COMMITTEE NEWS

Federal Practice Committee to Present CLE at 2017 PBA Midyear Meeting in St. Kitts

The Federal Practice Committee of the Pennsylvania Bar Association will present a two-hour CLE program, “The Impact of the 2015-16 Term of the Supreme Court of the United States on Federal Practice and a Preview of the Top Cases for 2016-17,” during the PBA Midyear Meeting on Jan. 27, 2017 at the St. Kitts Marriott Resort & The Royal Beach Casino, St. Kitts, West Indies.

Next Committee Meeting - Feb. 20, 2017

The Executive Council will hold its next quarterly meeting on Feb. 20, 2017 at 4:30 p.m. As a general practice all committee members are invited to participate in Executive Council meetings as non-voting members (see Article IV Section 8). This helps keep all committee members engaged and ensures a pool of interested members for potential/future committee leadership. Please mark your calendar and join us if you can. The call-in information will be provided via the PBA Federal Practice listserv. If you have any items of concern, please email the committee chair, co-vice chairs or subcommittee chairs. Their contact information is provided in the newsletter.

Best Sentencing Practices in the EDPA

On Oct. 25, 2016 the PBA Federal Practice Committee assembled a panel of the professionals involved in the federal criminal sentencing process to share best practices gained from their vast and diverse experience as federal prosecutor, defense counsel, probation officer, and district and appellate court judges’ perspectives. The one-hour CLE program titled, “Best Sentencing Practices in the EDPA,” was held at the William H. Hastie Library of the U.S. Court of Appeals for the Third Circuit in Philadelphia. A networking reception followed the program.

Panelists:
- Hon. D. Michael Fisher, U.S. Court of Appeals for the Third Circuit
- Hon. Gerald J. Pappert, U.S. District Court, Eastern District of Pennsylvania
- Nina Spizer, Chief, Trial Unit, Federal Community Defender for the Eastern District of Pennsylvania
- Leslie Maxwell, Senior U.S. Probation Officer, Sentencing Guidelines Specialist, Eastern District of Pennsylvania
- Thomas R. Perricone, Assistant United States Attorney, Chief, Narcotics and Organized Crime, Eastern District of Pennsylvania

Moderator:
- Philip Gelso, PBA Federal Practice Committee member, Law Offices of Philip Gelso

Course planners:
- Melinda C. Ghilardi, Co-Vice Chair of the PBA Federal Practice Committee, First Assistant Federal Public Defender, Middle District of PA
- Philip Gelso, PBA Federal Practice Committee member, Law Offices of Philip Gelso

U.S. Supreme Court Roundup

Hon. D. Michael Fisher, U.S. Court of Appeals for the Third Circuit, Pittsburgh served as the course planner for the August 24, 2016 “PBI 5th Annual U.S. Supreme Court Roundup.” The CLE program was live in Philadelphia and simulcast to other locations.
A Step-by-Step Journey through the Trial of a Federal Case

On Aug. 30, 2016 the committee provided a CLE program entitled, “A Step-by-Step Journey through the Trial of a Federal Case.” The program was held in Southpointe in western Pennsylvania. It was a highly successful program with excellent reviews. Participants indicated they liked the mock trial format. The program examined topics such as: appointment of a special master for discovery, ethics issues that can arise during protracted litigation, consent to conduct of proceedings by Magistrate Judge, summary judgment and Daubert motions. The two-hour program included one hour of substantive and one hour of integrated ethics credit. The program was followed by a well-attended one-hour networking reception with hors d’oeuvres and an open bar.

Panelists:
- Hon. D. Michael Fisher, U.S. Court of Appeals for the Third Circuit
- Hon. Maureen P. Kelly, U.S. Chief Magistrate Judge, Western District of PA
- Anne N. John, John & John
- Jeremy A. Mercer, Norton Rose Fulbright US LLP

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

SUBCOMMITTEES

Reports from the Chairs

Newsletter Subcommittee:
The Newsletter Subcommittee submitted for the FPC Executive Council’s consideration a proposal to use a LinkedIn “unlisted” group to provide FPC members with an opportunity to engage in dialogue over Open Forum questions.

-Susan Schwochau
If you’ve been relying on the 3-day rule when something is electronically served, know that this luxury disappears on Dec. 1.

Other changes include amendments designed to clarify and improve the inmate-filing rules (to Rules 4(c)(1) and 25(a)(2)(C), Forms 1 and 5; new Form 7); to clarify that a post-judgment motion restarts the time for taking an appeal only if it is filed within the time allowed by the Rules of Civil Procedure (Rule 4(a)(4)); and to establish rules for the treatment of amicus filings in connection with petitions for rehearing (new Rule 29(b)).

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 when Judge Marjorie Rendell assumed senior status. The nomination was referred to the Committee on the Judiciary. As of Sept. 30, no additional action has been taken.
- There is one additional vacancy (due to Judge Fuentes’ move to senior status).

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. As of Sept. 30, no additional action has been taken.
- There is one additional vacancy (due to Judge Gibson’s move to senior status).

U.S. District Court, Eastern District of PA
- On July 30, 2015, President Obama nominated Judge John M. Younge to fill the vacancy created when Judge Mary McLaughlin assumed senior status. A Senate Judiciary Committee hearing was held Dec. 9, 2015. As of Sept. 30, no additional action has been taken.
- 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 July and September 2016 that involved issues of potential interest to FPC members. The Court of Appeals issued 70 opinions in this quarter, including 5 en banc opinions. Because it was impossible to narrow this list to the 10 “most” important or interesting to our diverse membership, more than 10 opinions are summarized.

THIRD CIRCUIT PRECEDENTIAL OPINIONS

**Doe v. Hesketh,** 828 F.3d 159 (3d Cir. 2016) (Statutes [Masha’s Law] / Appellate Jurisdiction) – After dismissing one defendant pursuant to a settlement agreement and 12 others due to the lack of personal jurisdiction, the district court set aside the default entered against Defendant-appellee Mancuso and dismissed Doe’s Masha’s Law claim against him, concluding that his payment of “mandatory restitution” to Doe as part of his plea agreement barred Doe’s claim. Uncertain whether all defendants had been dismissed with prejudice, the Court of Appeals first assessed whether it had jurisdiction. Because Doe represented to the Court’s satisfaction that she would not re-file in the district court her claims against the 12 defendants, the Court proceeded to the merits, holding that (1) Masha’s Law permits a victim to bring a civil claim for the violation of a predicate statute even where that victim has previously received criminal restitution for the same violation of that statute for her purported full damages; and (2) collateral estoppel did not prevent Doe from litigating the question of her damages based on Mancuso’s criminal conduct. The Court reversed the district court’s dismissal and vacated its judgment setting aside the default entered against Mancuso.

**Richardson v. Director,** Federal Bureau of Prisons, 829 F.3d 273 (3d Cir. 2016) (Class Action / Federal Court Jurisdiction) – Richardson claimed that USP Lewisburg’s pattern, practice, or policy of placing Special Management Unit program inmates in cells with hostile cellmates violated his constitutional rights; his amended complaint sought class-wide injunctive relief for all current and future prisoners in the same program. Six weeks after filing the amended complaint, Richardson was transferred out of Lewisburg. The district court granted defendants’ motion to dismiss the class certification request in the amended complaint, concluding that the class definition was “untenable because it [was] not objectively, reasonably ascertainable.” In this interlocutory appeal, defendants admitted that under Shelton v. Bledsoe, 775 F.3d 554 (3d Cir. 2015), Richardson’s class claims would survive, but urged that those claims had become moot. The Court of Appeals vacated the district court’s order, concluding that (1) under the “picking off” exception to mootness, the denial of class certification could relate back to the date of Richardson’s amended class complaint, and the subsequent mooting of those claims because of his transfer did not prevent him from continuing to seek class certification or from serving as the class representative, and (2) Richardson’s allegations were sufficient to prevent at the motion to dismiss stage a mootness determination under Spomer v. Littleton, 414 U.S. 514 (1974).

**Langbord v. U.S. Dep’t of the Treasury,** 832 F.3d 170 (3d Cir. 2016) (En Banc) (Statutes [Civil Asset Forfeiture Reform Act] / Evidence) – Finding 10 1933 Double Eagle gold pieces in a safe-deposit box, plaintiffs agreed in 2004 to turn the coins over to the Mint for authentication but reserved “all rights and remedies.” The Mint refused to return them, prompting plaintiffs to file suit alleging, among other things, violations of the Constitution and CAFRA. Reviewing the district court’s judgment in favor of the government after a jury trial, the Court of Appeals concluded that (1) the government did not initiate a “nonjudicial civil forfeiture proceeding” subject to CAFRA’s 90-day deadline and thus missing that deadline imposed no obligation to return the coins; (2) the district court did not err in allowing the government to amend its answer nearly four years after the litigation began with a count seeking a declaration that the coins “were not authorized to be taken from the United States Mint” and therefore remained the property of the U.S.; (3) because the government’s claim was in the nature of a claim to quiet title, it did not have to be submitted to a jury; (4) the multiple-hearsay rule applies to statements made in ancient documents, and as a result, the district court abused its discretion in admitting the hearsay embedded within certain Secret Service reports without applying F.R.E. 805; (5) allowing the government’s...
expert to testify to the embedded hearsay within those Secret Service reports was an abuse of discretion; and (6) the evidentiary errors were harmless. After rejecting plaintiffs’ arguments regarding improper jury instructions, the Court affirmed the district court’s judgment.

*Freedom From Religion Found., Inc. v. New Kensington Arnold Sch. Dist.*, 832 F.3d 469 (3d Cir. 2016) (Federal Court Jurisdiction [Standing]) – A mother, daughter, and a foundation brought suit alleging that the school district violated the Establishment Clause by maintaining a monument of the Ten Commandments at its high school. Reviewing the district court’s grant of summary judgment to the school district on standing and mootness grounds, the Court of Appeals stated that a community member may establish standing by showing direct, unwelcome contact with the allegedly offending object or event, regardless of whether such contact is infrequent or whether she doesn't alter her behavior to avoid it. Applying that standard, the Court concluded that the mother had standing to pursue nominal damages and injunctive relief and that her request for injunctive relief was not moot. The Court affirmed the district court’s judgment as to the daughter’s claim for nominal damages, but vacated the order dismissing the foundation’s claims to allow the district court to consider whether the mother was a member of the foundation at the time the complaint was filed.

*S.D. v. Haddon Heights Bd. of Educ.*, 833 F.3d 389 (3d Cir. 2016) (Civil Rights - IDEA) – Parents’ suit asserted claims under the ADA, Section 504 of the Rehabilitation Act, and § 1983 and alleged discrimination and retaliation by the board of education based on their son’s disability and assertion of his Section 504 rights. The district court, relying on *Batchelor v. Rose Tree Media School District*, 759 F.3d 266 (3d Cir. 2014), dismissed the action for lack of subject-matter jurisdiction because parents had not exhausted the IDEA’s administrative process. The Court of Appeals reiterated that the ultimate question under *Batchelor* and § 1415(l) of the IDEA is whether a non-IDEA claim “relate[s] to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.” Narrowly extending the holding of *Batchelor*, the Court concluded that Appellants’ alleged injuries were educational in nature and implicated services within the purview of the IDEA, and that their claims were subject to the IDEA exhaustion requirement. The Court affirmed the district court’s judgment.

*Brown v. Superintendent Greene SCI*, ___ F.3d ___, 2016 WL 4434398 (3d Cir. Aug. 22, 2016) – During petitioner’s trial, his co-defendant’s redacted confession was read to the jury, and the jury was instructed that the confession could only be used against the co-defendant and not as evidence against petitioner. Because the prosecutor’s closing argument allowed the jury to identify petitioner as the person whose name was redacted, petitioner sought habeas relief on the ground that *Bruton v. United States*, 391 U.S. 123 (1968), had been violated. Reviewing the district court’s denial of the petition, the Court of Appeals held that, as a matter of clearly established Supreme Court law, the prosecutor’s comments violated the Confrontation Clause; this was a case in which, like *Bruton*, limiting instructions could not cure the harm created from the jury’s exposure to the incriminating confession. Because under the circumstances the error was not harmless, the Court reversed the district court’s order and remanded with instructions for it to grant the petition and require the Commonwealth either to release Brown or retry him within a specified and reasonable time period.

*Goldman v. Citigroup Global Markets Inc.*, ___ F.3d ___, 2016 WL 4434401 (3d Cir. Aug. 22, 2016) (Arbitration / Federal Court Jurisdiction) – The Goldmans sought to have an adverse arbitration award vacated, alleging breach of FINRA Arbitration and Mediation contracts and violations of FINRA rules. The district court dismissed the Goldmans’ suit for lack of subject-matter jurisdiction. Because the FAA does not itself create federal subject-matter jurisdiction, and because the Goldmans pointed to no federal law as the reason there should be a vacatur, the Court of Appeals considered whether “arising under” jurisdiction existed under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005). The Court rejected the Goldmans’ arguments as to the existence of such jurisdiction, holding that (1) a district court may not look through a § 10 motion to vacate to the underlying subject matter of the arbitration (here securities...
law) in order to establish federal question jurisdiction; and (2) even if “manifest disregard” was a valid basis for vacatur, the Goldmans’ principal complaint was not that the award was rendered in manifest disregard of federal law, but was instead that partiality, corruption, and ineptitude infected the arbitration process. The Court also rejected the Goldmans’ argument that alleged violations of FINRA rules raise questions of federal law. The district court’s judgment was affirmed.

**U.S. v. Browne,** ___ F.3d ___, 2016 WL 4473226 (3d Cir. Aug. 25, 2016) (Evidence) – Browne, who admitted he had a Facebook account under the name of “Billy Button,” challenged his conviction of child pornography and sexual offenses with minors on the ground that Facebook’s records of chats involving the Button account should not have been admitted into evidence because the government failed to establish that he was the author of the communications, i.e., failed to properly authenticate them. The Court of Appeals rejected the government’s argument that the five sets of chats were business records that were properly authenticated under F.R.E. 902(11) by way of a certificate from Facebook’s records custodian, and held that the government was required to introduce enough evidence such that the jury could reasonably find that Browne authored the Facebook messages at issue. The Court examined testimony from various individuals, including Browne, and concluded that the government had provided more than enough evidence to support that the disputed Facebook records reflected Browne’s online conversations with an 18-year old and with several minors. Although the Court concluded that one of the five sets of chats should not have been admitted because it was hearsay, the error was harmless because witness testimony largely duplicated the improperly admitted record. The district court’s judgment was affirmed.

**Chavez v. Dole Food Company, Inc.**, ___ F.3d ___, 2016 WL 4578641 (3d Cir. Sept. 2, 2016) (En Banc) (Federal Court Jurisdiction / First-Filed Rule) – Applying the first-filed rule, the district court dismissed with prejudice foreign agricultural workers’ tort claims against their employers and chemical companies because plaintiffs had previously initiated an identical action in Louisiana. As a result, it also denied plaintiffs’ request to transfer to New Jersey claims against one defendant over which the court did not have personal jurisdiction. The Court of Appeals, after reviewing relevant case law and treatises, concluded that because federal courts have an obligation to hear cases within their jurisdiction, district courts applying the first-filed rule should generally avoid terminating a claim that has not been, and may not be, heard by another court, and instead should “in the vast majority of cases” stay or transfer a second-filed suit. Because this case did not entail the type of circumstances in which justice required responding to a second-filed suit with a prejudice-based dismissal, the Court held that the district court abused its discretion. The Court also held that the district court erred in not transferring claims to New Jersey after finding no personal jurisdiction over one defendant. Finally, the Court held that the timeliness dismissals entered by the Louisiana District Court did not create a res judicata bar to the plaintiffs’ resurrected suits. The district court’s dismissals were vacated, and the case was remanded.

**Hartig Drug Co. Inc. v. Senju Pharmaceutical Co. Ltd.**, ___ F.3d ___, 2016 WL 4651381 (3d Cir. Sept. 7, 2016) (Antitrust [Antitrust Standing]) – An indirect purchaser who asserted antitrust standing via assignment from a direct purchaser filed a putative class action claiming that defendants violated the Sherman Act. One defendant countered with a Rule 12(b)(1) motion arguing that an agreement between it and the direct purchaser (which was attached to the motion but never mentioned in Hartig’s complaint) prevented assignment. The district court held that Hartig lacked standing and dismissed the case on subject-matter grounds. The Court of Appeals, describing the differences between Article III standing (a jurisdictional issue) and antitrust standing (not a jurisdictional issue), and the differences between a Rule 12(b)(6) motion (must take all allegations as true) and a factual challenge to jurisdiction under Rule 12(b)(1) (consideration of supporting documents possible), the Court vacated the district court’s judgment and remanded, adding, due to considerations of judicial economy, a description of why it had doubts about the district court’s
Binderup v. U.S. Attorney General, ___ F.3d ___, 2016 WL 4655736 (3d Cir. Sept. 7, 2016) (En Banc) (Constitution [Second Amendment]) – In separate actions, Binderup and Suarez asserted statutory and as-applied constitutional challenges to the federal prohibition on the possession of firearms by any person convicted in any court of a “crime punishable by imprisonment for a term exceeding one year.” 18 U.S.C. § 922(g)(1). Both plaintiffs had been convicted of misdemeanors that carried possible sentences of more than two years, and both received sentences that required no jail time. The district courts rejected plaintiffs’ argument that § 922(g)(1) did not apply to their convictions as a matter of statutory construction, but held that § 922(g)(1) was unconstitutional as applied. Plaintiffs and the government appealed, and the appeals were consolidated for en banc review. Although eight of 15 judges agreed that § 922(g)(1) was unconstitutional as applied to plaintiffs, the judges disagreed as to their rationales for arriving at that conclusion (Judge Ambro preferring a two-step framework that included application of heightened scrutiny; Judge Hardiman preferring a one-step categorical approach; both judges viewing plaintiffs as falling within the scope of individuals having Second Amendment rights but disagreeing on the doctrinal basis for that determination). Seven judges dissented because they would hold that persons who committed any felony or misdemeanor currently within § 922(g)(1)’s scope were disqualified from asserting their Second Amendment rights; four of those seven judges, however, agreed with the constitutional framework applicable to as-applied challenges. Applying that framework to this case, those in dissent would hold that the government satisfied its burden under intermediate scrutiny. In short, the opinion is, as Judge Ambro repeatedly described, “fractured.”

Chassen v. Fidelity Nat’l Financial Inc., ___ F.3d ___, 2016 WL 4698256 (3d Cir. Sept. 8, 2016) (Arbitration [Waiver]) – In an action under New Jersey law filed in early 2009, plaintiffs, seeking to represent a putative class of New Jersey real estate purchasers and refinancers, alleged that defendants’ agents intentionally charged them more than the county clerk charged for recording documents and pocketed the difference. Over two years later, the Supreme Court decided AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011), and within a few months of that decision, defendants moved to compel individual (versus class) arbitration. The district court granted the motion, ruling that any attempt to compel individual arbitration prior to Concepcion would have been futile under New Jersey law. In an interlocutory appeal, the Court of Appeals held that (1) futility can excuse the delayed invocation of the defense of arbitration; (2) because individual (bipolar) arbitration and class arbitration are distinct, each can be independently waived and thus each must receive a separate futility analysis; (3) the appropriate test for futility is whether assertion of a right to the particular form of arbitration (individual or class) was almost certain to fail; (4) whether or not class arbitration was available, defendants’ assertion of a right to individual arbitration was almost certain to fail under New Jersey law prior to Concepcion; and (5) in this case, waiver was inappropriate for the 3-month period between the issuance of Concepcion and the filing of the motion to compel arbitration.

Wallach v. Eaton Corp., ___ F.3d ___, 2016 WL 4791849 (3d Cir. Sept. 14, 2016) (Antitrust [Standing] / Civil Procedure) – The district court dismissed this antitrust action after concluding that the putative class representative lacked standing and denying, on untimeliness grounds, the motion of two possible replacement representatives to intervene as of right. The appeal raised two primary issues: whether consideration was necessary to support an assignment of antitrust claims from a direct purchaser to an indirect purchaser, and whether the presumption that a motion to intervene by a proposed class representative is timely if filed before the class opt-out date applied in the pre-certification context in addition to after the class is certified. After satisfying itself that the approach to assignments taken in the Restatement of Contracts comported with the underlying purpose and goals of federal antitrust law, the Court of Appeals held that assignment of a federal antitrust claim need not be supported by bargained-for consideration in order to confer direct purchaser standing on an indirect purchaser. Because the assignment here satisfied the requirement that it be express, the Court...
reversed the district court’s dismissal of the putative class representative. As to the intervention issue, the Court concluded that the presumption of timeliness was applicable to the pre-certification context, and also that the district court erred in balancing the three factors associated with the timeliness determination. Examining those factors itself (rather than remanding), the Court concluded that two of the factors weighed in favor of the motion being timely, and thus it reversed the district court’s ruling on the intervention issue as well.

**FTC v. Penn State Hershey Med. Ctr., ___ F.3d ___, 2016 WL 5389289 (3d Cir. Sept. 27, 2016) (Antitrust)** – The FTC filed an administrative complaint alleging that a proposed merger between two hospitals violated the Clayton Act; it sought from the district court a preliminary injunction to prevent the merger before the administrative adjudication could occur. The district court denied the motion, finding that the government had failed to meet its burden to properly define the relevant geographic market. The government appealed. The parties agreed that the hypothetical monopolist test was the correct standard to apply. The Court of Appeals concluded that the district court did not properly formulate the hypothetical monopolist test, and it did not properly apply that test. Turning to the question of whether the government met its burden to properly define the relevant geographic market, the Court concluded that it had. The Court reversed the district court’s denial of the preliminary injunction motion and directed the court to preliminarily enjoin the proposed merger.

**EASTERN DISTRICT OF PA OPINIONS**

**Lopez v. Bucks Cnty., 2016 U.S. Dist. LEXIS 87383 (E.D. Pa. July 5, 2016) (Relation back under FRCP 15)** – In this civil rights wrongful death and survival action, filed just shy of the two-year statute of limitations, estate sought leave to amend the complaint to identify six medical John Does and three correctional John Does, and an extension of the time for service, *nunc pro tunc*. County argued that leave to amend should be denied as futile because the statute of limitations had run on claims against correctional John Does and the proposed amendment did not relate back to the date of the original complaint. Examining whether individual correctional officers sought to be added received notice of the action during the Rule 4(m) service period, Judge J. Sánchez held that Rule 15(c)(1)(C)’s notice period could be extended for good cause. Finding good cause in this case, the Court granted the request to extend the Rule 4(m) service period, and therefore found the second requirement for relation back satisfied. Because the other requirements for relation back were also met, the Court granted the motion for leave to amend.

**Wall v. Cont’l Kraft Corp., 2016 U.S. Dist. LEXIS 92788 (E.D. Pa. July 18, 2016) (Motion to dismiss or transfer)** – Wall, who previously worked as sales director in the United States for a joint venture between a U.S. and German firms, asserted that defendants breached their contract with him and violated Pennsylvania’s Wage Payment and Collection Law (WPCL). Defendants sought (1) dismissal for lack of personal jurisdiction, (2) dismissal under the doctrine of *forum non conveniens* (preferring a German forum) or alternatively, transfer to the Southern District of New York; and (3) dismissal of the WPCL claim because Wall was not an “employee” and was instead an independent contractor. Judge G. Pappert concluded that Wall had satisfied his burden of showing that the Court had specific jurisdiction over the defendants. The Court also denied defendants’ request to dismiss on *forum non conveniens* grounds, given the deference to Wall’s chosen forum and the private and public interest factors that weighed against dismissal. In the course of this discussion, the Court assessed whether Pennsylvania law or German law would apply to the contract, ultimately concluding that defendants had failed to meet their burden to show the application of German law in part because they had failed to follow the dictates of FRCP 44.1. The Court also denied the defendants’ request to transfer the case to the Southern District of New York and their Rule 12(b)(6) motion to dismiss Wall’s WPCL claim.

**Jones v. LVNV Funding, LLC, 2016 U.S. Dist. LEXIS 94364 (E.D. Pa. July 20, 2016) (Claim preclusion)** – After Jones obtained a judgment in his favor in a state-court debt collection action, he filed claims for common-law defamation and violations of the Fair Debt Collection
Practices Act, the Fair Credit Reporting Act and of Pennsylvania statutes against those who had initiated the earlier action. Defendants moved for dismissal under Rule 12(b)(6) on claim preclusion grounds, arguing that Jones’ claims were precluded because he didn’t raise them as counterclaims in the debt collection action. Judge M. Baylson, applying Pennsylvania’s preclusion principles because the earlier action was in a Pennsylvania court, concluded that Jones’ action was not barred. For claim preclusion to apply under Pennsylvania law, the state-court action had to be subject to a compulsory counterclaim rule, and Pennsylvania Rules of Civil Procedure do not compel counterclaims. The Court stated that even if federal claim preclusion rules applied, Jones’ suit would not be barred because his claims arose from a different transaction or occurrence. The defendants’ motion, therefore, was denied.

Clientron Corp. v. Devon IT, Inc., 2016 U.S. Dist. LEXIS 95705 (E.D. Pa. July 22, 2016) (Personal liability for corporate debt) – Jury found in favor of Clientron in this breach-of-contract case, awarding it $737,018.00 in damages, but in an advisory verdict, found that Devon IT’s corporate veil should not be pierced. The Court entered an order of judgment on the jury verdict. Clientron moved for an order that Devon IT’s owners – who were husband and wife – were personally liable for Devon IT’s debts to Clientron. Construing Clientron’s motion as invoking Rule 52(a)(1), Judge M. Baylson entered findings and conclusions of law with respect to the corporate veil issue, and held that because Clientron failed to satisfy its burden of proof at trial as to alter-ego liability, the Court would adopt the jury’s advisory verdict as to the two individual defendants. “Separate and apart” from that holding, however, the Court decided to hold the husband (but not the wife) personally liable for Devon IT’s debts to Clientron as a sanction for his discovery misconduct, which impeded Clientron’s ability to prove alter ego liability.

Bradshaw v. Capacity of Tex. Inc., 2016 U.S. Dist. LEXIS 115325 (E.D. Pa. Aug. 26, 2016) – Bradshaw, who was injured when he fell while dismounting a “trailer jockey” yard tractor made by defendant, brought a products liability claim alleging that the trailer jockey was defectively designed and lacked proper warnings. The jury found in favor of defendant. Bradshaw sought post-trial relief under FRCP 50 and 59. Judge R. B. Surrick denied the motion for judgment as a matter of law because Bradshaw had failed to move for judgment as a matter of law at the close of the evidence and prior to the case being submitted to the jury. Bradshaw’s motion for a new trial was also denied, the Court (1) concluding that sufficient evidence supported the jury’s verdict that although the trailer jockey Bradshaw used on the day of his fall was defective, the defect was not the cause of his injury; (2) rejecting Bradshaw’s argument that defendant had prejudiced the jury on the issue of causation because it had improperly introduced negligence concepts into a strict liability claim; and (3) rejecting Bradshaw’s challenges to the Court’s jury instructions on the “heeding presumption” and on “factual cause,” noting that the “factual cause” challenge was untimely.

U.S. v. Hartline, 2016 U.S. Dist. LEXIS 127025 (E.D. Pa. Sep. 16, 2016) (Criminal Law & Procedure) – After a trial in which the meaning of “capital” was hotly disputed, a jury found defendants guilty of conspiracy to defraud the U.S., major fraud on the U.S. through the TARP, and false statements to the federal government – charges that stemmed from defendants’ attempt to obtain money from TARP by representing to the government that the bank of which one defendant was CEO had obtained additional capital when that “capital” was in actuality a loan given by the bank. Both defendants filed motions for judgments of acquittal under Rule 29 and for a new trial under Rule 33. In an opinion that details the elements of the charged crimes and the evidence elicited at trial, Judge C. D. Jones II explained why he rejected all of defendants’ challenges and denied the motions.

Green v. Police Officer Newton Badge No. 130, 2016 U.S. Dist. LEXIS 130195 (E.D. Pa. Sep. 22, 2016) (Qualified Immunity) – Green alleged in this §1983 action that Officer Newton violated his Fourth Amendment rights by using excessive force in the course of arresting him for unpaid parking tickets. Officer Newton filed a motion seeking either judgment on the pleadings under Rule 12(c) or summary judgment on qualified immunity grounds. Judge L. Stengel, after explaining why he treated the motion as a summary judgment motion, concluded that Officer
Newton was not entitled to qualified immunity: Green had set forth sufficient facts to raise a material question of fact with respect to whether Officer Newton had violated his Fourth Amendment rights (e.g., disputes over whether the officer used of excessively tight handcuffs and whether the officer failed to respond to pleas to loosen them).

_Dalmatia Imp. Grp., Inc. v. FoodMatch, Inc._, 2016 U.S. Dist. LEXIS 134205 (E.D. Pa. Sep. 29, 2016)(Contention interrogatories before close of discovery) – FoodMatch objected to served interrogatories on the ground that they were contention interrogatories to which it could not properly respond until the close of discovery. Dalmatia sought an order compelling answers. Magistrate Judge M. Heffley, after reviewing caselaw dealing with “early” contention interrogatories, granted Dalmatia’s request in part. Noting that the interrogatories were only in part contention interrogatories, the Court ordered FoodMatch to respond to those portions that sought the identification of documents and witnesses, but allowed it until the close of discovery to respond to the “contention” portions.

**MIDDLE DISTRICT OF PA OPINIONS**

_Barnard v. Lackawanna County_, ___ F. Supp. 3d ___, 2016 WL 3654473 (M.D. Pa. July 8, 2016) (Waiver of First Amendment rights / Written instruments under Rule 10(c)) – Barnard, a county employee and a member of AFSCME, alleged that in suspending her after she participated in union picketing with the Lackawanna County Children & Youth unionized workers on May 14, 2015, defendants engaged in First Amendment retaliation for her participation in First Amendment protected activities. Defendants filed an answer, to which they attached exhibits to support and supplement their responses and statements made in the answer. Barnard filed a motion to strike the answer and defendants sought judgment on the pleadings under Rule 12(c). Judge M. Mannion first concluded that the exhibits attached to the answer were “written instruments” for the purpose of Rule 10(c), and thus could be deemed incorporated into the defendants’ answer for all purposes. Thus, Barnard’s motion to strike was denied. Turning to the defendants’ arguments supporting dismissal, the Court concluded that Barnard participated in a sympathy strike that was precluded by the collective bargaining agreement that her union negotiated and to which she was bound. Because that agreement clearly and plainly waived her First Amendment right to participate in a sympathy strike, Barnard could not state a claim for First Amendment retaliation. The Court, therefore, granted defendants’ Rule 12(c) motion.

_Zimmerman v. Corbett_, ___ F. Supp. 3d ___, 2016 WL 3855573 (M.D. Pa. July 15, 2016) (Qualified Immunity) – After criminal charges related to the “Boxgate” conspiracy were voluntarily dismissed, Zimmerman filed malicious prosecution claims under the Fourth and Fourteenth Amendments against numerous defendants. Arguing they were entitled to qualified immunity, defendants sought dismissal under Rule 12(c) of claims premised on allegations that (1) they manufactured witness testimony and intimidated witnesses prior to the grand jury proceedings, (2) they destroyed exculpatory evidence, and (3) one defendant signed a criminal complaint and affidavit of probable cause that contained false and misleading statements. Judge Y. Kane (1) concluded that Zimmerman had adequately alleged a Fourth Amendment seizure; (2) rejected defendants’ definition of the right allegedly violated as a due process right implicating _Brady v. Maryland_, (3) rejected defendants’ contention that two defendants were presumptively entitled to qualified immunity because they relied in good faith on a legal opinion. Relying on _Halsey v. Pfeiffer_, 750 F.3d 273 (3d Cir. 2014), the Court concluded that a reasonable investigator would have understood that “knowingly us[ing] fabricated evidence to bring about [a] prosecution or to help secure [a] conviction, particularly if the investigators themselves had fabricated the evidence,” would violate a defendant’s constitutional rights. The Court, therefore, denied the motion without prejudice.

_Perez v. Great Wolf Lodge of the Poconos LLC_, ___ F. Supp. 3d ___, 2016 WL 4051282 (M.D. Pa. July 26, 2016) (Torts) – Perez sustained head and neck injuries when he was separated from the four-person vehicle he was in while riding the “Double Barrel Drop,” a “high thrill” waterslide, and he brought a negligence action against the waterpark operator. Defendants sought summary judgment. Judge R. Mariani concluded the “no duty” rule did not bar Perez’s claim because (1) defendants failed to point to
evidence supporting a finding that the risk of a head/neck injury resulting from ejectment from the ride’s vehicle was known or obvious to Perez, and that despite his awareness of that risk, he voluntarily assumed it, and (2) defendants’ argument that it did not owe Perez a duty because the injury he complained of is common and inherent in high thrill waterslides failed as a matter of law. The Court rejected defendants’ arguments that plaintiffs were unable to show causation or their entitlement to punitive damages because it found that plaintiffs had submitted sufficient evidence to raise a fact question as to these issues. The Court also concluded that Great Wolf Resorts was a proper defendant and that it could be vicariously liable under the circumstances presented. The defendants’ motion was denied. The opinion may also be notable for the Court’s reaction to plaintiffs’ “evasive” responses to defendants’ statement of undisputed facts: it deemed admitted listed paragraphs in defendants’ statement. See fn 1.

**Chesapeake Appalachia, L.L.C. v. Ostroski, ___ F. Supp. 3d ___, 2016 WL 4179583 (M.D. Pa. Aug. 8, 2016) (Class Arbitration)** – The Ostroskis, whose lease agreement with Chesapeake Appalachia, L.L.C. gave Chesapeake the right to explore for and produce gas from the Ostroski property, filed an arbitration demand against Chesapeake asserting claims related to the lease and the calculation of royalties thereunder. In the arbitration, the Ostroskis sought to represent a statewide putative class of individuals who were, or had been, royalty owners under a lease agreement with Chesapeake. Chesapeake filed a federal action seeking an injunction barring the Ostroskis from pursuing any class claims against Chesapeake asserting claims related to the lease and the calculation of royalties thereunder. In the arbitration, the Ostroskis sought to represent a statewide putative class of individuals who were, or had been, royalty owners under a lease agreement with Chesapeake. Chesapeake filed a federal action seeking an injunction barring the Ostroskis from continuing to pursue any class claims against Chesapeake in the already filed arbitration or in any other arbitration. It was undisputed that the lease’s arbitration clause was silent as to class arbitration. Reviewing Chesapeake’s motion for summary judgment, Judge J. Jones III first concluded that the FAA, rather than the PAA, applied because the lease involved interstate commerce. The Court, applying recent U.S. Supreme Court decisions, concluded that the arbitration clause’s silence meant that the lease did not allow the Ostroskis to compel class arbitration, and it granted Chesapeake’s motion.

**Reilly v. City of Harrisburg, ___ F. Supp. 3d ___, 2016 WL 4539207 (M.D. Pa. Aug. 31, 2016) (Constitution [First Amendment])** – Plaintiffs asserted that a city ordinance requiring demonstrators to remain a 20 feet from the entrances, exits and driveways of health care facilities violates the First and Fourteenth Amendments, both facially and as applied. Defendants sought dismissal under Rule 12(b)(6); plaintiffs sought a preliminary injunction. Judge S. Rambo granted defendants’ motion in part and denied it in part, concluding that (1) intermediate scrutiny applied because the ordinance is a content-neutral time, place, or manner restriction upon speech; (2) based on the ordinance’s language and on Supreme Court precedent, plaintiffs failed to state a claim that the ordinance is unconstitutionally vague; (3) the ordinance is not a prior restraint; (4) plaintiffs’ assumption that the ordinance is not enforced at other health care facilities throughout Harrisburg coupled with the “naked assertion” that the ordinance is an unreasonable policy did not state a plausible selective enforcement claim; (5) because plaintiffs’ substantive due process was a disguised First Amendment claim, the due process claim would be dismissed (the same was true of the equal protection claim); and (6) plaintiffs had not stated a free exercise claim. The Court also agreed that claims against the Harrisburg City Council and the mayor should be dismissed because they were redundant parties to the City of Harrisburg, which was the real party in interest. First Amendment free speech, free press, and free assembly claims passed muster, as did plaintiffs’ overbreadth claim. Turning to plaintiffs’ motion for a preliminary injunction, the Court found that plaintiffs had failed to show a probability of success on their First Amendment claims, and denied that motion.

**U.S. v. Harris, ___ F. Supp. 3d ___, 2016 WL 4539183 (M.D. Pa. Aug. 31, 2016) (Habeas Corpus / ACCA)** – Harris filed a petition to vacate, set aside or correct his sentence under 28 U.S.C. §2255, arguing that his sentence – which was imposed on him under the Armed Career Criminal Act (ACCA) – was no longer valid in light of Johnson v. United States, ––– U.S. ––––, 135 S.Ct. 2551 (2015). Judge W. Caldwell decided that Harris procedurally defaulted the claim that the ACCA’s residual clause was...
unconstitutionally vague by not raising it on direct appeal, but that Harris had shown cause for the default (the claim was not reasonably available in light of extant decisions at the time) and prejudice to him from the default. Turning to the merits, the Court thoroughly examined each of Harris’ prior convictions to assess whether they could qualify him as an armed career criminal under the ACCA. Based on that examination, the Court concluded that Harris’ motion appeared to be successful in that he had only one of the three convictions necessary. The Court, however, granted the government the opportunity to show by Shepard documents that any two or more of the following convictions qualified as a violent felony: (1) the June 1995 conviction for escape; (2) the 1987 or 1995 aggravated assault conviction; and (3) the June 1987 or February 1990 conviction for robbery.

Highhouse v. Wayne Highlands School Dist., ___ F. Supp. 3d ___, 2016 WL 4679012 (M.D. Pa. Sept. 7, 2016) (Fourth Amendment [Student strip searches]) – High school vice principal and a teacher strip-searched Highhouse, a 16-year old high school student, believing he stole $250 that another student left in the gym locker room. Highhouse filed a complaint asserting federal civil rights claims under the Fourth, Fifth, and Fourteenth Amendments and seeking compensatory and punitive damages. Defendants moved to dismiss the complaint under Rule 12(b)(6). Judge J. Munley concluded that (1) because the complaint failed to allege that they directed, participated in, knew of, or acquiesced in the alleged unconstitutional conduct, claims against the school superintendent and the principal would be dismissed; (2) plaintiff’s claims against the vice principal and teacher in their official capacities would be dismissed because the School District was also named in each surviving claim where individual defendants were named; (3) plaintiff’s Fifth Amendment Due Process claim against the vice principal and teacher would be dismissed because the Fifth Amendment restricts the actions of federal officials, not state actors; and (4) because claims for punitive damages not available against the School District or the other defendants in their official capacities, those claims would be dismissed. Defendants’ motion was denied as to plaintiff’s claims that the vice principal and teacher subjected him to an unlawful search and seizure in violation of his Fourth Amendment rights, his claims of municipal liability against the School District, and his claim for punitive damages against the vice principal and teacher. The Court also held that at this stage in the case, qualified immunity failed to shield the vice principal and teacher from individual liability.

Balon v. Enhanced Recovery Company, Inc., ___ F.R.D. ___, 2016 WL 4992099 (M.D. Pa. Sept. 15, 2016) (Civil Procedure) – In this action under the Fair Debt Collection Practices Act, Balon moved to strike two of the defendant debt collector’s affirmative defenses: the bona fide error defense and the statute of limitations defense. Judge W. Nealon held that, although Balon’s motion was untimely under Rule 12(f)(2), the court could decide it because the Rule allows a court to act “on its own,” and because Balon’s motion seemed to have merit. Based on decisions of other courts that had addressed the issue, Judge Nealon concluded that, because it constitutes an allegation of mistake, defendant’s bona fide error defense asserted pursuant to § 1692k(c) was subject to the heightened pleading standard of Rule 9(b). Because defendants’ defense did not allege the “who, what, when, where and how” of the claimed bona fide error, it would be stricken without prejudice. The Court also struck the statute of limitations defense without prejudice because there was no dispute that Balon’s complaint was filed prior to the expiration of the FDCPA’s one-year statute of limitations.

Borrell v. Bloomsburg Univ., 2016 WL 4988061 (M.D. Pa. Sept. 19, 2016) (Civil Rights - §1983) – In this § 1983 action, Borrell alleged that her Fourteenth Amendment due process rights were violated when she was dismissed from a university anesthesia program for refusing to take a drug test. Defendants’ liability was decided on summary judgment; a jury trial focused on damages. After the jury awarded Borrell $415,000 in compensatory damages and $1.1 million in punitive damages, defendants filed post-trial motions, and Borrell filed a motion seeking attorney fees and costs. Judge A.R. Caputo’s extensive opinion presents a detailed analysis of the defendants’ motions, which raised numerous challenges (including to the Court’s summary judgment and evidentiary rulings) and diverse issues, including among other things, application of the law of
the case, failure to seek reconsideration, apportionment of compensatory damages, waiver of the defense of qualified immunity, whether trial evidence to supported the award of any compensatory damages or punitive damages, whether evidence supported the amount awarded in damages as compensation for the denial of due process or the amount awarded in punitive damages, and whether improper statements during counsel's closing warranted a new trial. Ultimately, the Court rejected most of the defendants' challenges, but because the jury's compensatory and punitive damages awards were excessive in light of the evidence at trial, granted defendants' requests for remittitur, providing Borrell the option of a new trial if she did not accept the remittitur of either damage award. In an equally detailed manner, the Court explained why it was granting Borrell's request for attorney fees and costs only in part.

Johnson v. Wetzel, ___ F. Supp. 3d ___, 2016 WL 5118149 (M.D. Pa. Sept. 20, 2016) (Preliminary Injunction) – Convicted of murder, Johnson was sent to prison in 1973, and was put into solitary confinement after a violent escape attempt in 1979. Although his early years of confinement saw him accrue numerous misconducts, including accusations of two other attempts at escape, he had not been disciplined for any serious misconduct since 1987, and was described as “the model inmate” by a deputy superintendent. Nonetheless, he was kept in solitary confinement and was designated to stay there indefinitely. Johnson filed a complaint asserting, among other things, that his 36+ year placement in solitary confinement violated the Eighth Amendment’s proscription against cruel and unusual punishment. In an opinion that details the conditions under which Johnson lived, its effects, and the applicable law, Chief Judge C. Conner explained the bases for his decision to grant Johnson’s motion for a preliminary injunction and to compel his gradual reintegration to the general prison population.

WESTERN DISTRICT OF PA OPINIONS

Estate of Thomas v. Fayette County, ___ F. Supp. 3d ___, 2016 WL 3639887 (W.D. Pa. July 8, 2016) (Expert opinions at the summary judgment stage) – After his suicide, pre-trial detainee's estate raised deliberate indifference claims under the Fourteenth Amendment and a wrongful death claim under Pennsylvania Wrongful Death and Survival Act. Judge M. Hornak denied plaintiff's motion to strike defendants' experts, concluding they provided reliable and relevant opinions that could assist the trier of fact. After describing how a movant's expert opinion testimony may be considered at the summary judgment stage given the notion that “the trier of fact is not bound to accept expert opinion, even if it is uncontradicted,” the court granted defendants' motion for summary judgment, concluding that the record (1) would not support a finding that the detainee's suicide was caused by a constitutional violation by any individual prison official; (2) would not support an inference that any individual medical or prison official was deliberately indifferent to the detainee's or that any individual medical or prison official acted with a reckless indifference to a particular risk of suicide which was known or should have been known; and (3) would not support a conclusion that any of the alleged policies, actions, or inaction underlying the municipal liability, failure to train, or failure to supervise claims actually caused the detainee's alleged constitutional harm. Having dismissed the federal claims, the court declined jurisdiction over the state-law claim.

U.S. v. Dinh, ___ F. Supp. 3d ___, 2016 WL 3654547 (W.D. Pa. July 8, 2016) (Habeas Corpus) – Dinh moved under 28 U.S.C. § 2255 to vacate, set aside or correct his sentence, asserting that his federal conviction for conspiracy to distribute marijuana should be set aside and that his sentence of 18 months' incarceration should be vacated due to the Commonwealth of Pennsylvania's subsequent passage of legislation authorizing the distribution of medicinal marijuana within the Commonwealth. Judge N. Fischer denied the motion, explaining that (1) changes in state law do not provide grounds for relief under § 2255(a), (2) Pennsylvania law did not authorize anyone to distribute marijuana within the Commonwealth during the operative time period charged in the Indictment, and (3) Dinh's California Cannabis Patient Card, which was effective from February 12, 2012 through February 13, 2013, did not authorize him to illegally distribute multi-pound quantities of marijuana in Pennsylvania during 2010-2012.
Sloane v. Gulf Interstate Field Svcs., Inc., 2016 WL 4010965 (W.D. Pa. July 27, 2016) (Venue) – Texas resident who worked for Gulf during parts of 2014 at a compression station operated in Wyalusing, Bradford County, Pennsylvania filed a putative class action asserting that Gulf violated the FLSA by not paying overtime. None of the five opt-in plaintiffs worked on projects in Pennsylvania. Judge N. Fisher sua sponte raised the issue of venue at a hearing on Sloane’s motion for conditional certification. Despite being given the opportunity to do so, neither of the parties specifically addressed the court’s venue concerns in any of their supplemental filings. Because the relevant private and public factors set forth in Jumara v. State Farm Ins. Co., 55 F.3d 873, 883 (3d Cir. 1995) supported a discretionary transfer and because Sloane failed to show cause why the matter should not be transferred, the Court concluded that the case should be transferred to the Middle District of Pennsylvania under 28 U.S.C. § 1404(a). It also concluded that it was in the interests of judicial comity to transfer the case without rendering a decision on the pending motion.

Morocco v. Hearst Stations, Inc., 2016 WL 4447798 (W.D. Pa. Aug. 24, 2016) (Jurisdiction / Fraudulent Joiner) – Morocco alleged that defendant news reporter appeared on Hearst Station’s WTAE’s television broadcasts at which time she reported certain facts that Morocco alleged were defamatory and caused an invasion of his privacy. Hearst Stations removed on the basis of diversity, asserting that the Pennsylvania news reporter had been fraudulently joined. Hearst argued that claims against her were frivolous because she did not “publish” the alleged defamatory communications: Only Hearst controlled what was ultimately published. Given the definition of publication under Pennsylvania law and the allegations in the complaint, Magistrate Judge L. Lenihan rejected Hearst Station’s argument, and granted Morocco’s motion to remand.

Gucker v U.S. Steel Corp., ___ F. Supp. 3d ___, 2016 WL 4539614 (W.D. Pa. Aug. 31, 2016) (ADA liability cap, molding of verdict) – Gucker filed a complaint alleging that his employment was unlawfully terminated due to disability in violation of the ADA and the PHRA. A jury found U.S. Steel was liable to Gucker and awarded him $550,000 in compensatory damages and $5,000,000 in punitive damages. The verdict form did not ask the jury to apportion damages between the ADA and the PHRA, and damages were not apportioned. U.S. Steel moved to mold the verdict to conform to the ADA’s statutory cap ($300,000 maximum for compensatory damages; same maximum for punitive damages). Judge N. Fisher granted the motion in part and denied it in part. Although courts in the circuit are split with respect to whether the ADA standard and the PHRA standard continue to be coextensive after the 2008 amendments to the ADA, the Court concluded that, for purposes of this case, the standards could be taken as coextensive. Based on its review of Third Circuit caselaw, the Court decided that apportioning the compensatory damages under the PHRA was both appropriate and consistent with the purpose of both the PHRA and ADA. Finding ample bases for an award of such damages (and noting that the PHRA does not permit such damages) the Court decided that punitive damages up to the ADA’s $300,000 statutory cap (down from $5 million) should be awarded.

Cole’s Wexford Hotel, Inc. v. Highmark, Inc., ___ F. Supp. 3d ___, 2016 WL 5025751 (W.D. Pa. Sept. 20, 2016) (Discovery [Relevance] / Filed-Rate Doctrine) – In this antitrust case, Cole’s Wexford sought discovery of the base rates approved by the Pennsylvania Insurance Department and the actual rates charged by Highmark from 1999 through 2001 and in 2014, and it submitted a dispute over this request to a special master. The special master determined, among other things, that under Rule 26 and pursuant to the filed-rate doctrine, Cole’s Wexford did not satisfy its burden to show that the information it sought was relevant to the subject matter of the litigation. Chief Judge J. Conti adopted the special master’s report and recommendation in part, agreeing that the proposed uses of the requested information would impugn the ratemaking authority of the PID and involve the court in ratemaking – contrary to the filed-rate doctrine. After providing a detailed description of the history and development of Rule 26 in its current form (as of the 2015 amendments), the Court also explained why it could not adopt the special master’s statement that “[d]iscovery requests may be deemed
relevant if there is any possibility that the information may be relevant to the general subject matter of the action.”

**Municipal Water Auth. of Westmoreland Cnty. v. CNX Gas Co., LLC**, 2016 WL 50225752 (W.D. Pa. Sept. 20, 2016) (Local Controversy Exception to CAFA) - Plaintiff filed a putative class action asserting that defendants breached oil-and-gas leases by deducting post production costs from the royalties paid under those leases; defendants removed under CAFA. Plaintiff sought remand to state court, arguing that the local controversy exception applied. Chief Judge J. Conti denied the motion to remand, concluding, upon review of the entirety of the complaint, that the complaint was ambiguous as to whether the class definition encompassed owners of royalties under just Pennsylvania leases or whether owners of royalties under leases in other states were also included. Because the plaintiff bore the burden of proof, the ambiguity meant it could not satisfy its burden to show that greater than two-thirds of the putative class members were citizens of Pennsylvania at the time of removal.

**Pennsylvania Gen. Energy Co., LLC v. Grant Twp.**, 2016 WL 5724437 (W.D. Pa. Sept. 30, 2016) (Mootness). In August 2014, PGE filed an action challenging the constitutionality, validity and enforceability of Grant Township’s Community Bill of Rights Ordinance, which prohibited any corporation or government from “engaging in the depositing of waste from oil and gas extraction” and invalidated any “permit, license, privilege, charter, or other authority issued by any state or federal entity which would violate [this prohibition] or any rights secured by [the Ordinance], the Pennsylvania Constitution, the United States Constitution, or other laws.” Two months later, the PIOGA filed a motion to intervene, along with a proposed intervenor complaint that largely mirrored PGE’s then-operative complaint, but added two claims. A year later (after the case had been reassigned twice), the Court granted PGE’s motion for judgment on the pleadings, invalidating six provisions of the challenged Ordinance, and granted PIOGA’s motion to intervene. The Court directed PIOGA to file an Intervenor Complaint in accordance with the Court’s opinions and orders, but it instead filed a substantially different complaint, which the defendant was later able to have struck. The clerk was directed to file the Intervenor Complaint attached to the October 2014 motion to intervene, which was accomplished in February 2016, after the Court had invalidated portions of the Ordinance. The Township then sought dismissal of PIOGA’s complaint on mootness grounds. Construing the filing date of PIOGA’s Complaint to be October 24, 2014, when the Ordinance had not yet had been declared invalid and when Grant Township was organized pursuant to Pennsylvania’s Second Class Township Code, Magistrate Judge S. Baxter denied the Township’s motion, concluding that certain of PIOGA’s requests for relief remained viable despite the Court’s prior rulings and the repeal of the Community Bill of Rights Ordinance.

### From Around the Web

The link below is to a document that addresses the ABA’s efforts to persuade Congress to enact a specific, limited change to federal diversity jurisdiction. Tom Wilkinson notes that the document raises an interesting issue that the FPC may want to address in some fashion in the future.

Federal Practice Committee Leadership
PBA President Sara A. Austin has appointed the following people to lead the PBA Federal Practice Committee:

Chair: Hon. D. Michael Fisher
U.S. Court of Appeals
Third Circuit, Pittsburgh

Co-Vice Chair: Melinda Ghilardi
Federal Public Defenders Office,
Scranton

Co-Vice Chair: Nancy Conrad
White and Williams LLP,
Center Valley

Welcome New FPC Members!
On behalf of the FPC, Chair Hon. D. Michael Fisher sends a warm welcome our newest members:
- Greg Dann – Allegheny County, GAD Legal LLC
- Alisha Lubin – Philadelphia County, Philadelphia Court of Common Pleas
- NiaLena Caravasos – Philadelphia County, Law Office of NiaLena Caravasos LLC

We hope you will enjoy the benefits of FPC membership, which include automatic receipt of four quarterly e-newsletters. Please consider participating in any of the FPC’s subcommittees. You can reach out to Executive Council members with ideas 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 U.S. District Courts in Pennsylvania.

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Thank You
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- Kevin H. Conrad, White and Williams LLP, Center Valley
- Nancy Conrad, White and Williams LLP, Center Valley
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- Michael Gaetani, Norton Rose Fulbright US LLP, Pittsburgh-Southpointe
- Philip Gelso, Law Offices of Philip Gelso, Kingston
- Melinda Ghilardi, Federal Public Defenders Office, Scranton
- Arthur Hellman, University of Pittsburgh School of Law, Pittsburgh
- Adam Martin, Chambersburg
- Jeremy A. Mercer, Norton Rose Fulbright US LLP, Pittsburgh-Southpointe
- Susan Schwochau, Pittsburgh
- Brett G. Sweitzer, Defender Association of Philadelphia, Philadelphia
- Thomas G. Wilkinson, Jr., Cozen O’Connor, Philadelphia

A special thank you goes to Susan Etter, Esq., Pennsylvania Bar Association, who continuously provides invaluable assistance.

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NOTICE TO COUNSEL

Amendments to the Federal Rules of Appellate Procedure effective December 1, 2016 lower the word limits for briefs. These amendments also convert page limits into word limits for other documents such as motions, petitions for rehearing, petitions for mandamus. A chart showing the new word limits prepared by the Standing Committee is attached below.

Briefs filed after December 1, 2016 must conform to the new word limits. If an extension of time to file appellant’s brief is granted and the due date is beyond December 1, the new word limits apply. However, if the first brief in the case was filed before December 1, 2016, appellee/respondent’s brief and subsequent briefs may use the pre-December 1 word limits. This exception applies only to briefs; motions, Rule 28(j) letters and petitions for rehearing must conform to the new word limits.

The comment to the amendment to Rule 32 states, “In a complex case, a party may need to file a brief that exceeds the type-volume limitations specified in these rules, such as to include unusually voluminous information explaining relevant background or legal provisions or to respond to multiple briefs by opposing parties or amici. The Committee expects that courts will accommodate those situations by granting leave to exceed the type-volume limitations as appropriate.” The Court has reviewed the standing order of January 9, 2012 which discourages motions to exceed the word limits. The Court has determined that insofar as the order provides for granting a motion for excess words in extraordinary circumstances such complex multi-party cases or when “the subject matter clearly requires expansion of the word limits” the order is in harmony with the comment to Rule 32 and will remain in force.

The full report and text of the Amendments are posted on the Court’s website. Counsel should read and become familiar with the changes to the Rules. Counsel’s attention is particularly directed to Rule 4(a)(4) which clarifies that a motion listed in the Rule that is made after the time allowed by the Civil Rules will not toll the time for appeal and Rule 26(c) which “is amended to remove service by electronic means under Rule 25(c)(1)(D) from the modes of service that allow 3 added days to act after being served.” Committee Note to Rule 26(c).

Marcia Waldron
Clerk of Court