before the Court in 2015-16 and briefly touch on the impact of the loss of Justice Scalia. The program begins at 4:00 and will be followed by a networking social reception. We hope to see you there for what promises to be a great program and opportunity to network with your colleagues.

To register, please visit the Montgomery Bar Association web page by clicking here.

SUBCOMMITTEES

Reports from the Chairs

Nominations Subcommittee

The Nominations Subcommittee this quarter recommended candidates for the position of Secretary on the Executive Council of the FPC. The Secretary attends meetings of the Executive Council and records all proceedings of those meetings. Stephanie Lynn Hersperger, a member of the FPC and shareholder with the firm of Pion, Nerone, Girman, Winslow & Smith in Harrisburg, was selected to fill the Secretary position.

– Brett G. Sweitzer

Legislative Subcommittee

The U.S. House of Representatives has passed several bills which, if enacted, would alter jurisdiction and practice in the federal courts. Some potentially affect all cases (changes
to Rule 11); others are limited to particular areas of law (the patent reform bill). One of the bills, the Fraudulent Joinder Prevention Act of 2016, is the subject of the “Open Forum” in this issue of the newsletter. The Legislative Subcommittee has been monitoring these proposals and is considering how we might influence the course the legislation takes.
– Professor Arthur Hellman

Contact Information
The chairs of the FPC’s six subcommittees welcome new members, and they invite and encourage all FPC members to join one or more of them. If you are interested in serving on any of the six subcommittees, please contact:

Nominations Subcommittee:
Brett G. Sweitzer, Philadelphia, Defender Association of Philadelphia, brett_sweitzer@fd.org

Educational Programs Subcommittee:
Kathleen Wilkinson, Philadelphia, Wilson Elser Moskowitz Edelman & Dicker LLP, kathleen.wilkinson@wilsonelser.com

Legislative Subcommittee:
Professor Arthur Hellman, Pittsburgh, University of Pittsburgh School of Law, hellman@pitt.edu

Outreach and Diversity Subcommittee:
Jennifer Menichini, Lackawanna, Greco Law Associates PC, jmenichini@callGLA.com

Newsletter Subcommittee:
Susan Schwochau, Pittsburgh, sschwochau@comcast.net

Local Rules Subcommittee:
Marc Zucker, Philadelphia, Weir & Partners LLP, mzucker@weirpartners.com.

Welcome New Members!
The FPC continues to grow! On behalf of the FPC, Chair Hon. D. Michael Fisher sends a warm welcome to the following new members:
• Hanna Borsilli, Cumberland County
• Kristy Castagna, Montgomery County, Kane Pugh Knoell Troy & Kramer LLP
• Alexandra Dellarco, Cumberland County, Marcello & Kivisto LLC
• Neil Devlin, Allegheny County
• Cary Flitter, Montgomery County, Flitter Milz PC
• Melissa Freeman, Berks County, MidPenn Legal Services
• Tanner Jameson, Cumberland County
• Adam Kohl, Cumberland County
• Adam Martin, Franklin County
• Michael O’Brien, Cumberland County
• Steve Sess, Cumberland County
• Clinton Webb, Cumberland County
• Jordan Yatsko, Cumberland County

We are delighted that you have joined this vibrant and active committee! We hope that you will enjoy the benefits of FPC membership, which include automatic receipt of four quarterly e-newsletters. You are also encouraged to consider participating in any of the FPC’s subcommittees, and to reach out to Executive Council members with any ideas you may have on how the FPC can best pursue its mission to promote communication and cooperation among members of the federal judiciary and lawyers who practice in federal courts, and enhance the knowledge and professional capabilities of lawyers who practice law in the United States District Courts in Pennsylvania.
FEDERAL PRACTICE NEWS

Rules Changes

The U.S. District Court for the Western District on March 28 announced a series of proposed changes to its local rules. Civil rule amendments proposed include language dealing with hyperlinks, filing under seal, timing of scheduling conferences, depositions of witnesses for use at trial, electronically stored information, assignment of actions, voir dire, filing a bill of costs, and procedures for admission to practice, among others. Several changes to civil appendices are also proposed. Possible amendments to criminal rules include language dealing with defendants consulting with counsel, pretrial motions, matters to be discussed at the status conference, procedures governing sentencing proceedings, assignment of cases, and pro hac vice admissions. The chart below lists the rules to which changes are proposed:

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Status of Judicial Vacancies

U.S. Court of Appeals, Third Circuit

- On March 15, 2016, President Obama nominated Rebecca Ross Haywood, Esq. to fill the vacancy created by the retirement of Judge Marjorie O. Rendell. The nomination was referred to the Committee on the Judiciary.

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. A Senate Judiciary Committee hearing on these nominees was held Dec. 9, 2015. The nominations of Judge Baxter and Judge Horan were placed on the Senate Executive Calendar on Jan. 28, 2016, after being ordered to be reported favorably by Senator Grassley.

U.S. District Court, Eastern District of PA

- On July 30, 2015, President Obama nominated Judge John M. Younge to fill one of the vacancies in the United States District Court for the Eastern District of Pennsylvania. A Senate Judiciary Committee hearing was held Dec. 9, 2015.
- There is one additional vacancy (due to Judge Restrepo’s elevation to the Court of Appeals).
CASE SUMMARIES

Summaries of Third Circuit and Pennsylvania district court decisions issued between January and March 2016 that involved issues of potential interest to FPC members.

THIRD CIRCUIT PRECEDENTIAL OPINIONS

**U.S. v. Moreno, 809 F.3d 766 (3d Cir. 2016)** (Criminal Law & Procedure / Sentencing) – The Court of Appeals affirmed Moreno’s conviction, concluding that although a Confrontation Clause violation occurred at trial when a cooperating witness read statements of a non-testifying U.S. agent into the record, that violation was harmless given the limited importance of the statements and the strength of the government’s case. The Court also affirmed the district court’s four-level enhancement to Moreno’s sentence based on the finding that there were more than 50 victims in the case. The sentence, however, was vacated and the case remanded for resentencing because the district court committed plain error in allowing, during Moreno’s allocution, the prosecutor to cross-examine him on the subject of his guilt. The Court also stated that even if the error had not been plain, the Court “would nevertheless exercise [its] supervisory power and hold that a defendant may not be cross-examined during allocution.”

**Chesapeake Appalachia LLC v. Scout Petroleum LLC, 809 F.3d 746 (3d Cir. 2016)** (Arbitration) – Confronted with an arbitration demand by defendant/lessor on behalf of itself and similarly situated lessors, plaintiff/lessee sought a declaration that under its lease agreements – which incorporated by reference the AAA’s rules – the district court, not the arbitration panel, was to decide whether class arbitration was available, and that the language of the leases did not permit class arbitration. Applying Opalinski v. Robert Half International Inc., 761 F.3d 326 (3d Cir. 2014), the Court of Appeals affirmed both the district court’s summary judgment in favor of plaintiff/lessee and its order vacating an arbitration decision, concluding that the actual language of the leases at issue and the nature and contents of the AAA’s rules did not overcome the presumption that the question of class arbitrability is to be decided by the court.

**Finkelman v. National Football League, 810 F.3d 187 (3d Cir. 2016)** (Jurisdiction (Standing) / Consumer Fraud / Class Action) – In this putative class action, plaintiffs alleged that the NFL’s Super Bowl ticketing practices violated New Jersey law. Reviewing the district court’s Rule 12(b)(6) dismissal of the action, the Court of Appeals agreed that the plaintiff who did not buy any tickets lacked standing: no particularized injury was alleged by that plaintiff. Because the district court’s judgment as to the other plaintiff focused on the merits, the Court of Appeals vacated that portion of the judgment because it concluded that he lacked standing as well. He (1) did not participate in the NFL’s lottery (and so did not avail himself of the opportunity to get a ticket at its face price) and (2) failed to allege facts that supported his possible contention that he paid more for his tickets on the secondary market than he would have absent the NFL’s alleged misconduct, relying instead on mere conjecture.

**Connelly v. Lane Construction Corp., 809 F.3d 780 (3d Cir. 2016)** (Labor & Employment (Discrimination)) – The Court of Appeals vacated the district court’s Rule 12(b)(6) dismissal of plaintiff’s disparate treatment and retaliation claims because she alleged facially plausible claims. The Court reiterated that (1) a plaintiff could proceed under either a mixed-motive or a pretext theory and was not limited at the pleading stage to one or the other; (2) a complaint did not need to establish a prima facie case in order to survive a Rule 12(b)(6) motion; and (3) all alleged facts must be construed in the light most favorable to the plaintiff.

**U.S. ex rel. Moore & Company, P.A. v. Majestic Blue Fisheries, LLC, 812 F.3d 294 (3d Cir. 2016)** (Statutes [False Claims Act]) – The Court of Appeals reversed the district court’s Rule 12(b)(1) dismissal of this False Claims Act case, concluding that amendments to the Act in 2010 (1) rendered the public disclosure bar no longer jurisdictional (and therefore dismissal under Rule 12(b)(1) was in error); and (2) altered the “original source” exception to require a fundamentally different analysis. Under the 2010 amendments, courts must now compare the relator’s knowledge with the information that was disclosed through the public disclosure sources enumerated in § 3730(e)(4)
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[A], rather than to information readily available in the public domain, to assess whether the relator's knowledge “materially adds” to the publicly disclosed information (e.g., by supplying the who, what, when, where and how of the alleged fraud). Applying the new “original source” definition, the Court concluded that the relator materially added to the public disclosures by contributing details of the alleged fraud that it independently uncovered through discovery in a wrongful death action in federal court.

**Wiest v. Tyco Electronics Corp.,** 812 F.3d 319 (3d Cir. 2016) (Statutes [SOX-Whistleblower]) – Former Tyco employee claimed that Tyco unlawfully terminated his employment for reporting suspected securities fraud violations pertaining to the accounting treatment of two Tyco events. Adopting the approach taken by sister circuits as to what constitutes a “contributing factor,” the Court of Appeals affirmed the district court’s grant of summary judgment to Tyco, agreeing that Weist failed to offer any evidence to establish that his protected activity was a contributing factor to any adverse employment action. The Court also concluded that, assuming that Wiest could establish a factual dispute with respect to the issue of whether his protected activity was a contributing factor, Tyco was still entitled to summary judgment because it showed that it would have taken the same action against Weist in the absence of any protected activity.

**MCPc Inc. v. NLRB,** 813 F.3d 475 (3d Cir. 2016) (Labor & Employment) – The ALJ, based on its application of *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964), concluded that MCPc had discharged an employee for his protected concerted activity in violation of § 8(a)(1) of the National Labor Relations Act; the NLRB affirmed. The Court of Appeals agreed that (1) the employee engaged in concerted activity when, during a “team building” lunch, he communicated to MCPc management his dissatisfaction about working conditions he and other employees shared; and (2) the concerted activity was protected under the NLRA. The Court, however, concluded that the Board failed to apply the correct legal test in determining whether the employee was discharged for his protected activity or was discharged for his alleged misconduct occurring before the lunch or afterward. Given record evidence, the Court vacated and remanded for the Board to apply *Wright Line*, 251 N.L.R.B. 1083 (1980), rather than *Burnup & Sims*, to MCPc’s proffered reasons for the employee’s discharge.

**U.S. v. Steiner,** 815 F.3d 128 (3d Cir. 2016) (Criminal Law & Procedure) – Steiner was indicted on two counts of felony possession based on ammunition found during separate searches of a camper and a home. The jury found him guilty on one count (ammunition found in home). The Court of Appeals affirmed, concluding that (1) although the district court erred in admitting, as “background” evidence under Rule 404(b), arrest warrant evidence that did not bear on the charged offense and was not needed to understand what happened in this straightforward case, that error was harmless; and (2) the district court did not err in refusing to instruct the jury that, to find Steiner guilty, it had to unanimously determine which ammunition Steiner possessed. Because little evidence supported Steiner's contention that the ammunition found in the home was acquired at different times and for different purposes, or that it was separately stored in the home, the Court concluded that the indictment was not duplicitous. Thus, a curative jury instruction was not required.

**S.B. v. Kindercare Learning Centers, LLC,** 815 F.3d 150 (3d Cir. 2016) (Federal Court Jurisdiction) – The district court granted in part plaintiffs’ motion for voluntary dismissal under Rule 41(a), dismissing their tort claims against defendant without prejudice and imposing two conditions on their right to refile: (1) that they pay defendant’s reasonable attorneys’ fees; and (2) that they refile their complaint by a specific date about four years from the date of the order, with the possibility of extending the deadline by showing good cause. Plaintiffs filed a notice of appeal challenging the two conditions, but did so before submitting an objection to defendant’s affidavit of costs and before the district court entered a final order. Although the Court of Appeals adopted the legal prejudice exception to the final judgment rule, it concluded that the exception did not apply in this case because the challenged conditions did not “severely circumscribe” or render “uncertain” plaintiffs’ ability to refile their complaint. As a result, the appeal was dismissed for lack of jurisdiction.
EASTERN DISTRICT OF PA OPINIONS

Philadelphia Workforce Development Corp. v. KRA Corp., ___ F.Supp.3d ___, 2016 WL 161378 (E.D.Pa., Jan. 1, 2016) (Contracts / Evidence) – KRA, defendant in this contract case involving “hybrid” contracts, sought judgment as a matter of law or a new trial after a jury awarded plaintiff $161,151, which reflected overpayment under the parties’ agreements. Judge W. Beetlestone denied KRA’s motions. Contrary to KRA’s argument, the contracts’ payment provisions were ambiguous as a matter of law and properly submitted to a jury for resolution. The record contained sufficient admissible evidence from which the jury could reasonably adopt plaintiff’s interpretation of the contracts, and find KRA liable and PWDC not liable for breach. The reports that KRA challenged were properly admitted under FRE 803(6); though containing opinions, the reports did not fall under Rule 702. KRA’s motion for a new trial was denied because it failed to show that the jury’s verdict was contrary to the great weight of the evidence, or show error arising from the court’s evidentiary and procedural rulings.

U.S. v. Ocasio, 2016 WL 215230 (E.D.Pa., Jan. 19, 2016) (Bail) – Judge H. Bartle III, reviewing the Magistrate Judge’s denial of Ocasio’s bail, granted his motion to reconsider and released Ocasio pending trial. Ocasio was indicted by grand jury for violations of the Controlled Substances Act, 21 U.S.C. § 841, which carried a maximum term of imprisonment of ten years or more. Under the Bail Reform Act, 18 U.S.C. §§ 3141, et seq., Ocasio needed to overcome a rebuttable presumption by producing some credible evidence that he would appear and would not pose a threat to the community. The court found that Ocasio met this burden by showing that: (1) he owns his Philadelphia home and lived in Philadelphia for his entire life; (2) he is the sole caretaker for his four-year-old child; (3) his close family members all live in Philadelphia; (4) he maintains steady employment in Philadelphia, and his employer has supported him both in overcoming his addiction and addressing the charges in this case; and (5) he has never left the United States and does not have a passport. Ocasio was released subject to electronic monitoring, home confinement, and a bond on his home and adjoining land.

U.S. v. Whitehead, ___ F.Supp.3d ___, 2016 WL 233631 (E.D.Pa., Jan. 20, 2016) (Co-operating witness communications) – Whitehead sought to gain access to the communications of two possible cooperating witnesses. Although the government received BOP records of both witnesses’ communications, it had not reviewed any of the records of one witness and formally communicated that it did not intend to do so. Judge G. McHugh granted the motion in part and denied it in part. The court denied Whitehead’s request that the government produce BOP records of all emails and recordings of phone calls with both witnesses. The government agreed to turn over appropriate Brady and Jencks Act materials as to the witness whose records it had reviewed, rendering that request moot. Although the court recognized that Brady imposed no obligation on the government to review the records of the other witness, it held that the Jencks Act’s obligations were triggered because the government had specifically taken possession of the records in pursuit of prosecutorial objectives. Thus, the court ordered the government to examine the records of the other witness and to turn over Jencks Act materials, and it expressed confidence that, if in its review process it found Brady material as well, the government would turn that over too.

In re: Tylenol (Acetaminophen) Marketing, Sales Practices, and Prods. Liab. Litig., 2016 WL 807377 (E.D.Pa., Mar. 2, 2016) (Expert Testimony) – In a bellweather case, defendants moved to exclude the testimony of plaintiff’s expert in marketing, advertising, and consumer psychology. Pursuant to FRE 702 and Daubert, Judge L. Stengel initially found the expert was qualified, that his methods were reliable, and that his proposed testimony would be relevant to the failure-to-warn, fraud, and design defect claims. The court rejected defendants’ arguments seeking to limit the scope of the expert’s testimony, concluding that testimony regarding dollar amounts spent on advertising was not prejudicial and was strong evidence of the extent of defendants’ marketing effort; that opinions on the effect specific marketing may have had on product purchasers were relevant to plaintiff’s claims; and an explanation of the history of the Tylenol brand would provide helpful context. The court held, however, that plaintiff’s expert could not offer his opinion
that defendants were deficient in the way they marketed or advertised their products because the plaintiff did not raise a negligent marketing claim.

**U.S. v. Fattah**, ___ F.Supp.3d ___, 2016 WL 1043554 (E.D.Pa., Mar. 3 2016) (Speech & Debate Clause) – Fattah, a U.S. Representative who was indicted on numerous racketeering charges, moved to dismiss three counts of the indictment on the ground that they infringed on his rights under the Speech or Debate Clause. Judge H. Barle III denied the motion because the Speech and Debate Clause gives no protection to Fattah for his alleged promise to obtain a congressional earmark in the future in return for forgiveness of a debt or to his alleged attempts to influence the Executive Branch in return for a bribe.

**Chimenti v. Pennsylvania Dep’t of Corr.**, 2016 WL 1125580 (E.D.Pa., Mar. 21, 2016) (Civil Rights - §1983 / Medical Malpractice / Joinder, Venue) – Inmates at different correctional institutions filed a class action complaint asserting claims of deliberate indifference and medical malpractice arising from the defendants’ alleged policy of denying medical care to inmates who have been diagnosed with Hepatitis C. DOC defendants filed a motion to dismiss under Rule 12(b)(3) or (6); medical care providers and their officials and employees filed a motion to dismiss or sever. Judge J. Padova granted in part and denied in part the defendants’ motions, concluding that with isolated exceptions, plaintiffs’ claims could proceed. As to the Rule 12(b)(3) motion, the court ruled that although the challenged policy was developed in the MDPA, decisions pursuant to that policy in question were made and carried out in the EDPA. In addition to denying the Rule 12(b)(3) motion, the court denied the motion to transfer venue. It also denied the motion to sever under Rule 21, concluding that plaintiffs’ claims satisfied Rule 20’s requirements for permissive joinder.

**Green v. Cosby**, ___ F.R.D. ___, 2016 WL 1086716 (E.D.Pa., Mar. 21, 2016) (Rule 45 Subpoena) – Plaintiffs to a defamation suit filed in the District Court of Massachusetts served a subpoena on an attorney to produce her case files from tort actions against William H. Cosby and others filed in 2005 and 2006 in the EDPA. The attorney represented the plaintiff in the earlier litigation, during which the parties conducted discovery regarding other women’s accusations that Cosby had sexually assaulted them. The earlier cases settled in 2006, and the parties to those cases entered into a confidentiality agreement. Cosby moved to quash the subpoena. Judge A. Brody rejected Cosby’s argument that there was no compelling justification for requiring disclosure of materials subject to the confidentiality agreement because such an agreement cannot block the disclosure of those materials to third parties in discovery. The court also rejected Cosby’s undue burden argument. Because it was relevant to the Massachusetts action, Cosby’s motion to quash was denied as to materials pertaining to the plaintiffs and the other witnesses, but was granted as to other subject matter.

**McLaughlin v. Bayer Corp.**, ___ F.Supp.3d ___, 2016 WL 1178070 (E.D.Pa., Mar. 22, 2016) (Pre-emption / Pleading Standards) – Plaintiffs in five consolidated cases sought compensation for injuries suffered in connection with the use of a female birth control device. Bayer sought dismissal under Rule 12(c) of all claims on either pre-emption grounds, for failure to state a claim, or for failure to plead fraud with particularity. Judge J. Padova granted the motion in part, denied it in part, and permitted plaintiffs to file an amended complaint as to some of the dismissed counts. Plaintiffs’ negligent entrustment, fraudulent concealment, and strict liability counts were dismissed as expressly or impliedly pre-empted. Although plaintiffs’ fraudulent misrepresentation count was dismissed for failure to plead fraud with particularity (Rule 9(b)), the court refused to hold negligent misrepresentation claims to the 9(b) standard and thus denied Bayer’s motion as to that count. The court also denied the motion as to plaintiffs’ negligent failure to warn claim. The remaining six claims were dismissed under Rule 12(b)(6).

**MIDDLE DISTRICT OF PA OPINIONS**

**Burns v. Colvin**, ___ F.Supp.3d ___, 2016 WL 147269 (M.D.Pa., Jan. 13, 2016) (Social Security) – Judge Y. Kane adopted the magistrate judge’s recommendation that the denial of benefits be vacated and the case remanded for further proceedings. The court noted that under the deferential substantial evidence standard applicable to
a denial of benefits, the Third Circuit had held, “[i]n a slew of decisions” that predated 1991, that “no reasonable mind would find the ALJ’s evidence to be adequate when the ALJ rejects every medical opinion in the record with only lay reinterpretation of medical evidence.” At issue was whether this holding was still good law in light of subsequent legislative enactments, regulatory changes, and Third Circuit decisions. Reviewing all of these, the court concluded the holding was still binding, and finding that the ALJ had rejected all of the medical opinions using only lay interpretation of medical evidence, vacated the denial of benefits.

_souryavong v. Lackawanna County_, ___ F.Supp.3d ___ , 2016 WL 374462 (M.D.Pa., Feb. 1, 2016) (FLSA Damages / Attorney Fees) – Attorney fees take center stage in this opinion that addresses five post-judgment motions in an FLSA case. In addition to granting employees liquidated damages and denying their request for pre-judgment interest, Judge A. R. Caputo presented a detailed account of the reasons he reduced substantially the attorney fees plaintiffs sought (from $166,162.50 to $54,250). After denying plaintiffs’ motion to strike the county’s certificate of counsel as to Rule 68 offers of judgment plaintiffs had declined, the court (1) reduced counsel’s rate and (2) reduced the number of hours to be compensated (e.g., to exclude hours associated with claims on which plaintiffs did not prevail, hours that were duplicative, hours for which descriptions lacked sufficient specificity, excessive hours). In addition, the court adjusted the lodestar downward on the basis of factors in _Johnson v. Georgia Highway Express, Inc._, 488 F.2d 714 (5th Cir. 1974), including the fact that plaintiffs were relatively unsuccessful at trial and that they achieved substantially less than what acceptance of defendant’s Rule 68 offer would have provided.

_christ the king manor, inc. v. burwell_, ___ F.Supp.3d ___ , 2016 WL 688035 (M.D.Pa., Feb. 18, 2016) (Administrative Law) - Nonpublic nursing facility providers participating in Pennsylvania’s Medicaid Program challenged DHHS approval of an amendment to Pennsylvania’s state plan for administering its Medicaid program for the 2008-2009 fiscal year. The Third Circuit reversed an initial grant of summary judgment to federal defendants, concluding that the administrative record before the DHHS lacked sufficient evidence that Pennsylvania had considered the impact of the amendment on quality of care or adequate access. Following remand, the DHHS – based on additional post-hoc information supplied by Pennsylvania – again approved the amendment. Judge J. Jones III granted defendants’ summary judgment motion, rejecting plaintiffs’ arguments that (1) the reopening and approval proceedings were barred because neither the Third Circuit’s decision nor the court’s final judgment authorized a remand for further agency proceedings with regard to the amendment and (2) the DHHS’ re-approval was based on an impermissible construction of the governing statute’s requirements in that “post-hoc” (i.e., after the fact) data rather than prospective (or “predictive”) data was used to support the decision.

_brennan v. community bank, n.a._, ___ F.R.D. ___ , 2016 WL 727643 (M.D.Pa., Feb. 24, 2016) (Intervention in Class Action) – After preliminary approval of a class-action settlement and just before the final approval hearing, four class members sought to intervene as of right or by permission in order to be able to engage in discovery and file motions. Judge M. Mannion denied the motion. Viewing the totality of circumstances, the motion was untimely. Although it was filed before the opt-out deadline, intervenors had early awareness of the action and did not justify their delay in moving to intervene. Intervenors also did not show the adversity of interest, collusion, or nonfeasance on the part of a party that would overcome the presumption of adequate representation in the class action context. Instead, intervenors’ arguments were objections to the settlement, which cannot provide the basis for intervention.

_barker v. kane_, ___ F.Supp.3d ___, 2016 WL 827129 (M.D.Pa., Mar. 3, 2016) (Motion to Stay Pending Conclusion of Criminal Proceedings) – Former Chief Deputy Attorney General of Criminal Appeals Barker filed a civil action asserting that Attorney General Kane violated his constitutional rights by terminating his employment in retaliation for his testimony before a grand jury and later offering defamatory explanations for his termination. Attorney General Kane moved to stay Barker’s action pending resolution of criminal charges filed against her. Chief Judge C. Conner granted the Attorney General’s motion, concluding that there was material overlap in the
issues in the civil and criminal cases, and that the five-month delay (given when the criminal trial was scheduled to begin) did not cause prejudice to Barker or cause the interests of the court or public to outweigh the risks of self-incrimination that the Attorney General faced.

**WESTERN DISTRICT OF PA OPINIONS**

**Bennett v. R&L Transfer, Inc.,** 2016 WL 154141 (W.D.Pa., Jan. 12, 2016) (Use of deposition of deceased witness at trial) – In this tort case arising out of a truck accident, the injured truck driver passed away after he gave his deposition. A physician had diagnosed the truck driver with frontal lobe syndrome, traumatic brain injury, cognitive dysfunction, oppositional defiant disorder, disruptive behavior disorder, daily temperamental extremes, low frustration tolerance, and an increased risk of developing dementia. Plaintiff-executrix moved to use the truck driver's deposition at trial; defendants objected on the ground that he was not competent at the time he gave his deposition. Concluding that the truck driver's deposition and the physician's deposition did not support defendants’ argument, Judge K. Gibson granted the motion, subject to further rulings by the court.

**Miller v. Native Link Constr., LLC,** 2016 WL 247008 (W.D.Pa., Jan. 21, 2016) (Motion to serve by alternate method) – In this diversity case, Chief Judge J. Conti denied, without prejudice, pro se plaintiff’s motion for service by an alternative method (to defendant’s LinkedIn messaging account) because Miller failed (1) to show that service could not be made on defendant using the methods set forth in Pennsylvania’s Rules; (2) to submit the required affidavit stating his efforts to locate the defendant and the reasons why service cannot be made; and (3) to show that service directly through a LinkedIn message to defendant was reasonably calculated to provide the defendant with notice of the proceedings against him. As to the last prong, the court noted that Miller had not made the showings that the plaintiff in *WhosHere, Inc. v. Orun,* No. 13-526, 2014 WL 670817 (E.D. Va. Feb. 20, 2014) had made (e.g., Miller proposed only one (versus 4) electronic messaging formats; he did not show the defendant “regularly view[s] and maintain[s]” his LinkedIn account’s messaging inbox or that this was his preferred method of communication).

**Gucker v. United States Steel Corp.,** 2016 U.S. Dist. LEXIS 10770 (W.D.Pa., Jan. 29, 2016) (Admissibility of settlement-related notes) – In this age discrimination case, USS sought to preclude admission of notes and testimony of one of its employees, a labor relations representative, concerning her investigation of plaintiff’s EEOC charge. Judge N. Fischer granted in part, denied in part, and deferred in part USS’s motion. Over plaintiff’s objection that the notes did not fall under FRE 408 because no offer of settlement had been communicated to him, the court, noting that the Third Circuit had already refused to adopt the holding of the case on which plaintiff relied, granted defendant’s motion as to notes that appeared to be closely related to potential settlement discussions regarding Plaintiff’s EEOC charge. The court denied USS’s motion as to notes that did not relate to settlement, concluding that they were relevant, not unfairly prejudicial, and even if they encompassed privileged materials, USS had waived the privilege. A ruling on some notes was deferred because they were illegible.

**Cole’s Wexford Hotel, Inc. v. UPMC & Highmark, Inc.,** 2016 WL 462856 (W.D.Pa., Feb. 8, 2016) (Inadvertent disclosure / Waiver of privilege) – In 2007, UPMC produced numerous documents to the DOJ in response to a civil investigative demand. A special master appointed to assist with discovery concluded that UPMC’s inadvertent disclosure to the DOJ of documents subject to the attorney-client privilege did not effectively waive its attorney-client privilege with respect to those documents. Upon her de novo review, Chief Judge J. Conti agreed with the special master, concluding that UPMC took reasonable measures to protect its privilege and promptly took reasonable steps to rectify its inadvertent disclosure of privileged documents. The court rejected plaintiff’s argument that it was entitled to the documents because they were relevant – “Privilege is not waived because the privileged information is probative to a party’s case.”

**Banks v. U.S. Marshals Serv.,** 2016 WL 1394354 (W.D.Pa., Feb. 16, 2016) – Banks, claiming to be a member of an Indian tribe, filed pro se a complaint alleging numerous claims pertaining to his relatively
brief incarceration at the Allegheny County Jail. Federal defendants moved for dismissal under Rule 12(b)(1), (5) or (6). Magistrate Judge L. Lenihan recommended that claims be dismissed under Rule 12(b)(6). Judge D. Cercone followed that recommendation and adopted the magistrate judge's opinion. *Banks v. U.S. Marshals Serv.,* 2016 WL 1223345 (W.D.Pa., Mar. 24, 2016). Claims against the United States, the United States Marshals Service and the Bureau of Indian Affairs and Bivens claims against the federal defendants in their official capacities were barred by sovereign immunity – the Sioux Treaty of Fort Laramie did not waive immunity. Treaty-based and Tucker Act claims failed because, among other things, the alleged “wrongs” did not occur within a Sioux reservation, as the “bad men” provision of Article I of the Sioux Treaty of Fort Laramie requires. The court also described that claims against individual defendants could not survive under the doctrines of qualified immunity, absolute judicial immunity and/or quasi-judicial immunity, and because Banks did not allege facts showing that each of the defendants personally participated in the allegedly unconstitutional conduct.


*Heavy Iron Oilfield Servs., L.P. v. Mountain Equip. of New Mexico, Inc.*, 2016 WL 930300 (W.D.Pa., Feb. 11, 2016) (Summary Judgment / Breach of Contract) – Plaintiff purchased from defendant sand traps (equipment used in oil and gas extraction) manufactured by a third party. Plaintiff alleged that defendant breached the parties’ contract for the sale of the traps because those traps were not both ASME certified and compliant. At the time of the sale, the traps bore the stamps reflecting that they were ASME certified; 10 months after the sale, notices were sent that the manufacturer's traps were not ASME compliant. Magistrate Judge M. Kelly granted defendant's motion for summary judgment and denied plaintiff’s motion for partial summary judgment, concluding that plaintiff contracted for, and received, ASME certified sand traps.

*Gadley v. Ellis*, 2016 WL 1090654 (W.D.Pa., Mar. 18, 2016) (Post-Trial Motions / UTPCPL Damages) – In this breach of contract case, Judge K. Gibson denied defendant's Rule 50 motion, which sought judgment on plaintiff’s UTPCPL claim on the ground that the gist-of-the-action doctrine precluded that claim, because certain of plaintiff’s claimed damages fell outside the scope of the doctrine. Defendant’s motion for a new trial was denied because the verdict slip allowed damages precluded by the economic loss doctrine to be removed from the jury's total amount of damages. The court declined to award plaintiff treble damages because the jury did not find defendant engaged in fraudulent or deceptive conduct. The court instead awarded double damages, after adjustments were made for damages precluded by the economic loss doctrine and the jury’s finding that plaintiff failed to mitigate. The court granted in part plaintiff’s motion for attorney fees and costs.

*Rothschild v. Lancer Ins. Co.*, 2016 WL 1237353 (W.D.Pa., Mar. 30, 2016) (Removal) – Judge C. Bissoon granted plaintiff’s motion to remand this insurance matter to state court, concluding that the federal court did not have subject matter jurisdiction. The court rejected defendant’s contentions that (1) an MCS-90 endorsement affixed to the insurance policy conferred jurisdiction under the narrow exception of *Grable & Sons Metal Prods. v. Darue Eng’g & Mfg.*, 545 U.S. 308 (2005); (2) three other defendants were fraudulently joined; and (3) even if not fraudulently joined, the three defendants are now citizens of Texas. As to the last two contentions, defendant offered insufficient evidence to carry its burden in light of the complaint’s allegations.

*Gonzalez v. Owens Corning*, 2016 U.S. Dist. LEXIS 43707 (W.D.Pa., Mar. 31, 2016) (Class Certification) – Defendants in four consolidated cases arising out of Owens Corning’s manufacture and sale of allegedly defective fiberglass asphalt roofing shingles sought class certification under Rules 23(b)(1)(B), (b)(2), and (b)(3). In a meticulous
100+ page opinion, Chief Judge J. Conti denied the motion, concluding that (1) a class could not be certified under Rule 23(b)(1)(B) because the named plaintiffs sought to have the court answer a question that the Third Circuit had already answered, and its answer made it impossible to enter any class-wide rulings with respect to the effect that Owens Corning’s bankruptcy proceedings have on proposed class members’ claims; and (2) a class could not be certified under Rules 23(b)(2) or (b)(3) because, among other reasons, the named plaintiffs sought to pursue relief under various state-law theories that were not the same for all members of a proposed class, it was impossible to determine whether a structure owner was a member of the class, and the record contradicted any finding that either all (or even most or many) of the shingles suffered from a common defect or that Owens Corning represented to all putative class members that its shingles would not, for at least 25 years, crack, de-granulate, fragment, or deteriorate, or that the shingles would have a useful life of at least 25 years.

OPEN FORUM

Should Congress Enact a “More Robust” Version of the Fraudulent Joinder Doctrine?

By Arthur D. Hellman**

On Feb. 25, 2016, the U.S. House of Representatives approved H.R. 3624, the “Fraudulent Joinder Prevention Act of 2016” (FJPA). H.R. 3624 would codify “a somewhat more robust version of the fraudulent joinder doctrine” than the one generally applied by courts today. Is that a good idea? That is the topic for this issue’s Open Forum.

Background

The fraudulent joinder doctrine emerged from the intersection of litigation strategy and jurisdictional rules. Today as in the past, plaintiffs in civil actions often have a strong preference for litigating in state court, while defendants often prefer federal court. If an in-state plaintiff sues an out-of-state defendant in state court and the amount in controversy is more than $75,000, the defendant can remove the case to federal district court under the diversity of citizenship jurisdiction, 28 U.S.C. § 1332(a). But jurisdiction under § 1332(a) is governed by the rule of “complete diversity.” Under that rule, which traces back to a decision by Chief Justice John Marshall, a suit is “between … citizens of different states,” and thus within federal jurisdiction under 28 U.S.C. § 1332(a), only when no plaintiff is a citizen of the same state as any defendant. So the plaintiff with a claim against a citizen of another state can keep the case in state court by joining a fellow citizen as a co-defendant. For example, in an insurance dispute, the in-state policyholder sues the out-of-state insurance company that issued the policy and joins the local agent or claims adjuster as a co-defendant. In a products liability action, the plaintiff sues the out-of-state pharmaceutical manufacturer and joins the local doctor who prescribed the drug or the local pharmacist who filled the prescription.

Ordinarily, the joinder of a co-citizen of the plaintiff as defendant would destroy complete diversity and prevent removal. If the out-of-state defendant removes nevertheless, the federal court would be required to grant the plaintiff’s motion to remand the case back to the state court. But in the first part of the 20th century, the Supreme Court recognized that plaintiffs might abuse the complete diversity requirement in order to defeat out-of-state defendants’ right to removal. To limit that abuse, the Court developed the doctrine of fraudulent joinder. Under that doctrine, courts can disregard the citizenship of non-diverse defendants when those defendants have been “fraudulently” joined. As many courts and commentators have noted, “fraudulent” is a term of art; the plaintiff’s motives are irrelevant. But determining what does make joinder...
fraudulent can often be difficult. The Supreme Court has not addressed the issue in many decades, and lower courts have diverged both in their articulation of the governing law and in setting forth procedures for making the determination.

One feature, however, is common to all circuits’ law: the standard is a very demanding one. Typically, courts take the position that joinder is not fraudulent unless the plaintiff has “no possibility” of imposing liability on the resident defendant. Some courts go so far as to say that the removing party “must prove that there is absolutely no possibility that the plaintiff will be able to establish a cause of action against the in-state defendant.”

The Third Circuit has not spoken on the subject in several years, but in 2009 the court reiterated the standard it had previously articulated: “[I]f there is even a possibility that a state court would find that the complaint states a cause of action against any one of the resident defendants, the federal court must find that joinder as proper and remand the case to state court.”

Supporters of the FJPA believe that standards like these create a strong incentive for plaintiffs to assert feeble or attenuated claims against in-state individuals and small businesses simply to keep their cases in state court. This is harmful in two ways. First, the out-of-state defendant (e.g., the pharmaceutical manufacturer) loses the removal rights that it would have if sued alone. Second, local individuals and businesses are dragged into litigation when their role in the controversy is at best tangential or peripheral.

The Proposed New Test: Plausibility

To address the concerns noted above, the FJPA adds a new subsection (f) to 28 U.S.C. § 1447, which deals with procedure after removal. In many respects, the new subsection codifies current law. But it also makes one major change, and that change will be the focus of discussion here.

H.R. 3624 sets forth four situations in which a court should find joinder to be fraudulent. Prong (B) will be widely regarded as the central provision of the bill. It provides that joinder of a non-diverse or in-state defendant is fraudulent if, “based on the complaint and [other materials submitted by the parties], it is not plausible to conclude that applicable state law would impose liability on that defendant.” (Emphasis added.)

Prong (B) thus replaces standards like “no possibility of recovery” with a uniform standard of “plausibility” drawn from Twombly and Iqbal, the Supreme Court’s decisions interpreting Rule 8 of the Federal Rules of Civil Procedure. Those decisions make clear that “plausibility” requires more than “possibility,” but it is not akin to a requirement of “probability.” Rather, the Court has indicated that a claim lacks plausibility when “there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint.”

The FJPA applies this standard in the context of fraudulent joinder. Under prong (B), the removing defendant bears the burden of showing that the claims against the non-diverse or in-state defendants lack plausibility in the sense described by the Twombly and Iqbal opinions. But in contrast to current law, the defendant would not have to show that there is “no possibility” of imposing liability on the local defendants.

The FJPA is now awaiting action by the Senate. A more detailed explanation of the FJPA’s provisions, as well as the Dissenting Views of the minority, can be found in the Report of the House Judiciary Committee, available at https://www.gpo.gov/fdsys/pkg/CRPT-114hrpt422/pdf/CRPT-114hrpt422.pdf. But in raising this issue for discussion now, I’m hoping that FPC members will draw on their own experience in litigation.

Question/Issue

Should Congress modify the fraudulent joinder doctrine and allow removal based on diversity jurisdiction if the out-of-state defendant shows that it is not plausible to conclude that state law will impose liability on the in-state defendant?

Or should Congress leave the law as it is, so that removal will be precluded if there is “even a possibility” that state law would impose liability on the in-state defendant?

The “Open Forum” section in future issues of the FPC newsletter is open to all FPC members for raising questions of federal practice, rules, and other matters that are likely to be of interest or importance to other members. Submissions for possible inclusion in the Open Forum section can be sent to s.schwochau@comcast.net.

See endnotes on page 13.
Thank You

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Open Forum Endnotes

1. **Professor of Law, University of Pittsburgh. The author participated in the drafting of the version of H.R. 3624 that was approved by the House. The views expressed are entirely his own.**


3. See **Wecker v. National Enameling & Stamping Co.**, 204 U.S. 176, 186 (1907) (Because “the real purpose in joining [the resident defendant] was to prevent the exercise of the right of removal by the nonresident defendant,” the lower court was correct in refusing to remand the case).

4. The doctrine is also invoked when there is complete diversity but one or more defendants are citizens of the forum state, thus violating the “forum defendant” rule of 28 U.S.C. § 1441(b)(2). The FJPA deals with that situation in the same way.

5. **Stillwell v. Allstate Ins. Co.**, 663 F.3d 1329, 1332 (11th Cir. 2011).


7. **Brown v. JEVIC**, 575 F.3d 322, 326 (3d Cir. 2009) (emphasis added)); **Brown** was not a diversity case, but the court said the same principle applied. Id. at 327.

