COMMITTEE NEWS

“Excellent – We Need More Seminars Like This One”

That’s how one of the over 100 people who attended the Nov. 30, 2017 “Federal Practice: Procedures and Pointers from the Bench” CLE reacted to the presentation held at the Bar Association of Lehigh County.

Panel members – led by Eastern District Chief Judge Lawrence F. Stengel – included District Court Judges Jeffrey L. Schmehl, Edward G. Smith and Joseph F. Leeson, as well as Bankruptcy Judge Richard E. Fehling and Magistrate Judge Henry S. Perkin. Chief Judge Stengel welcomed the attendees and provided a brief overview of the Eastern District. The panel then reviewed and provided pointers about the key rules of civil procedure, noting recent amendments to the rules and, in particular, the court’s active managerial role in the litigation process to expedite the efficient disposition of a case. Nancy Conrad, FPC co-vice chair, planned the program and moderated a panel discussion that included procedures related to scheduling conferences and scheduling orders, discovery disputes (including the proportionality standard) and summary judgment standards.

Other feedback was equally positive:

• “All of the presenters were very engaging and informative.”
• “Well thought out presentation.”
• “Very informative and well prepared!!”
• “Well done! Thank you.”
• “Can’t get any better than this!”
• “Well prepared, organized program.”

A reception followed the program and provided time for additional dialogue among members of the bench and bar. The program will continue on May 3, 2018, when the panel will address pretrial procedures, trial and post-trial procedures.

If you are interested in having a similar program planned for and presented in your area, please contact Nancy Conrad.

ACBA-FPC Co-Sponsored CLE Underscores That Ethical Issues Can Arise at Any Stage of Litigation

The “From Complaint to Closing, Ethical Issues from the Ely v. Cabot Case” CLE held in Pittsburgh on Dec. 21, 2017, gave its attendees a new appreciation for the myriad ethical issues that can arise during litigation. Using real-life examples from the high-profile federal litigation in the Ely v. Cabot Oil and Gas Co. case, the session explored how those issues can arise at any stage of the litigation.

Panel members – FPC Chair Judge D. Michael Fisher of the Third Circuit Court of Appeals, and Jeremy Mercer and Amy Barrette, both of BlankRome LLP – gave a presentation that was very well received. Judge Fisher’s participation added significantly to the presentation, especially as to the discussion of extrajudicial statements and the changes to the Western District’s Local Rule 83.1 as a result of U.S. v. Wecht, 484 F.3d 194 (2007).

The audience actively participated in the discussion of ethics rules and the effects that violations of those rules can have. A number of attendees stayed afterward to continue the discussion. All seemed to appreciate the real-world aspect of the presentation, seeing not only how many ethical issues can come up in the various phases of a federal case, but...
also how those issues and violations of ethics rules can have practical effects on the litigation beyond their effects on the lawyer involved.


Reminder: Next Committee Meeting – Feb. 19, 2018

The Executive Council will hold its next quarterly meeting on Feb. 19, 2018 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 future committee leadership.

Please mark your calendar and join us if you can.

The conference call number is 1-877-659-3786 and the passcode is 6677829609#.

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

LinkedIn Will Be Making Changes to Its Groups

According to a Jan. 15 email, LinkedIn is working on changing the “group experience.” As of Feb. 15, the “standalone iOS app for Groups . . . will stop working.” Other changes slated to roll out (not sure of the date) include allowing you to (1) access your groups from the homepage, (2) see the latest content from your groups in notifications and the homepage feed, (3) post videos into your groups, (4) mention the members you want to weigh in, and (5) keep the conversation going by replying to comments.

Not Getting Notifications of Conversations Among the FPC’s LinkedIn Group Members?

Some FPC members have asked why they are not getting notifications of conversations among the FPC’s LinkedIn group members. Assuming you’re a LinkedIn member and have also joined the PBA-FPC group on LinkedIn, there are a couple of reasons why you are not getting notifications.

First, there really hasn’t been a lot of activity. No activity, no notifications.

Second, you may not have the correct group settings. In order to get notifications, you have to indicate in a group’s settings both that you want notifications and what kind of notifications you want. To do this – at least before LinkedIn implements its changes to its “group experience” (see above) – sign on to LinkedIn, and on your homepage, find the word “Work” in the upper right-hand corner. Click on it, and a half-window will open that has several small boxes near the top. One of those boxes will be labeled “Groups.”

Click on that box. A new window should open, at the top of which should be several options. One of those options should be “My groups.” If you click on that, you’ll get a listing of the groups that you’ve joined. At the right of each listed group will be a small wheel (the settings wheel).

Click on the settings wheel for the PBA-Federal Practice Committee group. One of the options that pops up should be “Group Settings.” Click on that. You should be able to see “Contact Me” as one of the settings, along with several options for notifications. If you want notification via email of the start of a new conversation, make sure you have an email address entered and that you have a check mark in the box next to “New Conversation Activity.” If you don’t see “Contact Me” options in the middle of the window after you click on “Group Settings,” click on the “Contact Me” option at the left of the page.

Now, if you’ve done all of that already, and you still aren’t getting notifications, let Susan Schwochau know. But you
may want to check the FPC group page first to see whether any conversations have started recently.

Welcome New FPC Members!
The FPC continues to grow! On behalf of the FPC, Chair Hon. D. Michael Fisher sends a warm welcome to new members joining in the fourth quarter:

• Joyce Collier, Montgomery County, Collier Law PC
• Jude Joanis, Philadelphia County
• Max Kaplan, Philadelphia County
• Kandis Kovalsky, Philadelphia County, Kang Haggerty & Fetbroty LLC
• Michael Lyon, Montgomery County, Kane Pugh Knoell Troy & Kramer LLP
• Daniel McDyer, Allegheny County, Anstandig McDyer PC
• Andrew Miller, Montgomery County
• Timothy Polishan, Lackawanna County, Kelley Polishan & Solfanelli LLC
• Patrice Turenne, Montgomery County, Marshall Dennehey Warner Coleman & Goggin
• Ronald Williams, Chester County, Fox Rothschild LLP

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. Please consider participating in any of the FPC’s subcommittees – see pages 15 and 16 for subcommittee contact information. You can 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. And don’t forget to join our PBA FPC LinkedIn group: https://www.linkedin.com/groups/PBA-Federal-Practice-Committee-8592167/about.

SUBCOMMITTEES
Reports from the Chairs
Nominations –
The initial two-year terms of the current chairs of the six subcommittees (Nominations; Educational Programs; Legislative; Outreach and Diversity; Newsletter; and Local Rules) will expire in the first quarter of 2018. The current chairs have been contacted to determine their interest and availability in a renewed term. All other members of the FPC should contact Brett Sweitzer with any interest in serving as a chair or member of any subcommittee. Subcommittee chair appointments and/or reappointments will be made at the next meeting of the Executive Council on Feb. 19.

Brett Sweitzer

FEDERAL PRACTICE NEWS
RULES CHANGES
Changes to Federal Rules
Changes to the following rules went into effect on Dec. 1, 2017:
• Civil Rule 4;
• Appellate Rule 4;
• Bankruptcy Rules 1001, 1006, 1015, 2002, 3002, 3007, 3012, 3015, 3015.1 (new), 4003, 5009, 7001, and 9009; and
• Evidence Rules 803 and 902.

The changes to FRCP 4 and FRAP 4 are minor, but you may want to review specifically the amendments and additions to the bankruptcy and evidence rules. Information on the changes made, including committee notes, can be found here.

Extensive Changes to the Eastern District’s Bankruptcy Rules Became Effective Dec. 1, 2017
On Oct. 16, 2017, the judges of the U.S. District Court approved proposed amendments to the Local Rules and Forms of the United States Bankruptcy Court for the Eastern District of Pennsylvania. The changes – described as so extensive that a redline would not be informative – became effective on Dec. 1, 2017. They were made
necessary by the amendments to the Federal Rules of Bankruptcy Procedure that became effective Dec. 1, 2014, and the additional amendments scheduled to take effect on Dec. 1, 2017 (see above).

Information on the changes may be found here.

### STATUS OF JUDICIAL VACANCIES

**U.S. Court of Appeals, Third Circuit**
- There are two vacancies: one created when Judge Julio Fuentes assumed senior status (July 18, 2016) and one created when Judge D. Michael Fisher assumed senior status (Feb. 1, 2017). Recent reports show no nominees.

**U.S. District Court, Eastern District of PA**
- There are four vacancies: one created when Judge Mary McLaughlin assumed senior status (Nov. 18, 2013); one created when Judge L. Felipe Restrepo was elevated (Jan. 11, 2016), one created when Judge James Knoll Gardner assumed senior status (Apr. 3, 2017), and one created when Judge Legrome Davis assumed senior status (Sept. 28, 2017). On Dec. 20, Judge Chad F. Kenney of the Delaware County Court of Common Pleas was nominated to fill Judge Restrepo’s seat. That nomination was referred to the Committee on the Judiciary.

**U.S. District Court, Western District of PA**
- There are five vacancies: one created with the passing of Judge Gary Lancaster (Apr. 24, 2013), one created when Judge Sean McLaughlin resigned (Aug. 16, 2013), one created when Judge Terrence McVerry assumed senior status (Sept. 30, 2013), one created when Judge Kim Gibson assumed senior status (June 3, 2016) and one created when Judge David Cercone assumed senior status (Nov. 24, 2017). On Dec. 20, Magistrate Judge Susan Paradise Baxter of the District Court for the Western District and Judge Marilyn Jean Horan of the Butler County Court of Common Pleas were nominated to fill Judge McLaughlin’s seat and Judge Lancaster’s seat, respectively. Those nominations were referred to the Committee on the Judiciary.

### CASE SUMMARIES

Summaries of Third Circuit and Pennsylvania district court decisions filed between Oct. 1 and Dec. 31, 2017, involving issues of potential interest to FPC members.

### THIRD CIRCUIT PRECEDENTIAL OPINIONS

**Valspar Corp. v. E. I. Du Pont de Nemours & Co.,** 873 F.3d 185 (3d Cir. 2017) (Antitrust) (Sept. 14, 2017 opinion was unsealed on Oct. 2, 2017) – At issue in this appeal was the type of circumstantial evidence that a plaintiff alleging price-fixing among oligopolists must proffer to support an inference of an illegal agreement (as opposed to “conscious parallelism”— i.e., the idea that oligopolists will naturally follow a competitor’s price increase in the hopes that each firm’s profits will increase) so as to survive summary judgment. Relying on 31 parallel price increase announcements that suppliers of titanium dioxide issued between 2002 and late 2013, Valspar claimed DuPont had conspired with other suppliers to fix prices. The district court granted DuPont’s motion for summary judgment, concluding that “evidence of an actual agreement to fix prices” was lacking. The Court of Appeals affirmed. Because proof of parallel behavior by itself will rarely create an inference of conspiracy among oligopolists, the court explained that under Third Circuit precedent, a plaintiff will often need to “show that certain plus factors are present” and in particular, proffer evidence supporting a conclusion that defendants more likely than not engaged in a traditional conspiracy. The court agreed with the district court that Valspar failed to submit such evidence.

**Cottrell v. Alcon Laboratories,** 874 F.3d 154 (3d Cir. 2017) (Federal Court Jurisdiction [Art. III Standing]) – Plaintiffs alleged that manufacturers and distributors of prescription eye-drop medications engaged in unfair trade practices in violation of state law by putting their product into bottles with tips that necessarily dispensed 200 to 300 percent more medication than a human eye could hold, leading to the overage either running down the cheek (and wasted), or, if it entered into the patient’s tear ducts, potentially causing certain harmful systemic side effects. As a result, in any given year, the patients had to buy more
bottles of medication than they would have had to if each drop was smaller (a smaller drop would make a bottle of a given size last longer) – in essence, they were forced to pay for medication that was impossible for them to use. The district court granted defendants’ motions to dismiss, concluding that plaintiffs had not pleaded an injury in fact necessary to confer standing. After examining each of the components of injury in fact separately, the Court of Appeals reversed. The court emphasized that whether a plaintiff has alleged an invasion of a “legally protected interest” does not hinge on whether the conduct alleged to violate a statute does, as a matter of law, violate the statute: there is a difference between whether a plaintiff has a “cause of action” and whether he or she has “standing.” Here, in claiming injury to their economic interests, plaintiffs had sufficiently alleged “legally protected interests.” Because each plaintiff also alleged that defendants’ conduct caused them to personally incur tangible, economic harm that was actual, the court held they had alleged an injury in fact sufficient to confer Article III standing.

In re: Bressman, 874 F.3d 142 (3d Cir. 2017) (Fraud on the Court / Bankruptcy) – In the 1990s, plaintiffs filed in the Southern District of NY civil securities fraud and RICO claims against Bressman and others. The NY action against Bressman was stayed upon his New Jersey bankruptcy filing but continued against his co-defendants. As a result of the stay, plaintiffs filed a similar action against Bressman in the NJ bankruptcy court. The NY action against the co-defendants ultimately resulted in a financial settlement, which was received by Folkenflik (plaintiffs’ attorney) in August 1998. In 1999, Folkenflik on behalf of plaintiffs sought a default judgment in the bankruptcy court. He made no mention of the settlement in supporting affidavits for either the default judgment or the later application for RICO damages, and the court entered a judgment of over $15.5 million, awarding over $900,000 in attorneys’ fees. Upon learning in 2013 that Bressman was to receive a potential $10 million payment, Folkenflik sought to have the $15 million judgment satisfied in both NY and NJ district court courts through _ex parte_ applications, again making no mention of the settlement that had been received, but now seeking over $30 million with the addition of post-judgment interest. When in October 2013 all the courts involved and Bressman found out about the settlement, orders granting the _ex parte_ applications were vacated. The bankruptcy court in 2014 vacated the default judgment and dismissed the action with prejudice, concluding that Folkenflik had committed fraud on the court. The district court affirmed, as did the Court of Appeals.

Collins v. Mary Kay Inc., 874 F.3d 176 (3d Cir. 2017) (Civil Procedure [Forum Non Conveniens / Choice of Law]) – Invoking the court’s diversity jurisdiction, Collins, a Mary Kay beauty consultant and New Jersey resident, filed a putative class action complaint in the New Jersey district court, alleging that Mary Kay had violated the New Jersey Wage Payment Law in various ways. Applying federal common law, the district court granted Mary Kay’s motion for dismissal on _forum non conveniens_ grounds, concluding that Texas was the appropriate forum under the terms of the forum selection clauses in the agreements that Collins had signed. Because Collins’ appellate argument focused on the scope of the forum selection clauses rather than on their enforceability, the Court of Appeals determined that state contract law, rather than federal common law, applied to the interpretation of the clauses. Under New Jersey’s choice-of-law rules, Texas law would control because the parties had agreed that Texas law would govern the interpretation of their contract. Under that law, forum selection clauses with broad language, like that used in the parties’ agreements, encompassed statutory claims. Having determined that Collins’ claims fell within the scope of the forum selection clauses under applicable state contract law, the court next addressed the district court’s application of the _forum non conveniens_ framework, as modified in _Atlantic Marine Construction Co. v. U.S. District Court for the Western Dist. of Texas_, 134 S. Ct. 568 (2013). The court affirmed, concluding that the district court correctly dismissed the action on _forum non conveniens_ grounds.

Mullin v. Balicki, 875 F.3d 140 (3d Cir. 2017) (Civil Rights - § 1983 / Civil Procedure [Rule 15]) – Mullin’s son Robert committed suicide less than a day after he was transferred to New Jersey’s Central Reception & Assignment Facility. Just shy of two years later, Mullin filed suit. Her state tort and constitutional vulnerability-to-suicide claims...
focused on defendants’ alleged failure to provide Robert with the level of care, treatment and monitoring that he needed and that was required by prison policy for someone with his history of depression, self-harm and substance abuse. It was not until more than two years into the suit that Mullin’s attorney received from New Jersey state employee defendants an investigative report supporting a different theory of liability: the report contained fellow New Jersey inmates’ statements about a prison guard who allegedly refused Robert’s requests for psychiatric assistance and urged Robert to kill himself instead. Due to a filing error by her staff, however, Mullin’s counsel, despite indications that something was missing, did not review the report until about 10 months later, at which point Mullin’s operative complaint had been dismissed in large part. The district court denied Mullin’s request for leave to amend her complaint and, after additional motion practice, granted summary judgment in favor of the one remaining defendant. Mullin sought review of the Rule 12(b)(6) dismissal against one defendant and the denial of leave to amend. The Court of Appeals affirmed the order dismissing Mullin’s constitutional and state-tort claims but, relying heavily on the fact that this was a civil rights case, vacated the order denying leave to amend. The court concluded that that the denial amounted to an impermissible exercise of discretion as some of the factors relied upon were not supported by the record or were at odds with case law. The court also noted that Mullin’s attempt to amend fell well within the applicable two-year limitations period if measured from the date the report was initially received.

Kedra v. Schroeter, 876 F.3d 512 (3d Cir. 2017) (Civil Rights - § 1983 [Qualified Immunity]) – In the course of explaining the “trigger reset” function on a handgun during a routine firearms training session, Schroeter, the instructor, bypassed all safety checks, failed to inspect the gun to ensure it was unloaded, raised the gun to chest level, pointed it directly at Kedra and pulled the trigger. Kedra died within hours. Schroeter pleaded guilty to five counts of reckless endangerment of another person and retired from the State Police. In a § 1983 complaint, Schroeter’s guilty plea irrelevant and dismissed on qualified immunity grounds, concluding that the complaint adequately alleged only an objective theory of deliberate indifference (because it did not allege that Schroeter had actual knowledge that there was a bullet in the gun when he fired it) and that such a theory was not clearly established at the time of the shooting. Although it agreed that an objective theory was not clearly established at the time of the shooting, the Court of Appeals concluded that the complaint alleged facts, including facts going to the obviousness of the risk and Schroeter’s guilty plea (a statement that he acted with the requisite knowledge of risk), that supported an inference of actual, subjective knowledge of a substantial risk of lethal harm, i.e., it pleaded deliberate indifference under the clearly established subjective test. Defining the right at issue as an individual’s right not to be subjected, defenseless, to a police officer’s demonstration of the use of deadly force in a manner contrary to all applicable safety protocols, the court also concluded that this right was clearly established at the time of the shooting. The court therefore reversed the district court’s judgment.

Barna v. Board of School Directors of the Panther Valley Sch. Dist., 877 F.3d 136 (3d Cir. 2017) (Civil Rights - § 1983 [First Amendment] / Issue Preservation) – Because Barna was threatening and disruptive on several occasions, the Panther Valley School Board barred him from attending all board meetings or school extracurricular activities. Barna filed suit against the board and various officials, alleging violations of his First and Fourteenth Amendment rights. The district court granted summary judgment on qualified immunity grounds to both the board and to the individual defendants, concluding that the right to participate in school board meetings, despite engaging in a pattern of threatening and disruptive behavior, was not clearly established. The board, however, was a municipal entity that, under Owen v. City of Independence, 445 U.S. 622 (1980), did not enjoy qualified immunity from a § 1983 suit for damages. The board urged affirmance on failure-to-preserve grounds. After describing the principles underlying its preservation rules in detail, the court concluded that (1) Barna failed to preserve the issue of the
board’s immunity by not addressing it at any level beyond mere generalities; (2) Barna’s failure constituted a forfeiture rather than a waiver; and (3) there were exceptional circumstances permitting review of the otherwise forfeited issue. The court vacated the district court’s judgment with respect to the board, and remanded so that the district court could consider the board’s liability in the first instance.

**U.S. v. Graves**, __ F.3d __, 2017 WL 6347563 (3d Cir. Dec. 13, 2017) (Sentencing) - Graves appealed his conviction and sentence for unlawful possession of a firearm, arguing that the district court erred in (1) denying his motion to suppress because the arresting officer lacked reasonable suspicion to stop and frisk him or, in the alternative, exceeded the scope of a valid frisk by focusing on more than just potential weapons on his person, and (2) treating North Carolina common law robbery as the categorical equivalent of generic robbery, with the result that he was sentenced as a career offender. The Court of Appeals concluded that the circumstances gave the officer reasonable suspicion that criminal activity was underway when he stopped and frisked Graves, and that, as in **U.S. v. Yamba**, 506 F.3d 259 (3d Cir. 2007), the officer did not exceed the bounds of a valid protective frisk in removing multiple packets of Depakote and one live .22 caliber bullet from Graves’ pockets during the course of the search. With respect to Graves’ challenge to his sentence, the court first determined that North Carolina common law robbery required only the use of *de minimis* force and then considered whether generic robbery required something more. The court confronted a divergence between the approach of the Model Penal Code and a minority of states (which required more than *de minimis* force) and of the majority of states (which did not). The court held that the most important factor in defining the generic version of an offense was the approach of the majority of state statutes defining the crime and joined the Seventh and Eleventh Circuits in holding that generic robbery requires no more than *de minimis* force. Because North Carolina common law robbery and generic federal robbery contained the same elements, the district court did not err in applying the career offender enhancement to Graves’s sentence.

**Constitution Party of Pennsylvania v. Cortes**, __ F.3d __, 2017 WL 6347560 (3d Cir. Dec. 13, 2017) (Civil Rights – Voting) – Plaintiffs claimed that Pennsylvania election law provisions that (1) regulate the number of signatures required to attain a position on the general election ballot and (2) govern the process by which private individuals can sue to challenge the validity of a candidate’s nomination paper or petition violated their First and Fourteenth Amendment rights. They prevailed, and the district court’s judgment was affirmed on appeal. On remand, the Commonwealth’s proposal for remedying the constitutional violation relied on county-based signature requirements under which plaintiffs’ candidates could be placed on the ballot if they gathered two and one-half times as many signatures as major party candidates had to gather. Over plaintiffs’ objection that the proposal amounted to an unconstitutional vote dilution scheme, the district court entered a permanent injunction adopting the Commonwealth’s signature requirements. The Court of Appeals noted that resolving vote dilution challenges was a fact intensive process and that county-based signature gathering requirements have been held to be constitutional only when they are shown to have no appreciable impact on the franchise. Here, the district court did not make any factual findings or provide any explanation on the record of the factors it considered in determining that its injunction was appropriate. The court therefore vacated the district court’s order.

**Finkelman v. Nat’l Football League**, __ F.3d __, 2017 WL 6395503 (3d Cir. Dec. 15, 2017) (Federal Court Jurisdiction [Art III Standing]) – In this putative class action, Finkelman alleged that the NFL violated New Jersey’s Ticket Law by withholding more than five percent of tickets to the Super Bowl. In a prior appeal from the dismissal of the complaint, the Court of Appeals concluded that Finkelman lacked standing, but remanded to allow the district court to decide if Finkelman should be given leave to amend. On remand, Finkelman amended his complaint to include additional specific allegations describing how the NFL’s withholding set into motion a series of events that ultimately raised prices on the secondary market – from which Finkelman had purchased $800
face value tickets for $2,000 each. The district court again dismissed for lack of standing and noted in the alternative that even if Finkelman had standing, he had not properly alleged a violation of the Ticket Law. The Court of Appeals reversed on the standing issue, concluding that Finkelman had offered economic facts that were specific, plausible, and susceptible to proof at trial, and that were sufficient to show Article III standing. The court deferred action on the merits of the appeal pending a decision by the Supreme Court of New Jersey on a petition for certification of questions of state law.

**EASTERN DISTRICT OF PA OPINIONS**

**Jefferies v. Sessions, _ F.Supp.3d __, 2017 WL 4411044 (E.D. Pa. Oct. 3, 2017) (Second Amendment as-applied challenge to § 922(g)(4))** – In 2001, Jefferies was involuntarily committed after he followed his daughter and wife (who he suspected was having an affair) home from a football game, bumped the car they were in to provoke an altercation and threatened to kill himself. As a result of the commitment, he lost his state and federal private capacity firearm rights. The state rights were restored in 2004, when a state court determined Jefferies was “capable of possessing firearms without posing a danger to himself or others.” Unable to purchase firearms or renew his license to carry a concealed weapon due to 18 U.S.C. § 922(g)(4), Jefferies filed suit alleging that that statute was unconstitutional as applied to him under the Second Amendment, and that his rights under the Fifth and Fourteenth Amendment were also violated. Applying the framework laid out in *Binderup v. Attorney General United States of America*, 836 F.3d 336 (3d Cir. 2016) (addressing as-applied challenges to the prohibition in 18 U.S.C. § 922(g)(1)), Judge M. Kearney granted the attorney general’s motion to dismiss. The court concluded that (1) Jefferies failed to pass the first step of the *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010), framework. The court also concluded that (1) Jefferies’s inability to seek relief from § 922(g)(4) did not render the prohibition unconstitutionally overbroad; (2) Jefferies did not have a Fifth Amendment right to procedural due process before the United States applied § 922(g)(4) to him; and (3) Jefferies failed to allege an equal protection claim under the Fourteenth Amendment because he did not allege how the United States treated him differently from a similarly situated party.

**O’Donnell v. Knott, _ F.Supp.3d __, 2017 WL 4467508 (E.D. Pa. Oct. 6, 2017) (Constitution [First Amendment])** – O’Donnell, who lived and worked outside of Bucks County, created a “Knotty is a Tramp” profile on social media to parody the behavior of Kathryn Knott, the daughter of the chief of police for a Bucks County borough, and to satirically comment on various news items. In her § 1983 complaint advancing First Amendment retaliation and other counts, O’Donnell alleged that Kathryn Knott and her father used Karl Knott’s position as chief of police to enlist the Bucks County district attorney and detectives within the DA’s office to assist in silencing O’Donnell’s protected speech on social media. Judge M. Goldberg denied in large part defendants’ Rule 12(b)(6) motions. The court concluded that (1) O’Donnell plausibly alleged conduct that was unrelated to initiating and conducting judicial proceedings, and thus the DA’s argument that he was entitled to absolute immunity was premature; (2) she plausibly alleged that the posts were constitutionally protected satire and presented sufficient facts to causally connect the posts to the alleged retaliatory action; and (3) the detectives at this point were not entitled to qualified immunity. The court also concluded that the complaint contained sufficient facts to articulate plausible claims for prior restraint of free speech against the Bucks County individual defendants, and for civil conspiracy against all individual defendants. Because O’Donnell agreed that she failed to state a claim against Bucks County, those claims were dismissed.

**Martin-McFarlane v. City of Philadelphia, _ F.Supp.3d __, 2017 WL 4844831 (E.D. Pa. Oct. 25, 2017) (Civil Rights - § 1983 [State-created danger])** – Martin-McFarlane, a registered nurse, was assigned to tend to a prisoner’s medical care. After she was assaulted by that prisoner during his attempt to escape, she filed suit against correctional officers, the City of Philadelphia, various hospital entities and the Department of Protective Services, raising federal constitutional and numerous state-law claims. In her complaint, Martin-McFarlane alleged, among
other things, that the correctional officers’ conduct left a man charged with murder, attempted murder, aggravated assault, robbery, and resisting arrest, and who was denied bail, unrestrained in a public hospital. Judge C. Rufe granted defendants’ Rule 12(b)(6) motion in part. The court concluded that Martin-McFarlane had sufficiently pleaded a Fourteenth Amendment state-created danger claim against the correctional officers, and that a decision on qualified immunity was premature. Martin-McFarlane’s Monell failure-to-train claim against the City also survived dismissal, as did her intentional infliction of emotional distress claim against the City and the correctional officers. The court dismissed with prejudice Martin-McFarlane’s remaining federal claims (under the First and Fourth Amendments) and state-law claims (assault and battery, false imprisonment, trespass, and negligence and gross negligence). Negligence and gross negligence claims were dismissed on grounds of governmental immunity, and all state-law claims against the hospital entities were dismissed because they were preempted by the Workers’ Compensation Act.

**Straus v. United States Postal Serv.**, __ F. Supp. 3d __, 2017 WL 5157679 (E.D. Pa. Nov. 7, 2017) (Contract [Lease to the USPS]) – In 1966, Plaintiffs’ father leased the Richmond Station Post Office to the U.S. Postal Service (USPS). The lease gave the USPS six consecutive renewal options, each for a term of five years, and an option to purchase the station at certain times for $240,000. A 1982 amendment to the lease reduced the rent owed and granted the USPS an option to purchase the property at fair market value at any time during the remaining term of the lease and any renewal term. A year before the end of the final renewal term, the USPS gave notice that it intended to exercise the option to purchase the Station for $240,000. Plaintiffs filed suit, seeking a declaration that they had no obligation to sell the property to USPS for either a fixed price or for market value. They also claimed that USPS was a holdover tenant that owed them back rent. Addressing the parties’ cross-motions for summary judgment and applying federal law to the interpretation of the lease and its amendment, Judge W. Beetlestone concluded that the amendment unambiguously gave the USPS an additional option to purchase at fair market value, and that the USPS was entitled to specific performance. The USPS conceded that it was a holdover tenant and owed rent to plaintiffs for the period through the closing of the sale of the property.

**In re Processed Egg Prod. Antitrust Litig.**, 2017 WL 5177757 (E.D. Pa. Nov. 7, 2017) (Post-deadline Daubert motion) – Direct action plaintiffs claimed an egg price-fixing conspiracy throughout the U.S. under which egg producers used a United Egg Producers (UEP) run certification program to decrease egg supply and increase egg prices. Before the May 25, 2015 deadline for Daubert motions, plaintiffs’ expert produced a report concluding that UEP requirements led to increased prices. As directed by the court, the expert filed a supplemental report on Nov. 4, 2016 removing damages based upon eggs produced or sold in Arizona after a particular date. More than two years after the Daubert motion deadline, defendants filed a Daubert motion to exclude plaintiffs’ expert and submitted their own expert’s report disputing plaintiffs’ expert’s findings. Plaintiffs moved to strike the motion and the new report. Defendants urged that post-May 25, 2015 court opinions and the supplemental report gave them good cause to have the scheduling order’s deadline extended. Judge G. Pratter rejected defendants’ attempt to “show good cause by poaching the reasoning from this court’s recent opinions when that reasoning was available at the Daubert deadline.” The court also rejected defendants’ attempt to “yolk a permissible challenge of [the] supplement to a broader challenge of [the expert’s] overall conclusions when [defendants] failed to challenge those conclusions by the deadline.” The court granted plaintiffs’ motion as to defendants’ challenge to the expert’s initial report and defendants’ expert’s rebuttal report attacking it. The supplemental report and the portion of defendants’ expert’s report focused on the supplemental report were ruled admissible.

**Homer v. Law Offices of Frederic I. Weinberg & Assocs. PC**, __ F. Supp. 3d __, 2017 WL 5184193 (E.D. Pa. Nov. 9, 2017) (Statutes [FDCPA]) – Debt collector sent Homer a letter that stated, in part, that “u[less we hear from you within thirty (30) days after receipt of this letter that you dispute the validity of the debt, or any portion thereof, this office will assume the debt is valid.” Homer filed suit
alleging that the letter violated the Fair Debt Collection Practices Act (FDCPA). Addressing the parties’ cross-motions for summary judgment, Judge T. Savage concluded that the letter’s language violated the FDCPA. First, although other circuit courts have decided the question differently, under Third Circuit case law, the dispute notice must be in writing. The letter’s “hear from you” language was deceptive because it suggested that the dispute notice could be made orally. Second, following Second and Seventh Circuit court decisions, the court concluded that the FDCPA required that the debtor send the dispute notice within 30 days. Because the letter Homer received informed him that the dispute notice must be received by the debt collection within 30 days, it impermissibly shortened the dispute period. The court granted Homer’s motion for summary judgment and denied the debt collector’s motion.

City of Philadelphia v. Sessions, __ F.Supp.3d __, 2017 WL 5489476 (E.D. Pa. Nov. 15 2017) (Constitution [Tenth Amendment, Spending Clause] / APA) – Philadelphia filed a six-count complaint against the attorney general, challenging on statutory and constitutional grounds three conditions (“sanctuary city” conditions) that the AG imposed on the receipt of JAG Program grants, which give state and local law enforcement additional funds for personnel, equipment, training and other criminal justice needs. The City moved for a preliminary injunction. In a detailed and thorough (and therefore lengthy) opinion, Judge M. Baylson described why the court granted the City’s motion, found that Philadelphia could properly certify its substantial compliance with JAG Program conditions and enjoined the attorney general from denying the City’s JAG grant for FY 2017. Among other things, the court concluded that (1) the attorney general’s implementation of two of the new conditions for receiving the JAG Program grant were issued without appropriate authority under the APA, (2) the third challenged condition was arbitrary and capricious under 5 U.S.C. § 706(2)(A); and (3) the City was likely to succeed on one or more of its claims that the new conditions were improper under settled principles of the Spending Clause, the Tenth Amendment, and principles of federalism (although the court did not base its decision regarding a preliminary injunction on the City’s Tenth Amendment challenge).

In re Biomet Orthopaedics Switzerland GmbH Under 28 U.S.C. § 1782 for Order to Take Discovery for Use in Foreign Proceeding, __ F.Supp.3d __, 2017 WL 5624877 (E.D. Pa. Nov. 21, 2017) (Discovery pursuant to 28 U.S.C. § 1782) - Biomet sought production of Heraeus Medical GmbH’s discovery in the possession of counsel for Esschem Inc. – the defendant in a trade secret case Heraeus brought that was pending before Judge C. Rufe – so that Biomet could use that discovery in an appeal hearing in a criminal proceeding against Biomet in Germany. The discovery was produced pursuant to a protective order in the civil action. After Biomet obtained a subpoena from a different judge, requiring that Esschem’s counsel produce Heraeus’ confidential discovery, Heraeus took actions to intervene in the Section 1782 action, have that action reassigned to Judge Rufe and stay enforcement of the subpoena. It also filed a motion to quash the subpoena. Assuming without deciding that the statutory requirements had been met, Judge Rufe granted that motion, concluding that Intel Corp.’s [v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004)], factors to guide courts’ exercise of their discretion in Section 1782 cases weighed against enforcing the subpoena. After describing how two of the four factors weighed against enforcement, the court also noted its concern over the precedent that would be set if it allowed a party to surreptitiously use a § 1782 application to demand that a law firm produce an opposing party’s documents. Heraeus was a German company, and Biomet sought to use the discovery in a German court. Rather than seeking the information from Heraeus, Biomet sought to use § 1782 to obtain the documents from an American law firm representing a party opposing Heraeus in litigation pending in the United States.

United States v. Hallinan, __ F.Supp.3d __, 2017 WL 6016308 (E.D. Pa. Dec. 4, 2017) (Attorney-Client Privilege and Crime-Fraud Exception) – In this opinion, Judge E. Robreno gave the legal reasoning behind two orders issued in October 2017 that sustained in part and overruled in part the objections, on attorney-client privilege grounds, of Hallinan and of a corporation he formed to the government’s use at Hallinan’s criminal trial of (1) 15 documents related to litigation against the corporation in Indiana; and (2) testimony of three attorneys. The 15
documents had been withheld by a law firm on the basis of the attorney-client privilege and the attorney work product privilege with respect to the firm’s representation of the corporation and Hallinan in his personal capacity in the Indiana suit. According to a superseding indictment, Hallinan and others engaged in a scheme to defraud the plaintiffs in the Indiana suit by deceiving them into believing that the defendant corporation was effectively judgment proof so that they would accept a discounted settlement offer on their claims. In response to the claims of privilege, the government argued that to the extent any privilege applied, it was unavailable under the crime-fraud exception. Judge E. Robreno concluded in October – prior to the conclusion of trial – that (1) all of the documents and portions of the testimony of the three attorneys were protected by the attorney-client, attorney work product, or community-of-interest privileges; (2) the crime-fraud exception applied to the 15 documents and the testimony of the attorney who represented Hallinan in the last months of Indiana action because there was a reasonable basis to suspect that entire act of retaining counsel and soliciting legal advice was in furtherance of Hallinan’s alleged fraud; (3) the crime-fraud exception did not apply to the privileged testimony of the remaining two attorneys. A jury found Hallinan guilty on all counts in the superseding indictment on Nov. 27, 2017.

Pennsylvania v. Trump, __ F.Supp.3d __, 2017 WL 6398465 (E.D. Pa. Dec. 15, 2017) (Administrative Law / Standing) - Naming President Trump and the Secretaries of Health and Human Services, the Treasury, and Labor, as well as each of their agencies, as defendants, the Commonwealth of Pennsylvania sought to enjoin enforcement of two Interim Final Rules (New IFRs) that permit (1) any non-profit or for-profit firm to opt out of the Affordable Care Act’s requirement to provide no-cost contraceptive coverage on the basis of “sincerely held” religious beliefs; and (2) any non-profit or for-profit organization that is not publicly traded to deny contraceptive coverage for any “sincerely held” moral conviction. The Commonwealth challenged the New IFRs on various statutory and constitutional grounds. Before the court was Pennsylvania’s motion for a preliminary injunction. Judge W. Beetlestone first addressed the issue of the Commonwealth’s standing, and concluded that it had standing to pursue injunctive relief through its APA claims based on an injury to its fiscs. Focusing on the Commonwealth’s APA claims, the court ruled that it was likely that the Commonwealth would succeed on both its claim that the defendants did not follow proper procedures in issuing the New IFRs and its claim that the New IFRs are arbitrary, capricious and contrary to established law. Finding that the Commonwealth would suffer irreparable harm and that the balance of equities and public interest favored enjoining the New IFRs, the court granted the Commonwealth’s motion.

MIDDLE DISTRICT OF PA OPINIONS

United States v. Pennsylvania, 2017 WL 4354917 (M.D. Pa. Oct. 2, 2017) (Title VII Disparate Impact) – Filing suit under 42 U.S.C. § 2000e-6 (Civil Suits by the Attorney General), the U.S. alleged that the Commonwealth and the Pennsylvania State Police’s use of its physical fitness tests to screen and select applicants for entry-level trooper positions had an unlawful disparate impact against female applicants. Defendants moved for summary judgment, arguing – as they had in an unsuccessful motion to dismiss – that the U.S.’s disparate impact claims were not cognizable under the analysis of Texas Department of Housing and Community Affairs v. Inclusive Communities Project Inc., 135 S. Ct. 2507 (2015) (addressing whether disparate impact claims are cognizable under the Fair Housing Act). The U.S. moved for partial summary judgment, arguing that its statistical evidence was sufficient to satisfy its prima facie burden of disparate impact. Judge S. Rambo denied defendants’ motion – which was viewed as an attempt to get the court to revisit and reverse its earlier ruling – concluding that Inclusive Communities did not provide supervening new law in the Title VII disparate impact context. After reviewing the U.S.’s expert’s evidence and that proffered by three defense experts, the court ruled that the U.S. had provided statistical evidence of a kind and degree sufficient to show that the physical fitness tests excluded women from continuing the hiring process to become a trooper because of their gender, and that there was no genuine issue of material fact on that issue. As a result, the court granted the motion for partial summary judgment.
Keyes v. Sessions, __ F.Supp.3d__, 2017 WL 4552531 (M.D. Pa. Oct. 11, 2017) (Second Amendment as-applied challenge to § 922(g)(4)) – Keyes, a former U.S. Air Force Airman 1st Class and former Master Trooper with the Pennsylvania State Police, was involuntarily committed as an adult to Holy Spirit Hospital from Aug. 25, 2006 to Sept. 8, 2006 after consuming numerous alcoholic beverages and making suicidal statements following an emotional divorce. As a result of that commitment, he lost his state and federal private capacity firearm rights (though he continued to possess and utilize firearms while on duty as a Master Trooper). His state rights were restored in 2008. Keyes filed suit in federal court, asserting that 18 U.S.C. § 922(g)(4) violated the Second Amendment as applied to him. Before the court were the parties’ cross-motions for summary judgment. In contrast to Judge M. Kearney (see Jefferies v. Sessions, 2017 WL 44110044 (E.D. Pa. Oct. 3, 2017), summarized above), Judge J. Jones III distinguished the as-applied challenge to § 922(g)(1) (barring those who had been convicted of a crime punishable by imprisonment for a term exceeding one year from possessing guns) in Binderup v. Attorney General United States of America, 836 F.3d 336 (3d Cir. 2016), noting, among other things, that an involuntary commitment is premised on mental illness – i.e., it is unlike the deliberate choice to break the law and forfeit civil rights as a result. The court concluded that the passage of time and evidence of rehabilitation were factors to consider in determining whether Keyes had distinguished himself from the historically barred class of persons. After concluding that Keyes had satisfied his burden under step one of the Marzzarella framework, the court at step two applied Judge Ambro’s formulation of intermediate scrutiny in Binderup and assessed whether the government presented “evidence explaining why banning people like” Keyes “promotes public safety.” Because it determined that the government had not satisfied its burden, the court granted summary judgment in favor of Keyes.

Smith v. University of Scranton, 2017 WL 5991733 (M.D. Pa. Dec. 4, 2017) (Motion to amend an answer) – Smith alleged that the university unlawfully terminated her employment in retaliation for engaging in conduct protected under the ADA and the PHRA. At her deposition – conducted over seven months after defendants had filed their answer – defendants received documents suggesting that Smith was in violation of a number of university policies prior to, and immediately following, her termination. Within days of receiving the transcript of that deposition, and before the discovery deadline had passed, defendants sought leave to amend their answer to include after-acquired evidence and unclean hands affirmative defenses. Smith opposed the motion, contending that defendants had received the documents more than four months earlier, and that they delayed the motion for leave so as to prevent her from asking deponents about the new defenses. Judge A.R. Caputo, applying Rule 15’s principles, granted the motion, concluding that the amendment sought was logically connected to documents discovered after defendants’ answer was filed and that Smith had failed to establish that the proposed amendment followed an undue delay or would result in prejudice.

Landau v. Zong, 2017 WL 6055340 (M.D. Pa. Dec. 7, 2017) (Motion to compel to resolve a deposition scheduling failure) – State inmate Landau filed a § 1983 suit against 20 correctional defendants. A dispute arose between the parties regarding the scheduling of the depositions of certain defendants and witnesses, and, rather than continue efforts to find mutually acceptable dates, Landau filed a motion to compel asking the court to direct the scheduling of the depositions and award monetary sanctions to plaintiff’s counsel. Guided by the “basic principle” that in the first instance counsel should be civil and cooperative in their attempts to schedule depositions (and noting that “the search for mutually agreeable dates should not be a task that demands the court’s intervention”), Magistrate Judge M. Carlson denied the motion without prejudice, concluding that the parties simply resorted prematurely to motions practice – a conclusion bolstered by the fact that the motion to compel had been filed on one of the dates defense counsel offered for the depositions. The court prescribed a process for cooperative deposition scheduling moving forward.
WESTERN DISTRICT OF PA OPINIONS

**Calhoun v. Berryhill**, 2017 WL 4390246 (W.D. Pa. Oct. 3, 2017) (Social Security) – Seeking review of the denial of her application for supplemental security income, Calhoun contended that the ALJ ignored her most recent urology record and improperly rejected her primary care nurse’s opinion to find that Calhoun was not disabled under the Social Security Act. Judge D. Ambrose granted the commissioner’s motion for summary judgment and denied Calhoun’s. The medical record of Calhoun’s most recent treatment with her urologist was not part of the record before the ALJ. Because Calhoun failed to show (1) the evidence was new; (2) the evidence was material, and (3) there was good cause for not having submitted the evidence before the ALJ’s decision, remand was not warranted and the record could not be considered by the court in its review of the ALJ’s decision. The court also concluded that, as a nurse practitioner is not “an acceptable medical source” and is instead an “other source,” the ALJ appropriately considered the nurse practitioner’s opinion that Calhoun was limited to lifting 10 pounds and four hours of work per day, which was set forth in a two-page check box form, and assigned little weight to that opinion.

**Clouser v. Golden Gate Nat’l Senior Care LLC**, 2017 WL 4546626 (W.D. Pa. Oct. 10, 2017) (Reconsideration of denial of stay pending arbitration) – Sylvia Clouser filed, in state court, a wrongful death claim and a survival claim against defendants after her husband John, a former resident of the Golden Living Center-Hillview in Altoona, passed away. Defendants removed. In prior opinions, Judge K. Gibson (1) granted defendants’ motion to compel arbitration of the survival claim; (2) denied defendants’ motion to compel arbitration of the wrongful death claim; and (3) denied defendants’ motion to stay trial of the wrongful death claim pending arbitration. Defendants sought reconsideration of the denial of the motion to stay, asserting that the Pennsylvania Supreme Court’s decision in *Taylor v. Extendicare Health Facilities Inc.*, 147 A.3d 490 (Pa. 2016), was an intervening change in controlling law that required granting the motion to stay. Clouser opposed, urging that the language defendants relied on was not part of the central holding of *Taylor* and was instead part of a footnoted response to an argument made by the dissent in that case. The court granted the motion for reconsideration, concluding that although it was not part of the central holding of *Taylor*, the language in that case regarding staying a wrongful death action while a survival claim was arbitrated provided “reliable data tending to convincingly show” how the Pennsylvania Supreme Court would rule if the stay issue was put before it.

**Jesmar Energy Inc. v. Range Resources-Appalachia LLC**, 2017 WL 4572526 (W.D. Pa. Oct. 13, 2017) (Diversity Jurisdiction [Jurisdictional Amount]) - Jesmar filed a state court complaint against Range Resources for breach of contract, unjust enrichment and declaratory relief, alleging that Range had breached an Assignment of Oil and Gas Lease by improperly deducting costs from the royalty payments Jesmar was entitled to receive. Range removed on diversity grounds, asserting an amount in controversy and attaching an affidavit in support of removal. Jesmar filed a motion for remand, contending that the jurisdictional amount was not satisfied, but submitting no additional evidence. Magistrate Judge L. Lenihan found that Jesmar’s complaint did not demand a specific sum and sought both monetary and non-monetary relief. Range’s Notice of Removal was not conclusory in nature and included a plausible allegation that the amount in controversy exceeded $75,000. Because Jesmar’s complaint included a claim for declaratory relief, the amount in controversy was not limited to the amount due and owing given past payments, and instead included the value of a determination that the royalty payments Range owed Jesmar under the Assignment – both in the past and in the future – did not include an off-set for post-production costs. The court concluded Range had met its burden to show that the value of the object of the litigation was over the $75,000 jurisdictional threshold, and it denied the motion to remand.

Pennsylvania Bar Association • Federal Practice Committee • Fourth Quarter 2017

for the removal.” Exeter had been served on June 16, but that was not shown on the docket at the time of removal. On July 13, 2017, Exeter filed a consent to Citizens' notice of removal. Six days later, Mitchell moved to remand, contending that the notice of removal was procedurally defective because it violated the rule of unanimity. Judge C. Bissoon denied the motion. The court concluded that the email attached to Citizens’ notice provided a sufficiently clear and unambiguous statement of Honda’s consent and that because that expression of consent was filed less than 30 days after Honda had been served, it was timely. As to Exeter, the court noted that district courts in the circuit were split on whether to apply a “reasonable diligence” exception to the consent rule, but decided that, in any event, Exeter’s July 13 timely consent meant that any defect in the notice of removal as to Exeter was cured.


Dinaples received from MRS BPO a collection letter that displayed on the outside of the envelope a Quick Response Code (QR Code), which, when scanned with a readily available QR reader, revealed Dinaples' account number. She filed suit claiming that MRS violated the Fair Debt Collection Practices Act by disclosing her account number through the QR Code. The parties filed cross-motions for summary judgment on liability, and Dinaples also sought certification of a class defined as all consumers with an address in Westmoreland County who, from Nov. 2, 2014 through and including the final resolution of the case, were sent one or more letters from MRS attempting to collect a consumer debt allegedly owed to Chase Bank, which displayed on the outside of the mailing a QR Code containing the consumer's account number. Following **Douglass v. Convergent Outsourcing**, 765 F.3d 299 (3d Cir. 2014), Judge M. Ponsor (Senior U.S. District Judge in the District of Massachusetts) concluded that MRS violated the FDCPA by sending Dinaples a collection letter with her account number embedded in the QR Code on the face of the envelope. Rejecting MRS’s arguments that Dinaples had not suffered a concrete injury, that the FDCPA’s “benign or harmless language” exception applied, and that the disclosure occurred as a result of bona fide error, the court granted Dinaples' motion for summary judgment and denied MRS's cross-motion. Finding that all the requirements of Rules 23(a) and 23(b)(3) were met, the court also granted Dinaples's motion for class certification with respect to the proposed class.

**Boyington v. Percheron Field Services LLC**, 2017 WL 5633171 (W.D. Pa. Nov. 21, 2017) (Civil Procedure [Modification of Case Management Order for additional discovery]) – A primary issue in this FLSA case was the number of hours plaintiffs worked, the determination of which would rely largely on the credibility of witnesses because Percheron failed to keep proper time records. Shortly after two key witnesses had been deposed, they ended their employment with Percheron. Hearing “reports” that those employees left because of their involvement with “improper and/or illegal” arrangements with landowners on a project on which many of the opt-in plaintiffs worked, plaintiffs sought, after the case management order's March 1 discovery deadline, further discovery regarding the employees’ departure. Percheron refused and would give no explanation for the departure. Boyington moved to reopen discovery and compel discovery responses to a set of interrogatories and the request for documents. Judge K. Gibson granted the motion in part. The court concluded that (1) plaintiffs had satisfied their burden under Rule 16(b)(4) to demonstrate “good cause” to modify the Case Management Order and allow discovery to be reopened on the narrow topic of the employees’ departure; and (2) plaintiffs’ request for additional interrogatories regarding the employees’ departure satisfied the requirements of Rule 33(a), Rule 34, and Rule 26(b). The court, however, denied the request for an order compelling Percheron to respond to the interrogatories or to produce documents and instead allowed plaintiffs to seek such an order if Percheron failed to serve its answers and/or any objections within 30 days after being served with the discovery requests.

**Municipal Auth. of Westmoreland County v. CNX Gas Co. LLC**, 2017 WL 6539308 (W.D. Pa. Dec. 21, 2017) (Attorney-Client Privilege) – Municipal Authority of Westmoreland County (MAWC) alleged that defendants CNX Gas Co. (a subsidiary of CONSOL Energy) and Noble Energy improperly deducted post-production costs from the royalty payments owed to MAWC under oil and gas leases and that the royalty deductions were higher due to defendants’ affiliation with CONE Gathering, which
provided midstream gas gathering services. In a deposition of the vice president of CONSOL’s midstream operations and chief operating officer of CONE Midstream, MAWC learned of a “series of emails” about “appropriate deduction[s]” from “royalty payments.” Attempts to gain from the deponent insight into the content of the emails were thwarted by objections on privilege grounds. As directed by the court, MAWC issued subpoenas to CONE Gathering, CONE Midstream, and the deponent after CNX stated that it did not have the emails. Counsel for the subpoena recipients sent the responsive emails to CNX and stated that they intended to produce the emails unless CNX wished to assert a privilege. CNX moved to quash the subpoenas, or in the alternative, for a protective order, arguing that the emails were privileged communications between CONSOL employees and CONSOL attorneys regarding issues that required legal advice. As directed, CNX produced the emails to the court for in camera review. Chief Judge C. Conner (MDPA, sitting by designation), after reviewing each of the documents, denied CNX’s motion in part, concluding that (1) several of the documents were clearly not privileged as they contained emails solely between CONSOL employees, communications in which no attorney listed on the recipient list was contributing to the exchange, or were logistical communications or unprivileged data attached to an otherwise privileged email; and (2) several emails were not privileged because the CONSOL attorney was providing business, rather than legal, advice. The court also denied the alternative request for a protective order. The motion to quash was granted as to the communications the court agreed were privileged.

OPEN FORUM
No submissions this quarter.

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

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Thank You

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