PBA NEWS

PBI Sixth Annual U.S. Supreme Court Roundup Scheduled for Aug. 14, 2017

The four-credit CLE will be live in Philadelphia and simulcast to other locations. See page 15 for program details and registration information.

COMMITTEE NEWS

Best Sentencing Practices CLE Comes To Scranton on Aug. 31, 2017

The FPC has again assembled a panel of professionals involved in the federal criminal sentencing process to draw from their vast and diverse experiences and share the best sentencing practices from the government, defense counsel, probation office, district court and appellate court perspectives. Titled “Best Sentencing Practices in the Middle District of Pennsylvania,” the CLE program will be held in one of the fourth floor courtrooms at the William J. Nealon Federal Building & U.S. Courthouse, 235 N. Washington Avenue, Scranton, PA 18503, from 3 p.m to 4 p.m. on Aug. 31, 2017. A one-hour networking reception will follow the program.

Panelists:
• Hon. Thomas I. Vanaskie, U.S. Court of Appeals for the Third Circuit
• Hon. Christopher C. Conner, Chief Judge, U.S. District Court, Middle District of Pennsylvania
• Bruce Brandler, U.S. Attorney, Middle District of Pennsylvania
• Heidi R. Freese, Assistant Federal Public Defender, Federal Public Defender Designee, Middle District of Pennsylvania
• Douglas S. Moyle, Supervising U.S. Probation Officer, Middle 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 Pennsylvania
• Philip Gelso, PBA Federal Practice Committee member, Law Offices of Philip Gelso

The registration fee is $40. Check-in begins at 2:30 p.m. To register online, click here, or use the attached registration form.

The FPC’s ‘Hot Topics’ CLE Gives Audience Something To Talk About

Using as a backdrop an appeal of a district court’s preliminary injunction against enforcement of an executive order, a panel of federal judges and practitioners on May 10, 2017, provided insight on recent developments affecting the practice of law in the federal courts. Moderated by Court of Appeals Judge and FPC Chair D. Michael Fisher, the “Hot Topics in Federal Practice” CLE allowed attendees to learn about issues involving not only injunctive practice challenging executive actions, but also Article III standing and the elements of standing necessary to maintain a federal lawsuit in light of Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016), and the impact of the 2016 amendments to the E-Discovery Rules. The use of a mock appeal created the setting for an engaging and lively discussion of those and other current issues important to effective federal practice. The only unresolved question: Which side won the appeal?

Panel members included Chief Judge Joy Flowers Conti and Magistrate Judge Cynthia Eddy of the Western District, FPC members Anne John and Kathleen Wilkinson and FPC Co-Vice Chair Nancy Conrad.
Reminder: Next Committee Meeting – Aug. 21, 2017

The Executive Council will hold its next quarterly meeting on Aug. 21, 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 future committee leadership. Please mark your calendar and join us if you can. 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 below.

Subcommittee Report

Nominations

The reappointments of at-large members to the FPC Executive Council – Anne John, Tom Wilkinson and Jeremy Mercer – were approved in May.

Brett Sweitzer

Contact Information

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

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

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

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

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

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

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 second quarter:

• Ellen Bailey, Philadelphia County
• Brian Bevan, Allegheny County, The Grail Law Firm
• Zachary Gross, Out of state
• Linda Hernandez, Allegheny County, Dickie McCamey & Chilcote PC
• Timothy Jones, Out of state, Phelan Hallinan Diamond & Jones PLLC
• Christina Powers, York County, Pennsylvania Immigration Resource Center
• Colleen Reed, Allegheny County, DeForest Koscelnik Yokitis Kaplan & Berardinelli
• Anthony Sherr, Montgomery County, Sherr Law Group LLP
• John Weiss, Lehigh County, Fitzpatrick Lentz & Bubba PC

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 “Contact Information” on this page. 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 U.S. District Courts in Pennsylvania. And don’t forget to join our new PBA FPC LinkedIn group: https://www.linkedin.com/groups/PBA-Federal-Practice-Committee-8592167/about.
Circuit Judge Fisher Hears Arguments in the Ninth Circuit

By Hon. D. Michael Fisher

In mid-June, I was invited by the Ninth Circuit to sit with them for two days in San Francisco. This assignment was in addition to my case assignments with the Third Circuit. The opportunity to sit out of circuit is one of the advantages of senior status, and it is something that I hope to continue to do in future years.

There is much written and said about how the Ninth Circuit differs from the other circuits across the country, yet, during my two days there, the cases we heard and the legal reasoning applied was very typical of what one experiences as a member of our court.

My colleagues were two distinguished jurists: Mary M. Schroeder of Arizona, the court’s former chief judge, appointed by President Carter in 1979, and N. Randy Smith of Idaho, appointed in 2007 by President George W. Bush. The arguments we heard were on a wide variety of subjects including The First Amendment (Free Exercise Clause), arbitrability of False Claims Act claims, TCPA/apparent authority, personal jurisdiction, insurance contract interpretation, habeas petitions and criminal appeals.

We heard arguments on all but one case, which, as practitioners before our court know, is a higher number than the Third Circuit would typically hear. Some argument times were less than the 15 minutes allotted in our court, so it was a somewhat more limited exchange between counsel and the panel. We often discuss whether appellate counsel in our court would welcome the chance to go to Philadelphia for argument if they were only given five or 10 minutes.

The decision-making process at the Ninth Circuit was the same. Judges Schroeder and Smith were willing to listen to the views of a visiting judge from Pittsburgh and, on most cases, we easily agreed on how the cases should be decided. I was even given the chance to write a precedential opinion, which, if approved, will become binding precedent in the Ninth Circuit.

What the assignment taught me is that we have excellent federal judges throughout the United States, and we have a legal system that is truly committed to uphold the rule of law. There may always be some criticism, but we have the best justice system in the world.

STATUS OF JUDICIAL VACANCIES

U.S. Court of Appeals, Third Circuit

There are three vacancies: one created when Judge Marjorie Rendell assumed senior status (July 1, 2015), one created when Judge Fuentes assumed senior status (July 18, 2016), and one created when Judge D. Michael Fisher assumed senior status (Feb. 1, 2017). On June 19, 2017, President Trump’s nomination of Stephanos Bibas, University of Pennsylvania Law School professor of law and criminology, was received in the Senate and referred to the Committee on the Judiciary. Professor Bibas was nominated to fill Judge Rendell’s seat.

U.S. District Court, Western District of PA

There are four 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), and one created when Judge Kim Gibson assumed senior status (June 3, 2016). Recent reports show no nominees.
U.S. District Court, Eastern District of PA

There are three vacancies: one created when Judge Mary McLaughlin assumed senior status (Nov. 18, 2013); one created when Judge Luis Restrepo was elevated (Jan. 11, 2016), and one created when Judge James Knoll Gardner assumed senior status (Apr. 3, 2017). Recent reports show no nominees.

CASE SUMMARIES

Summaries of Third Circuit and Pennsylvania district court decisions filed between April and June 2017 involving issues of potential interest to FPC members.

THIRD CIRCUIT PRECEDENTIAL OPINIONS

Andrews v. Sciulli [sic], 853 F.3d 690 (3d Cir. 2017) (Civil Rights - § 1983 / Qualified Immunity) – The central issue in this case was whether any of the misleading assertions and omitted facts in an affidavit of probable cause could, when corrected, outweigh a crime victim’s positive identification or undermine reliance on it. After he was acquitted, Andrews filed suit against Officer Sciulli for false arrest and malicious prosecution. The district court granted summary judgment to Sciulli on qualified immunity grounds, concluding that the omissions and misleading assertions it found in Sciulli’s affidavit were not material to probable cause, which could be based on the victim’s identification of Andrews alone. The Court of Appeals identified an additional omission that it found significant. When that omission was combined with others, the court, based on a reconstructed affidavit, concluded that a reasonable jury could find that the corrected and added facts outweighed the victim’s identification of Andrews or undermined reliance on that identification. The court therefore reversed the district court’s grant of summary judgment in favor of Sciulli and remanded for trial.

In re: Lipitor Antitrust Litig., 855 F.3d 126 (3d Cir. 2017) (Federal Court Jurisdiction) – In all but one of 15 consolidated cases, plaintiffs alleged that companies holding the patents for Lipitor and for Effexor XR delayed entry into the market of generic versions of those drugs by engaging in an overarching monopolistic scheme that involved fraudulently procuring and enforcing the underlying patents and then entering into reverse-payment settlement agreements with generic manufacturers. In the remaining case, a group of California pharmacists asserted claims against Lipitor defendants solely under California law. All the cases were assigned to one district court, which dismissed the bulk of plaintiffs’ claims. The Court of Appeals’ opinion deals solely with defendants’ jurisdictional challenges and does not address the merits of the plaintiffs’ appeals. Applying Christianson v. Colt Indus. Operating Corp., 486 U.S. 800 (1986), the court concluded that it was not necessary to transfer cases to the Court of Appeals for the Federal Circuit because (1) federal and state antitrust law – not patent law – created plaintiffs’ causes of action; and (2) plaintiffs’ well-pleaded complaints did not state any claim upon which their “right to relief necessarily depend[ed] on resolution of a substantial question of federal patent law, in that patent law [was] a necessary element of one of the well-pleaded claims.” As to the California pharmacists’ case, the court concluded that the district court erred in denying plaintiffs’ remand motion on the ground that it was possible that patent issues would be raised in defense. After rejecting defendants’ assertion that the pharmacists’ case “arises under” patent law pursuant to § 1338(a), the court considered the alternate argument that diversity jurisdiction existed at the time of final judgment due to the voluntary dismissal of non-diverse parties. Finding the record insufficient to determine the citizenship of the parties, however, the court, retaining jurisdiction over the appeal, ordered a limited remand so the record could be clarified.

Palakovic v. Wetzel, 854 F.3d 209 (3d Cir. 2017) (Eighth Amendment / Prison Suicides) – Plaintiffs’ son, a mentally ill 23-year old imprisoned at SCI Cresson, committed suicide after repeatedly being placed in solitary confinement. Plaintiffs sued, alleging prison officials were deliberately indifferent both to the inhumane conditions that their son experienced while in solitary confinement and to his serious medical need for mental health care. Concluding that the “vulnerability to suicide” legal framework applied, the district court dismissed plaintiffs’ claims under Rule 12(b) (6) and granted leave to amend. Rather than repleading their original claims, plaintiffs asserted only vulnerability-to-suicide claims and a failure-to-supervise claim. After
the district court also dismissed the new claims, plaintiffs declined the option to amend again and appealed, challenging both dismissals. Because they did not replead their original claims in their amended complaint or express an intention to preserve those claims for appeal, the Court of Appeals first considered whether plaintiffs had waived appellate review of the first dismissal. Concluding that the claims in the original complaint were dismissed on legal grounds, the court ruled they had not. On the merits, the court clarified when the vulnerability-to-suicide framework applies. Because plaintiffs sought to hold prison officials accountable for injuries that their son experienced during his periods in solitary confinement while he was alive, rather than seeking to hold officials accountable for failing to prevent his death, the district court erred in applying the vulnerability-to-suicide framework. The district court also erred in dismissing the amended complaint because it applied an incorrect standard. Under the proper standard, plaintiffs had pleaded sufficient facts to bring their claims to the discovery stage. Therefore, the court vacated both judgments.

**Jones v. SCO Silver Care Operations LLC**, 857 F.3d 508 (3d Cir. 2017) (Labor & Employment [FLSA] / Arbitration) – Certified nursing assistants sued their employer, alleging that it violated the FLSA by (1) failing to include certain wage differentials in its calculation of their regular rate of pay, resulting in lower overtime pay, and (2) automatically deducting 30-minute meal breaks from their total time worked, even though they often needed to work through those breaks during night shifts. Silver Care moved to dismiss or to stay the proceedings pending arbitration, citing the arbitration clause in the governing collective bargaining agreement (CBA) and arguing that both of the plaintiffs’ FLSA claims depended on disputed interpretations of that agreement. The district court held that the plaintiffs’ FLSA claims did not arise out of or implicate the CBA and denied the motion. The Court of Appeals affirmed, concluding that neither of the plaintiffs’ claims depended on disputed interpretations of CBA provisions such that arbitration was necessary.

**Reilly v. City of Harrisburg**, 858 F.3d 173 (3d Cir. 2017) (First Amendment [Buffer Zone Ordinance] / Civil Procedure [Preliminary Injunction]) – Plaintiffs mounted several constitutional challenges to a Harrisburg ordinance that declared persons could not “knowingly congregate, patrol, picket or demonstrate in a zone extending 20 feet from any portion of an entrance to, exit from, or driveway of a health care facility.” In considering whether to grant plaintiffs’ requested preliminary injunctive relief, the district court ruled that plaintiffs did not bear their burden of demonstrating that they were likely to succeed on the merits, and for that reason alone denied plaintiffs’ request. The Court of Appeals first clarified that the applicable standard for preliminary equitable relief did not require a movant to establish all four factors. Instead, courts must assess whether the movant met the threshold for the first two “most critical” factors and if so, must then determine in their sound discretion if all four factors, taken together, balance in favor of granting the requested preliminary relief. Turning to the case at hand, the court concluded that the district court erred in placing the entire burden on plaintiffs to show a likelihood of success because the government bore the burden of justifying its restriction on speech. The district court’s ruling was vacated and the case remanded so that defendants could have the opportunity to show that the ordinance was narrowly tailored and so that the district court could reassess whether preliminary injunctive relief was warranted under the clarified standard.

**In re: Klaas**, 858 F.3d 820 (3d Cir. 2017) (Bankruptcy) – Sixty-one months after the start of their Chapter 13 plan and after debtors had paid $174,104 (slightly more than their anticipated plan base), the trustee filed a motion to dismiss the case under 11 U.S.C. § 1307(c), alleging that her final calculation showed that debtors still owed $1,123. Debtors paid the extra money within 16 days, and, although the trustee withdrew her motion, a creditor who had joined the motion pursued it, asserting that the case must be dismissed because debtors had not completed all payments within 60 months. The bankruptcy court denied the motion to dismiss, denied the creditor’s motion for summary judgment in a later-filed adversary proceeding in which she made the same argument and issued a completion discharge. The district court affirmed the bankruptcy court’s rulings. After determining that the appealed orders from both cases were final orders, the Court of Appeals addressed whether a bankruptcy court may deny a motion to dismiss.
and/or grant a completion discharge when there remains at the end of the 60-month plan term a shortfall that the debtor is willing and able to cure. The court held that bankruptcy courts retain discretion under the Bankruptcy Code to grant a reasonable grace period for debtors to cure an arrearage, and, after setting forth a non-exhaustive list of five factors that courts should consider in deciding whether to exercise that discretion, also held that the bankruptcy court did not abuse its discretion in this case. The district court’s orders were affirmed.

**In re: Zoloft (Sertraline Hydrochloride) Prods. Liab. Litig.**, 858 F.3d 787 (3d Cir. 2017) (Evidence [Daubert]) – Plaintiffs alleged that Zoloft, an anti-depressant drug Pfizer manufactured, causes cardiac birth defects when taken during early pregnancy. They offered the expert testimony of Dr. Nicholas Jewell, Ph.D., to support their position. The district court, finding that Dr. Jewell “failed to consistently apply the scientific methods he articulate[d], [] deviated from or downplayed certain well established principles of his field, and [] inconsistently applied methods and standards to the data so as to support his a priori opinion,” excluded Dr. Jewell’s testimony and later granted Pfizer’s motion for summary judgment. Noting that a central question in the case was whether statistical significance is necessary to prove causality, the Court of Appeals declined to state a bright-line rule and instead described that the requisite proof necessary to establish causation will vary greatly across cases and cautioned that discussions of statistical significance should not understate or overstate its importance. The court rejected plaintiffs’ contention that the district court had created a legal standard under which reliability requires replicated, statistically significant findings, concluding that the district court had simply made findings of fact. Agreeing with the district court that Dr. Jewell had unreliably applied the techniques underlying the weight-of-the-evidence analysis and the factors of the Bradford Hill analysis, the court affirmed the district court’s exclusion of Dr. Jewell’s testimony and the subsequent grant of Pfizer’s summary judgment motion.

**De Ritis v. McGarrigle,** ___ F.3d ___, 2017 WL 2802636 (3d Cir. June 29, 2017) (First Amendment / Qualified Immunity) – For about 11 months, Assistant Public Defender De Ritis relayed to other attorneys, judges and members of the county council that the reason for his transfer back to the Public Defender Office’s juvenile court unit was that he was “being punished” for “taking too many cases to trial.” This reason was identified through “fourth-person hearsay” – De Ritis took no steps to confirm that the relayed reason was accurate. After he was fired for making these statements, De Ritis brought various constitutional and state-law claims against, among others, the public defender, a Delaware County judge, the county solicitor, and the Delaware County Council and its members. Roger, the public defender, appealed from the district court’s denial of his motion, based on qualified immunity, for summary judgment on De Ritis’s First Amendment claim. The Court of Appeals held that Roger did not violate De Ritis’s First Amendment rights because (1) the statements, when made to judges and attorneys while in court, were not citizen speech; (2) the statements, when made to other attorneys outside of the courthouse, did not involve a matter of public concern; and (3) the statements made to the county solicitor and the county council chair gave Roger adequate justification to treat De Ritis differently from a member of the general public. In the course of its analysis, the court also held, as a matter of law, that a person’s speech is recklessly false when he disseminates “gossip” in the form of “fourth-person hearsay” and chooses to do so for “six months or eight months” without investigating its truth. The court reversed the district court’s denial of qualified immunity.

**Halley v. Honeywell Int’l Inc.**, ___ F.3d ___, 2017 U.S. App. LEXIS 11594 (3d Cir. June 29, 2017) (Class Action) – Plaintiffs filed a putative class action on behalf of property owners in several Jersey City neighborhoods, alleging common law tort and civil conspiracy claims for depreciation of their property values due to alleged contamination by a known human carcinogen. The contaminant was contained in the byproduct of two chromate chemical production plants, one of which was operated by a company to which Honeywell is the successor in interest and one of which was operated by Pittsburgh Plate Glass. The district court certified a settlement-only class as to the claims against Honeywell and approved a settlement fund, which included an award of costs and
attorneys’ fees for plaintiffs’ counsel. A member of the settlement class appealed, asserting, \textit{inter alia}, that the district court (1) abused its discretion in finding the settlement fair and reasonable under Rule 23(e); (2) erred in analyzing the award of attorneys’ fees based on the amount of the recovery before deducting costs, rather than after deducting costs, as required by New Jersey Court Rule 1:21-7; and (3) abused its discretion in awarding costs from the Honeywell settlement for costs incurred in litigation against PPG. The Court of Appeals concluded that the class certification requirements of Rules 23(a) and (b)(3) were satisfied, and that the district court did not abuse its discretion in its analysis and balancing of the factors set forth in \textit{Girsh v. Jepson}, 521 F.2d 153 (3d Cir. 1975). It agreed that Rule 1:21-7 applied, but concluded that application of the rule had no effect on the district court’s substantive analysis, and thus there was no abuse of discretion. The court, however, vacated and remanded the district court’s approval of costs under Rule 23(g) so that court could provide its reasoning as to why the costs were reasonably incurred in the prosecution of the case against Honeywell and address the issue of commingled expenses.

\textbf{EASTERN DISTRICT OF PA OPINIONS}

\textit{Long v. SEPTA}, 2017 WL 1332716 (E.D. Pa. Apr. 5, 2017) (Standing [Concreteness under \textit{Spokeo}]) – After they were denied employment with SEPTA, plaintiffs asserted that SEPTA violated the Fair Credit Reporting Act (FCRA) in failing to provide (1) a clear and conspicuous written disclosure, (2) consumer reports to plaintiffs before revoking their employment offers, and (3) a summary of plaintiffs’ rights under the FCRA before revoking those offers. SEPTA sought dismissal under Rule 12(b)(1), arguing that plaintiffs failed to plead facts that showed they suffered a concrete and particularized injury as a consequence of SEPTA’s purported FCRA violations. Chief Judge P. Tucker agreed with SEPTA, concluding that plaintiffs failed to allege any specific, identifiable trifle of injury or allege that they were harmed in any non-abstract way as a consequence of SEPTA’s procedural violations. Plaintiffs alleged that they were denied jobs because of their criminal histories, which they disclosed before SEPTA conducted any background check, and did not allege that the reports obtained from that check was inaccurate. The court granted SEPTA’s motion.

\textit{Fair Housing Rights Center in Southeastern PA v. Morgan Properties Mgmt Co.}, LLC, 2017 WL 1326240 (E.D. Pa. Apr. 11, 2017) (Housing discrimination / Standing) – After conducting an investigation triggered by a disabled person’s complaint, nonprofit agency filed suit against several apartment owners, asserting that the defendants’ inflexible first-of-the-month due date for rent made it more difficult for disabled people reliant on SSDI to obtain housing on the defendants’ properties, and discouraged disabled people from applying to live in those properties. Defendants sought judgment on the pleadings, arguing that the accommodation sought (flexibility in setting the due date for SSDI recipients) was not required under the Fair Housing Act and that the plaintiff lacked standing. Judge R. B. Surrick rejected the defendants’ accommodation-related arguments, concluding that the FHA may require accommodations for an SSDI recipient’s financial circumstances and that SSDI recipients may need to be afforded “preferential treatment” in order to provide them with an equal opportunity to obtain housing. Other arguments raised fact questions that required discovery to address and thus could not be the basis for dismissal. The court also ruled that the injuries alleged in the plaintiff’s complaint (e.g., the resources expended to conduct its investigation of defendants’ discriminatory actions) were sufficient to establish standing.

\textit{Juday v. Merck & Co.}, 2017 WL 1374527 (E.D. Pa., Apr. 17, 2017) (Statute of limitations & discovery rule when claims accrue outside PA) – Indiana citizens filed negligence, product liability, failure-to-warn and other claims against Merck based on Mr. Juday’s adverse reaction to Merck’s shingles vaccine. Merck sought summary judgment on statute-of-limitations grounds. Given the Judays’ claims accrued outside Pennsylvania, a central issue was whether Indiana’s law or Pennsylvania’s law provided the shorter statute of limitations for each of those claims. Concluding that a two-year limitations period applied to all of the Judays’ claims, Judge H. Bartle also addressed the Judays’ argument that they were entitled to application of the discovery rule – a question that also required assessment of both states’ laws to determine which would result in the shorter period. Ultimately, the court granted Merck’s
motion because the Judays had filed their complaint more than two years after the vaccine had been administered, and they provided no factual basis to invoke the discovery rule under either Pennsylvania or Indiana law to toll the commencement of the limitations periods applicable to their claims.

Hendrick v. Aramark Corp., 2017 WL 1397241 (E.D. Pa., Apr. 18, 2017) (Standing [Concreteness under Spokeo]) – Hendrick claimed that the defendants violated the Fair and Accurate Credit Transaction Act (FACTA) when, after buying a soft drink, the store they operated gave him a receipt that displayed 10 digits of his credit card number. He alleged that this violation “exposed [him] to at least an increased risk of identity theft.” Defendants sought dismissal under Rule 12(b)(1) (or alternatively 12(b)(6)), arguing that Hendrick failed to allege facts to show the requisite “concrete,” “particularized” and “actual or imminent” injury-infact and thus did not show Article III standing. Judge N. Quiñones Alejandro agreed because Hendrick alleged only that he was subject to an increased risk of harm (versus that he had suffered an actual injury), and had not alleged any facts to substantiate such a risk (e.g., he alleged the receipt was still in his possession). The court granted defendants’ motion.

Smith v. Howmedica Osteonics Corp., ___ F. Supp. 3d ___, 2017 WL 1508992 (E.D. Pa., Apr. 27, 2017) (Viability of strict liability and implied breach of warranty claims against medical device manufacturers under Pennsylvania law) – The Smiths brought strict liability, negligence, breach of implied warranty and loss of consortium claims under Pennsylvania law against Howmedica and Stryker, asserting various physical and economic injuries stemming from the failed implantation of the Stryker Gamma 3 Nail System into Mr. Smith’s left hip and leg. Defendants moved to dismiss under Rule 12(b)(6), contending that Pennsylvania does not recognize strict liability or breach of implied warranty and loss of consortium claims against manufacturers of prescription medical devices, and that the Smiths failed to allege facts sufficient to support any of their claims. Judge W. Beetlestone granted defendants’ motion in part and denied it part. Upon its review of Pennsylvania court decisions, the court concluded that the strict liability claim based on design defect had to be dismissed, but predicted that the Pennsylvania Supreme Court would not bar strict liability claims asserting a manufacturing defect against medical device manufacturers. The court also concluded that the Smiths had plausibly alleged a manufacturing defect strict liability claim. Following the general understanding in the circuit that the implied warranty of merchantability and the rule of strict products liability in the Restatement (Second) of Torts § 402A are “essentially the same,” the court dismissed the claim based on design defect but permitted the claim based on manufacturing defect to go forward. Because the Smiths failed to allege facts plausibly giving rise to a negligent manufacturing, design, failure-to-warn or failure-to-recall claim, however, their negligence claim was dismissed. The court denied defendants’ motion as to Mrs. Smith loss-of-consortium claim because not all of Mr. Smith’s tort claims were dismissed.

Apotex, Inc. v. Cephalon, Inc., 2017 WL 2215262 (E.D. Pa., May 19, 2017) (Daubert [Damages expert]) – In this antitrust case, Apotex challenged both Cephalon’s patent and the reverse-payment settlement agreements that Cephalon entered into with each of four generic drug company defendants. After a bench trial (resulting in judgment in Apotex’s favor on its patent claims), motion practice and settlements, two antitrust claims involving the reverse-payment settlement agreements remained. Remaining defendants sought to exclude testimony of an Apotex expert, who provided three alternate damages calculations in support of Apotex’s damages claims. The first measured the lost profits Apotex allegedly suffered as a result of being unlawfully barred from the market by defendants’ conduct. The second and third calculations, which resulted in larger damages estimates, modified the first to reflect additional assumptions about the provisions of the reverse-payment agreements. Defendants challenged all three analyses. Judge M. Goldberg granted the motion in part and denied it in part. The court concluded that the first damages calculation could be presented to a jury because it was sufficiently reliable and fit the facts of the case; defendants’ disputes with the expert’s inputs could be dealt with on cross-examination. The court, however, agreed with defendants that the second and third calculations did not fit
the facts of the case and, because they measured damages in excess of lost profits, were contrary to the law on antitrust damages. The court ruled those had to be excluded.

**LaTorre v. Downingtown Area Sch. Dist.,** __ F. Supp. 3d __, 2017 WL 2223834 (E.D. Pa., May 22, 2017) (Constitution [First Amendment]) – LaTorre, who contracted with the school district to provide services as a chief security officer, claimed that the school district and its superintendent terminated that contract in violation of the First Amendment in retaliation for LaTorre speaking to a reporter to urge him to kill a false story that a student had weapons on school property. The parties filed cross motions for summary judgment. Noting the unique circumstances of the case – e.g., the speech involved benefited the school district – Judge E. Robreno concluded that LaTorre’s speech involved a matter of public concern, but also found that genuine issues of material fact existed as to (1) whether LaTorre spoke as an employee or a citizen; (2) whether defendants had an adequate justification for their termination of the contract; and (3) whether the speech was a substantial factor in the termination decision. As a result, the court denied both parties’ motions.

**Scottsdale Ins. Co. v. Kinsale Ins. Co.,** __ F. Supp. 3d __, 2017 WL 2311248 (E.D. Pa., May 26, 2017) (Non-signatory’s obligation to arbitrate) – Scottsdale asserted a host of claims (e.g., unjust enrichment, quantum meruit, equitable contribution and indemnification) against Kinsale, seeking to recover from Kinsale the monies spent and incurred for Scottsdale’s defense and indemnity of its insured in an underlying action that also involved Kinsale’s insured. Kinsale moved to compel arbitration and dismiss the case, relying on the arbitration clause contained in its policy with its own insured. The issue before Judge E. Robreno was therefore whether Scottsdale, a non-signatory of the agreement between Kinsale and its insured, could be compelled to arbitrate its claims against Kinsale under the arbitration provision contained in that agreement. The court concluded the answer to that question was yes. Given that Scottsdale’s claims were entirely dependent on Kinsale’s obligation to provide insurance coverage under the Kinsale policy, Scottsdale was equitably estopped from objecting to the arbitration clause in that policy. The court granted Kinsale’s motion and dismissed the case.

**Krist v. Scholastic, Inc.,** __ F. Supp. 3d __, 2017 WL 2349004 (E.D. Pa., May 30, 2017) (Copyright / Venue) – In his licensing agreement with Corbis Corporation, Krist granted Corbis limited rights to sublicense his photographs to third parties in exchange for a percentage of the fees that Corbis received. Corbis licensed Krist’s photographs to Scholastic in an agreement that put limits on Scholastic’s use of those photographs. Krist sued Scholastic, alleging it infringed his copyrights on 45 photographs when it used those photographs in ways that went beyond the limits that Corbis’ agreement with Scholastic had imposed. Scholastic moved for dismissal under Rule 12(b)(6), or in the alternative, transfer of the case to the Southern District of New York in accordance with either the forum selection clause in its agreement with Corbis or with § 1404(a). Judge C. Rufe denied the motion. The court first concluded that Krist’s allegations that Scholastic infringed his copyrights in five described ways shortly after Scholastic licensed his works were sufficient to state a claim. Noting a split among courts regarding whether forum selection clauses applied to copyright claims of non-parties, the court concluded that the clause did not apply to Krist’s claim because (1) that claim was not a dispute regarding the agreement between Corbis and Scholastic, and (2) Krist was neither a party to that agreement nor a third-party beneficiary. The court also concluded that because private interest factors weighed heavily in favor of Krist, Scholastic’s request for transfer under § 1404 would be denied.

**United States ex rel. Forney v. Medtronic Inc.,** 2017 WL 2653568 (E.D. Pa., June 19, 2017) (Statutes [False Claims Act]) – Filing under the False Claims Act and 29 state false claims statutes (not including Pennsylvania, which does not have such a statute), Forney alleged that Medtronic paid health care providers illegal kickbacks in the form of free services and staff to induce providers to choose Medtronic’s products over its competitors’ products. Because Centers for Medicare & Medicaid Services required providers to whom Medtronic paid such kickbacks to certify compliance with the Anti-Kickback Statute (AKS), Medtronic caused the providers to submit false claims. Medtronic moved for dismissal under Rule 12(b)(6), arguing that providing product support to a customer does not constitute an
illegal kickback. Judge E. Smith concluded that Forney's complaint was deficient in that she: (1) failed to allege with particularity how Medtronic's free services crossed the line separating permissible product support from illegal remuneration with independent value to the purchaser; (2) failed to allege that Medtronic acted “knowingly and willfully” as required by the AKS; and (3) failed to connect the alleged kickbacks to resulting false claims with sufficient particularity. As to claims under state laws, the complaint did not reference any actual claims, services, providers or conduct located outside of Pennsylvania and instead merely alleged that Medtronic engaged in “nationwide marketing,” which was not sufficient to survive dismissal. The court granted Medtronic's motion, but did so without prejudice and gave Forney an opportunity file a second amended complaint.

MIDDLE DISTRICT OF PA OPINIONS

Fields v. Speaker of the Pennsylvania House of Representatives, __ F. Supp. 3d __, 2017 WL 1541665 (M.D. Pa. Apr. 28, 2017) (Constitution [Establishment Clause]) – Atheist, agnostic, secular humanist and other persons who do not believe in a deity challenged on First and Fourteenth Amendment grounds a Pennsylvania House of Representatives' internal House rule, which limited guest chaplains delivering an opening invocation at legislative sessions to members “of a regularly established church or religious organization” and which the speaker of the House interpreted to exclude “non-adherents” and “nonbelievers” from the guest chaplain program. Among other relief, plaintiffs sought an injunction requiring the House to permit them to deliver nontheistic invocations, prohibiting defendants from discriminating against nontheistic speakers, and prohibiting the speaker from directing visitors to rise for invocations. Defendants, sued in their official capacities, sought dismissal, urging that plaintiffs lacked standing or otherwise failed to state a claim. Chief Judge C. Conner granted the motion in part and denied it in part. The court ruled that (1) plaintiffs and plaintiff organizations had standing; (2) plaintiffs pleaded a policy of religious discrimination sufficient to state a First Amendment claim; (3) only two plaintiffs stated a plausible coercion claim as both attended House daily sessions, had been exposed to the speaker's directive to rise for opening invocations, and were subjected to reproach and humiliation for remaining seated; and (4) legislative prayer is subject to review under the Establishment Clause alone, and thus plaintiffs' free speech, free exercise and equal protection claims had to be dismissed.

Audi of America, Inc. v. Bronsberg & Hughes Pontiac Inc., __ F. Supp. 3d __, 2017 WL 2480588 (M.D. Pa. June 8, 2017) (Attorney-client and common-interest privileges) – Audi sued Wyoming Valley Audi, alleging that it breached certain terms of an Audi dealer agreement when it entered into an asset and real estate purchase agreement with the Napleton Group. Wyoming Valley produced more than 13,000 documents responsive to Audi's discovery requests, but claimed that 54 documents – involving communications between Wyoming Valley and Napleton and communications between Wyoming Valley's counsel and its broker – were non-discoverable. Audi sought to compel production of those documents, asserting that because Wyoming Valley and Napleton were on opposite sides of the commercial transaction that Audi challenged, they could never have a common legal interest in defending the transaction that they negotiated. Magistrate Judge M. Carlson disagreed, noting that the documents at issue were created or exchanged after Audi and other manufacturers notified Wyoming Valley about concerns that they had regarding the purchase agreement and its alleged impact on the manufacturers' rights under their own contracts with Wyoming Valley. After the manufacturers put them on notice regarding potential legal challenges, Wyoming Valley and Napleton shared a legal interest in addressing those challenges. The court also concluded that six documents involving communications between Wyoming Valley's outside counsel and its broker were protected by the attorney-client privilege.
WESTERN DISTRICT OF PA OPINIONS

**Columbia Gas Transmission LLC v. Temporary Easements for the Abandonment of a Natural Gas Transmission Pipeline**, 2017 WL 1284943 (W.D. Pa. Apr. 5, 2017) (Preliminary injunction) – After its review and a period for public comment, FERC issued Columbia Gas a certificate of public convenience and necessity and authorized it to proceed with the abandonment of a section of its Line 138 system and certain associated facilities. When negotiations failed, Columbia Gas filed a condemnation action against the McCartys, Appalachian Timber Products Inc. and others, stating that it owned an easement that gave Columbia Gas the rights to operate and maintain Line 138 over those properties and that it needed additional temporary easements to accomplish Line 138’s removal. Columbia Gas then sought both a preliminary injunction, which would give it immediate access to, and possession of, the temporary easements, and partial summary judgment. Judge K. Gibson granted the motion for a preliminary injunction, concluding that several of the landowners’ arguments in opposition were arguments that should have been before FERC when it was reviewing Columbia Gas application for approval or were, in effect, collateral attacks on FERC’s certificate of public convenience and necessity. In either case, the arguments were not proper when made to the court after Columbia Gas had been issued that certificate. The court-deferred decision on Columbia Gas’ motion for partial summary judgment due to the case being in its very early stages.

**Columbia Gas Transmission LLC v. An Easement to Construct, Operate and Maintain a 20-inch Gas Transmission Pipeline**, 2017 WL 1355418 (W.D. Pa. Apr. 13, 2017) (Valuation of just compensation after condemnation under the Natural Gas Act) – Because Columbia Gas condemned a small part of the Griffith’s property upon their consent, remaining before the court in this condemnation action was the issue of just compensation. The Griffiths relied upon their experts’ use of an “income approach” to valuation. Columbia Gas moved for summary judgment, arguing the Griffiths could not meet their burden of proving just compensation because the “comparable sales” method was the appropriate method to use. It also sought to prevent both Mr. Griffith from testifying as an expert and Mrs. Griffith from testifying as a lay witness. After describing the alternate methods and the circumstances under which other courts viewed one or the other method as appropriate, Judge M. Kearney (sitting by designation) concluded that courts in the Third Circuit used the comparable sales approach when, as in this case, comparable sales were available. Because the Griffiths’ experts (including Mr. Griffith) relied solely on the “income approach,” they did not present competent testimony and thus did not raise a genuine issue of material fact. The court also agreed that Mrs. Griffith’s lay testimony raised no genuine issue. The court granted Columbia Gas’ summary judgment motion, concluding that the valuation presented by its expert should be used because it was uncontested.

**Gniewkowski v. Lettuce Entertain You Enterprises Inc., __ F. Supp. 3d __**, 2017 WL 1437199 (W.D. Pa. Apr. 21, 2017) (Barriers to websites under ADA’s Title III) – Visually impaired individuals claimed that defendants – including a bank and Churchill Downs – maintained websites that were not accessible to those with visual impairments in violation of the Title III of the ADA. Plaintiffs sought only injunctive relief. Defendants filed motions to dismiss under Rule 12(b)(1) and (b)(6), urging that plaintiffs lacked standing and failed to state a claim. Judge A. Schwab denied the motions. The court rejected defendants’ standing attacks, ruling that plaintiffs had sufficiently established that they had sustained an injury in fact – barriers prevented their screen reader software from reading the content of defendants’ websites and therefore prevented individual plaintiffs from conducting online research to assess financial services (bank) or participating in the gaming and entertainment services provided (Churchill Downs). Both defendants argued, in essence, that dismissal was required because a website is not a building (e.g., arguing that a website is not a “place of public accommodation”). The court also rejected these arguments. It found *Ford v. Schering–Plough Corp.*, 145 F.3d 601 (3d Cir. 1998), and *Peoples v. Discover Financial Services*, 387 Fed. Appx. 179 (3d Cir. 2010), distinguishable because, unlike those cases, the alleged discrimination in this case took place on property that defendants owned, operated and controlled, i.e., their websites.
**Gorgonzola v. McGettigan**, 2017 WL 1449789 (W.D. Pa. Apr. 21, 2017) (Class action / Judicial estoppel) – The dispute in this case centers on whether and how the Office of Personnel Management (OPM) will notify registered nurses who retired after April 7, 1986, after having worked part time at the VA for a portion of their careers of the increased annuity payments to which they were legally entitled. In this opinion, Judge M. Hornak dealt with seven motions (including cross motions for summary judgment and a motion seeking to amend a prior class certification decision in which the court used the term “conditionally certified”) and with a party that, despite repeatedly conceding that the law requires what the plaintiffs sought, insisted on “placing pretty much any obstacle that it could think of in the path of” carrying out its legal obligation (including taking inconsistent positions and positions that were contrary to the record). Among other rulings, the court denied OPM’s motion for summary judgment (after invoking judicial estoppel), granted in part plaintiffs’ motion for summary judgment (on their equal protection claim), and concluded, based on its review of its prior class certification decision, that it was not the sort of “tentative” and “conditional” certification decision that *In re National Football League Players Concussion Injury Litigation*, 775 F.3d 570 (3d Cir. 2014), made clear was no longer permitted.

**Bell v. Borough of West Mifflin**, 2017 WL 1832494 (W.D. Pa. May 8, 2017) (Pleading requirements for private corporation defendants in §1983 action) – Based on false accusations of a Walmart loss prevention officer and two assistant managers, Bell and Lewis, both African Americans, were handcuffed, detained, arrested and jailed when they attempted to return, with a receipt in hand, a TV they had purchased at Walmart earlier in the day. After the charges against them were dismissed, they filed suit under § 1983 against West Mifflin, two West Mifflin police officers and Walmart, claiming that all defendants deprived them of their constitutional rights and that Walmart committed the state-law torts of false arrest and malicious prosecution against them. Walmart moved that the claims against it be dismissed under Rule 12(b)(6). Chief Judge J. Conti granted Walmart’s motion. Even assuming that Walmart was a state actor, the court determined that plaintiffs’ amended complaint did not set forth factual allegations sufficient for the court to plausibly infer that Walmart maintained a custom or policy that directly caused their constitutional deprivation and that Walmart could not be held vicariously liable for the acts of its employees that allegedly deprived plaintiffs of their constitutional rights. As to plaintiffs’ state-law claims, factual allegations in the amended complaint were not sufficient to infer that the loss prevention officer and two assistant managers acted within the scope of their employment with Walmart (e.g., there were no allegations regarding job responsibilities or duties).

**Netherlands Ins. Co. v. Butler Area School Dist.,** __ F. Supp. 3d __, 2017 WL 2533525 (W.D. Pa. June 9, 2017) (Insurance [Duty to defend]) – Two insurance companies sought a declaration that they had no duty to defend the Butler Area School District and its superintendent in a class action lawsuit in which plaintiffs alleged that Summit Elementary School students consumed water that contained levels of lead and copper far in excess of acceptably safe water standards. The parties filed cross-motions for judgment on the pleadings. Judge A. Schwab denied the insurance companies’ motions and granted the insureds’ motion. After determining that the insureds had met their burden of showing coverage, the court turned to the policies’ exclusions. Here, it concluded that the policies’ pollution exclusions were ambiguous in the context of an alleged exposure to lead and/or copper in drinking water and thus had to be interpreted in favor of coverage. The court also rejected the insurers’ argument that, as their policies’ lead exclusions applied, they had no duty to cover claims that involved bodily injuries from “lead and/or copper.”

**Axiall Corp. v. descote S.A.S.,** 2017 WL 2608616 (W.D. Pa. June 16, 2017) (Daubert / weighted average cost of capital as a measure of consequential damages) – Axiall brought a claim of breach of implied warranty of fitness for a particular purpose, among others, based on descote S.A.S’s sale of allegedly defective dual angle valves, which were to be used on railroad tank cars that transported chlorine. The parties filed motions seeking to exclude testimony of the other’s expert, and the court sought supplemental briefing on two issues: whether descote’s expert’s testimony...
regarding the management-of-change process was relevant to the issue of reliance under 18 Pa. Cons. Stat. § 2315, and whether Axiall's expert's "weighted average cost of capital" (WACC) was the same as its actual return on assets. The question regarding WACC testimony arose because Axiall sought to use that testimony to support its claim for lost opportunity costs as a measure of its consequential damages. Chief Judge J. Conti ruled that descote's expert's testimony regarding the management-of-change process would not be admitted because the issue in the case was what descote knew or had reason to know when it sold Axiall the valves, and testimony about what Axiall should have done was not relevant to that issue. As to Axiall's expert's WACC testimony, the court allowed that, in theory, lost opportunity costs could in certain cases be recovered as an item of consequential damages. Because Axiall did not sufficiently tie the WACC to its actual return on assets, however, there was not a sufficient foundation for its expert to opine about WACC and thus his testimony was excluded.

Klein v. Commerce Energy Inc., __ F. Supp. 3d __, 2017 WL 2672290 (W.D. Pa. June 21, 2017) (Statutes – TCPA) – Over the course of nearly a year, Collectcents, which provided debt collection services to Commerce Energy for its customer accounts, made calls to Klein's VoIP number seeking to collect on a delinquent account of "P.S.", a Commerce Energy customer. The problem was that the number being called was not P.S.'s number – that number had not been properly recorded when P.S.'s account had been opened. Klein's third amended complaint stated claims that the numerous telephone calls made to him violated the Telephone Consumer Protection Act (TCPA) and constituted negligence and invasion of privacy under Pennsylvania law. Defendants sought summary judgment, and Chief Judge J. Conti granted their motions. Klein's TCPA claims fell under the catchall provision of 47 U.S.C. § 227(b)(1)(A)(iii) ("any service for which the called party is charged for the call") because calls were made to his Google VoIP number. Because Klein admitted that his VoIP service was free, the court held that defendants were entitled to summary judgment on Klein's TCPA claims. Exercising supplemental jurisdiction over the state-law claims, the court also concluded that Klein's negligence claim against Collectcents failed for lack of a violation of the TCPA and because the claim did not fall within one of the four scenarios for negligence causing emotional distress and that the claims against both defendants for invasion of privacy were time barred.

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
Thank You

The Chair of the FPC Newsletter Subcommittee extends a sincere thank you to the following Federal Practice Committee members for their contributions to this edition of the PBA Federal Practice Committee newsletter:

• Hon. D. Michael Fisher, U.S. Court of Appeals Third Circuit, Pittsburgh
• Nancy Conrad, White and Williams LLP, Center Valley
• Philip Gelso, Law Offices of Philip Gelso, Kingston
• Melinda Ghilardi, Federal Public Defenders Office, Scranton
• Adam Martin, Salzmann Hughes, PC, Harrisburg
• Jeremy A. Mercer, BlankRome, Pittsburgh
• Brett G. Sweitzer, Defender Association of Philadelphia, Philadelphia

A special thank you also goes to Susan Etter, Esq., Pennsylvania Bar Association.

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U.S. Court of Appeals
Third Circuit, Pittsburgh

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

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Federal Public Defenders Office, Scranton
6TH ANNUAL
U.S. SUPREME COURT ROUNDUP

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ASSISTANT TO THE SOLICITOR GENERAL, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, D.C.
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A federal criminal sentencing is a complex process, often starting long before any party appears before the District Court. The Federal Practice Committee of the Pennsylvania Bar Association has assembled a panel representing the participants in that process to draw from their vast and diverse experience and share the best sentencing practices from the government, defense counsel, probation office, district and appellate court perspectives.

The program will be followed by a one-hour networking reception.

Panelists:
- Hon. Thomas I. Vanaskie, United States Court of Appeals for the Third Circuit
- Hon. Christopher C. Conner, Chief Judge, United States District Court, Middle District of Pennsylvania
- Bruce Brandler, United States Attorney, Middle District of Pennsylvania
- Heidi R. Freese, Assistant Federal Public Defender, Federal Public Defender Designee, Middle District of Pennsylvania
- Douglas S. Moyle, Supervising United States Probation Officer, Middle District of Pennsylvania

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

PBA Federal Practice Committee Chair:
- Hon. D. Michael Fisher, United States Court of Appeals for the Third Circuit

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PBA Federal Practice Committee

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