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On Appeal

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ANOTHER FALSE CLAIMS ACT CIRCUIT SPLIT: THE THIRD CIRCUIT WEIGHS IN ON WHETHER A CLINICAL OPINION CAN BE DEEMED "FALSE" UNDER THE FCA

U.S. ex rel. Druding v. Care Alternatives, 952 F.3d 89 (3d Cir. 2020)

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In *United States ex rel. Druding v. Care Alternatives*, 952 F.3d 89 (3d Cir. 2020), the Third Circuit ruled that a difference of opinion between parties' medical experts can create a triable jury question as to the falsity requirement for an action under the False Claims Act (FCA). Declining to adopt the more rigorous "objective falsity" standard of the Eleventh and Fifth Circuits, the Third Circuit joined with other appellate courts that have determined that dueling expert opinions can create a genuine dispute of material fact.

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THIRD CIRCUIT SIDES WITH SISTER CIRCUITS AND ADOPTS CLEAR-STATEMENT RULES FOR AMBIGUOUS DISMISSAL ORDERS[1]

Papera v. Pa. Quarried Bluestone Co., 948 F.3d 607 (3d Cir. 2020)

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A dismissal order in a civil proceeding is a court order that denies the relief sought by the commencement of the action and ends the proceeding. An action may be dismissed by court order either voluntarily at the request of the plaintiff or involuntarily at the request of the defendant and direction of the judge. If a case is dismissed with prejudice, then a party will be precluded from bringing the claim again because final judgment on the merits has been reached. But if a claim is dismissed without prejudice, the case may be tried again.

In *Papera v. Pennsylvania Quarried Bluestone Co.*, 948 F.3d 607 (3d Cir. 2020), the Third Circuit adopted two clear-statement rules from its sister circuits to resolve ambiguous dismissal orders: First, for purposes of claim preclusion, the Third Circuit established that where a dismissal order is unclear, it will be construed as voluntary rather than involuntary. Second, the Third Circuit held that unclear voluntary dismissals will be interpreted as without prejudice, unless the order contains clear and express language to the contrary.

1 This article is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.

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ADVISORY OPINION: A FORMER THIRD CIRCUIT JUDGE'S TIPS FOR WINNING ON APPEAL

Hon. Thomas I. Vanaskie (Ret.), Geoffrey R. Johnson, Peter J. Adonizio, Jr.
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Before reentering private practice, I was a federal judge for over 24 years, the final eight of which I had the tremendous honor of serving on the United States Court of Appeals for the Third Circuit. As a circuit court judge, I reviewed thousands of briefs, heard scores of oral arguments, and addressed countless motions and emergency matters. Some of these cases were high-profile. Many were complex. Others, while diligently analyzed by the judges and their clerks, involved comparatively straightforward issues that were more easily resolved. Through *all* of these cases, however, I developed a mental checklist—a proverbial "dos and don'ts" list—for effectively presenting a case on appeal. To that end, I hope the following suggestions will be useful to the bar, new and veteran advocates alike:

- **Ensure accurate citations.** This may seem obvious, but it must be said. Far too often, parties submit briefs that are littered with inaccurate citations to the record and to legal authorities. Attorneys also carelessly cite to the record generally, or cite a statute or case without pinpointing the precise subsection or page, forcing the judge and her staff to hunt for the correct subsection or page. While the occasional typo can slip by even the most diligent writer, repeated erroneous or general citations can create the impression that your analysis is careless, which can undermine how the court views your arguments. You do not want this to happen. The Third Circuit's appendix-hyperlinking pilot project should help in this regard, but attorneys must still diligently ensure precision and accuracy in citations before filing a brief.
- **Write a clear summary of your argument.** The appeal you are presenting is very likely to be extremely important to your client, and for the individual client it is likely to be the most important thing in her life. Having said that, judges and their staff are busy. Indeed, it is common for federal appeals panels to have to decide approximately 25-30 cases for each sitting. For this reason, it is imperative that your brief has a succinct summary of your argument that clearly and convincingly articulates what you want the court to do and why it should do that. An effective summary of argument not only makes the court's job easier, it also guarantees that you—the person with the most knowledge about your position—have a chance to provide the court with a roadmap to your desired result. Always take advantage of that opportunity.
- **Vary sentence structures.** Short, simple sentences can be a highly effective tool in acclimating a judge with the facts and legal issues underlying your case. Like building blocks, this approach lays a foundation on which a reader can confidently delve into the record and case law. However, overreliance on short sentences can sometimes veer into monotony, which can make a reader lose interest. As such, I have found it helpful when parties intersperse longer sentences throughout their briefs, particularly when juxtaposed against a purposely impactful short sentence. See what I mean?
- **Avoid block quotes.** Many writers insert lengthy block quotes to underscore what they consider key points in their briefs. I respectfully disagree with this approach. While I understand the impulse to use block quotes, and the format is indeed needed in certain circumstances, I found that it made my job as a judge easier when parties used shorter quotes from cited authorities in their own sentences and placed lengthier quotes, when necessary, in footnotes. I was not alone in this view among my judicial peers. This approach increases the likelihood that a judge will not skim over what might otherwise appear in a tedious block quote and, perhaps most importantly, helpfully explains to the panel why an authority bolsters *your* position in *your* particular case.
- **Don't mischaracterize facts or law.** Your credibility is your most important asset and you do not want to lose a panel's trust by hiding from or mischaracterizing, intentionally or otherwise, the factual record or applicable law in your case. Of course, this advice is not meant to deter persuasive writing or zealous representation. Those are hallmarks of strong and effective appellate advocacy. Instead, this is a reminder that, if facts or precedents exist that undermine your position, chances are high that your adversary will find them and make the court aware of them. Generally speaking, then, you should confront adverse authorities and facts head-on, thereby bolstering your credibility with the court and presenting a significantly more helpful brief.
- **Maximize your reply brief.** Reply briefs are, hands down, the most frequently missed opportunity among practitioners to advance their case on appeal. While many, more experienced advocates use the reply brief effectively, more often than not, appellants simply repeat the arguments from their opening brief without actually replying to their adversary's brief. Or even worse, some advocates incorporate by reference whole sections of their opening brief in the reply brief. Those are egregious mistakes. Bear in mind that some judges start their review process by reading the reply brief. It is therefore extremely compelling when you submit a clear and focused reply brief that meaningfully addresses your adversary's arguments and explains why—notwithstanding those arguments—you win and they lose. Relatedly, given the increasingly low percentage of cases that are granted oral argument, you should not assume that you will be able to offer reply points at oral argument. If anything, writing an effective reply brief increases the likelihood that your panel will become more focused on your case and grant oral argument.

I could offer many more suggestions, but I think the above insights provide a helpful reference point for advocates, particularly newer members of the bar navigating the appeals process. For helpful advice regarding oral arguments, I'd also recommend reading Matthew Stiegler's article, "One Lawyer's Advice to Advocates Preparing for Their First-Ever Oral Argument," which was previously published in the April 2019 edition of this very newsletter. While that article was directed towards younger lawyers, the advice provided by Mr. Stiegler is universal and provides a useful refresher course for any attorney preparing for argument.

Now that I'm on the other side of the bench, I look forward to meeting and knowing the members of the Third Circuit Bar Association. Anyone interested in speaking about this article, or the practice more broadly, should feel free to contact me. I hope you do.

ANOTHER FALSE CLAIMS ACT CIRCUIT SPLIT: THE THIRD CIRCUIT WEIGHS IN ON WHETHER A CLINICAL OPINION CAN BE DEEMED "FALSE" UNDER THE FCA — continued from page 1

In *Care Alternatives*, former employees turned relators brought suit under the FCA's *qui tam* provision against their former employer and New Jersey hospice facility, Care Alternatives. They alleged that the facility improperly admitted patients who were ineligible for Medicare's Hospice Benefit, by which eligible persons receive and health care providers are reimbursed for providing palliative care. To effectuate its scheme, the facility purportedly altered patient Medicare certifications to reflect benefit eligibility, ultimately submitting falsified hospice-reimbursement claims to Medicare and Medicaid.

After the Government decided not to intervene in the action, the relators proceeded independently in the U.S. District Court for the District of New Jersey, seeking to hold the facility liable under the FCA, which prohibits any person from knowingly submitting to the United States a false claim for payment or approval. 31 U.S.C. § 3729(a)(1)(A). The parties each retained medical experts, who offered dueling opinions as to whether a reasonable physician would have determined that the patients at issue were hospice eligible. The relators' expert opined that 35% of patients examined were inappropriately certified, while the defendant's expert found no errors.

Care Alternatives successfully moved for summary judgment as the District Court concluded that a mere difference of opinion between medical experts, without more, is insufficient to show a "false claim" as the FCA requires. Reasoning that medical opinions are inherently subjective and thus cannot be false, the district court applied the Eleventh Circuit's "objective falsehood" standard, which requires relators to present evidence that a physician's prognosis was in fact inaccurate to meet the FCA's falsity requirement. *See United States v. AseraCare, Inc.*, 938 F.3d 1278 (11th Cir. 2019).

The Third Circuit's Decision

The relators successfully appealed. Judge Greenaway, writing for the panel that included Judges Hardiman and Bibas, stated that a provider's claim for reimbursement can indeed be deemed "false" based on medical expert testimony which shows that accompanying patient certifications did not support a prognosis of terminal illness. Rejecting the lower court's premise that an opinion's subjective nature makes falsity indeterminable, the Court looked to the common law—as the FCA does not define "false"—to determine that an opinion can in fact be considered false. Under the common law, the veracity of a medical opinion is subject to scrutiny and can be proven untrue through expert analysis after the fact.

Moreover, the District Court's approach required the relators to show that a physician deceitfully falsified a patient certification in exchange or that a doctor certified a patient whom she believed to be ineligible. But, this approach wrongly conflated the elements of falsity and scienter. Merging these statutory requirements, as the lower court had done, ultimately reads the latter out of the FCA. However, the requirement to show that a defendant *knowingly* submitted a false claim is an important independent element, as the mental state condition protects innocent providers from liability simply where an expert could be found to disagree with an original prognosis.

Finally, the objective falsity standard has the effect of requiring relators to prove "factual falsity"—that the facts contained within the claim are actually inaccurate. Third Circuit precedent, however, makes clear that the FCA also embraces "legal falsity." Under this alternative, a claim may be "false" where a provider incorrectly certifies that it has complied with a statute or regulation the compliance with which is a condition for payment by the Government. In other words, where relators can show that a defendant failed to meet a regulatory requirement for submitting a valid claim to the Government—which may be done, in part, through an expert opinion that patient Medicare certifications are inaccurate—they have shown a triable issue of fact as to whether such claims are indeed "false." Thus, the Third Circuit rejected the Eleventh Circuit's *AseraCare* holding that a difference of opinion among physicians reviewing medical documentation *ex post* cannot alone show the original medical opinion to be false.

Implications

Care Alternatives further opens the door for relators to get to trial, as their claims survive summary judgment where reasonable medical experts disagree about the factual or legal falsity of a challenged claim. Health care providers and FCA plaintiffs, in turn, face a diverging set of rules and risks. In the Eleventh and Fifth Circuits, greater reliance is likely to be placed upon original clinical opinions, as FCA plaintiffs bear the burden of identifying facts surrounding a clinical decision that are inconsistent with the proper exercise of medical judgment, such as by proving that a doctor failed to review a patient's file or that the doctor did not actually believe her certification when signing off. Elsewhere, *Care Alternatives* reinforces the need for health care providers to review documentation, policies, and other measures that safeguard against claims of falsity, as a reasonable original prognosis cannot alone insulate providers.

While *Care Alternatives* was a hospice case, the decision more broadly provides relators with a sword to challenge defendants who assert that their agents have made reasonable judgments in a subjective area. At the same time, the ruling, which was limited to the FCA element of falsity, leaves many traditional FCA defenses untouched. As the Third Circuit emphasized, the independent scienter element, and every other statutory condition required to bring an FCA claim, must still be proven. Likewise, *Care Alternatives* does not affect traditional summary judgment arguments, as a party may prevail where the factual record only supports an inference in favor of one party. Still, now that another Circuit has concluded that an expert's opinion is enough to create a jury question as to falsity, FCA litigation is not likely to slow any time soon.

THIRD CIRCUIT SIDES WITH SISTER CIRCUITS AND ADOPTS CLEAR-STATEMENT RULES FOR AMBIGUOUS DISMISSAL ORDERS — continued from page 1

Background

In *Papera*, the plaintiffs attempted to revive previously dismissed claims after a mediation settlement fell through. The parties appeared to resolve the underlying case in mediation. The plaintiffs alerted the district court and requested a 60-day order of dismissal. The district court subsequently filed a two-sentence order tentatively dismissing the case and giving the parties 60 days to finalize the settlement. In an accompanying minute entry, the district court noted that the case was dismissed "without prejudice," but the plaintiff could move to reinstate the case for good cause if the settlement fell through. The district court never received a final settlement agreement.

Four months later, the plaintiffs requested a conference call regarding the status of the litigation. The district court stated that it had administratively closed the case and no longer had jurisdiction. A month after the call, the plaintiffs filed a nearly identical new complaint, which was assigned to the same district court judge. The defendants moved for summary judgment based on the claim-preclusive effect of the prior dismissal order, which the district court granted on that basis. However, on appeal, the Third Circuit reversed.

Third Circuit's Decision

The pivotal issue on appeal was the claim-preclusive effect of an ambiguous dismissal order. Claim preclusion only bars relitigation of claims dismissed with prejudice. Under Rule 41(b), an involuntary dismissal is treated as dismissal with prejudice and, therefore, claim preclusive "[u]nless the dismissal order states otherwise." Fed. R. Civ. P. 41(b). Conversely, under Rule 41(a), a voluntary dismissal is treated as a dismissal without prejudice and, therefore, not claim preclusive unless the order "states otherwise." Fed. R. Civ. P. 41(a).

In *Papera*, the Third Circuit held that it would construe ambiguous orders as voluntary orders without prejudice. Thus, "[o]nly a clear and explicit statement will suffice" to establish claim preclusion, either by declaring the dismissal involuntary, voluntary with prejudice, or otherwise preclusive. In so holding, the Third Circuit observed that this "clear-statement rule" aligns with the similar rules in the Fourth, Fifth, and Eleventh Circuits, as well as the general preference against imposing the "severe" remedy of dismissal with prejudice.

Applying the clear-statement rule to the *Papera* case, the Third Circuit determined that the district court's dismissal order, at the plaintiffs' request, did not clearly express that the original lawsuit was dismissed involuntarily or with prejudice. The Third Circuit acknowledged that the dismissal order could have been intended to suggest that failure to present a settlement agreement within the 60 days would result in dismissal with prejudice. However, this speculative inference was insufficient, absent clear and express language. The Third Circuit also acknowledged that if the district court had issued a separate order after the 60 days had passed or during the requested conference call, then the subsequent dismissal could have had claim-preclusive effect. However, the record did not indicate a separate order. Thus, in the absence of a clear statement to the contrary, the dismissal order in the first lawsuit did not have claim-preclusive effect over the plaintiffs' second lawsuit.

Conclusion

Papera clarifies that Third Circuit courts will interpret a dismissal order as non-prejudicial unless the order contains clear and express language to the contrary. Therefore, parties should review dismissal orders for clear language indicating dismissal with prejudice. If no such language exists, the Third Circuit's opinion suggests that defendants can and should request an additional order noting dismissal with prejudice to ensure claim-preclusive effect.

TIPS FOR REMOTE ORAL ARGUMENTS

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There are a number of things to consider before engaging in a remote oral argument. One consideration is the technological resources that can benefit you (which will in part depend upon whether you are arguing by telephone or video). For telephonic, avoid your home phone and even your smart phone. Get a decent phone with speakerphone (handsfree) capability. For video, if at all possible, avoid using the built-in microphone and camera on your computer or iPad. Don't even think about using a smart phone. Invest in a good webcam and, ideally, a separate USB microphone that has noise-cancelling features or, better, cardioid features. You want to look and sound your best and these will make a big difference. Consider getting a "soft box" (aka "light box") with a daylight spectrum bulb to help eliminate the shadows under your eyes. When stores restock, you can get all three of these items for under $250 (total). Your computer speakers should work fine as long as you can hear what is said. It's important how you look and sound at argument; it's less important if the judges' voices don't sound natural.

Now consider the logistics of using the technology. Position the camera above your eyelevel and directly above the monitor where the judges will appear. If your camera is located somewhere else and you are looking at the judges on the monitor, it will appear to them like you are looking off to the side rather than at them. You don't want the camera too close to your face as webcams tend to distort facial features the closer you get to them. Consider the background behind you. A neutral background is best. Even a "diploma wall" is distracting. You don't want a light source behind you as that will make you appear as a silhouette. Consider a virtual background if using a platform like Zoom that offers that option. But virtual backgrounds can create a halo around your head when you move (especially if there is a light source behind you).

Now that you've got your system set up, you need to "moot" it. Have a technology moot court session with a colleague, using the same platform the court will use if possible. How does your name appear on the screen? (It might be the nickname given to your computer.) How do you get other participants to show up on your screen? How are you going to handle messages from your remote co-counsel in mid-argument? Consider a second technology moot with your opponent. You want the argument to go smoothly for the court. It benefits no one if there are distractions because your opponent does not understand the technology.

It's the day of the argument. Dress for court. No shorts. You don't know what might happen that forces you to stand up on camera. Avoid stripes or complex patterns as they tend to "move" on camera and distract the viewer. Avoid all black or all white. Cameras emphasize contrast. Grey, light blue or light pastels are good options.

Understand that your presentation by telephone or video will be different than a live argument. Sometimes the technology, especially in telephonic arguments, won't let you hear that a judge is trying to ask a question. You need to take more frequent breaks so that judges can ask their questions. In a video argument, you may be in a better position to realize that another judge is trying to ask a question, so you may need to play "traffic cop" more than would occur in a live argument. While you should never read an argument in any event, beware that it is much more obvious if you are reading when you present via video. Clock management can be much more difficult in a remote argument, especially a telephonic one.

Planning ahead and practicing will allow you to offer the best remote argument on behalf of your client in these difficult times. And the court will most certainly appreciate your additional preparation.

THIRD CIRCUIT TO START NUMBERING DOCKET ENTRIES

Starting January 1, 2020, docket entries listed on the Court's docket will be numbered. All cases opened in 2020 will have consecutive numbers assigned to each entry.

Docket entry numbers cannot be assigned to entries made prior to January 1, 2020 due to coding issues within the program. Entries made prior to January 1, 2020 will continue to be listed by filing date only and document icon where applicable. Entries posted on or after January 1, 2020 will be sequentially numbered calculated from all prior entries whether entered on the public docket or resulting from internal maintenance and processes such as referrals to the Circuit Mediator. For example, if a case has 15 docket entries prior to January 1, 2020 (10 public filing entries and 5 internal maintenance entries), the first docket entry made after January 1, 2020 on the general docket will docket number 16. The Court currently has approximately 2,800 open cases; the dockets for these cases will be mixed containing both numbered and unnumbered entries.

The changes will add clarity to the Court's dockets and will benefit the public, litigants, and practitioners.

THIRD CIRCUIT HOLDS REMOVAL TO FEDERAL COURT DOES NOT CONSTITUTE A WAIVER OF DEFENSES

Danziger & De Llano, LLP v. Morgan Verkamp LLC et al., 948 F.3d 124 (3d Cir. 2020)

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In our increasingly interconnected world, the practice of law has become ever more national, and at times even global, with few geographical obstacles impeding attorneys' practical abilities to assist clients. However, this ability to cast a wide net in forming professional associations creates the potential for complex questions of jurisdiction. This was the situation presented to the Third Circuit recently in *Danziger & De Llano, LLP v. Morgan Verkamp LLC et al.*, 948 F.3d 124 (3d Cir. 2020).

Background

This case saw Ohio law firm Morgan Verkamp and Texas law firm Danziger squaring off in Pennsylvania state court over attorney's fees arising from Morgan Verkamp's representation of a client, Michael Epp, who was living outside of the United States. Danziger alleged that it referred Epp to Morgan Verkamp and had formed an oral contract with the Ohio attorneys under which Danziger was to collect a referral fee in the form of one-third of any attorney's fees from Epp's lawsuit. After Morgan Verkamp recovered several million dollars in attorney's fees as a result of the Epp litigation, Danziger filed a writ of summons against Morgan Verkamp in Pennsylvania state court, which compelled Morgan Verkamp to participate in pre-complaint discovery for a year and a half before Danziger finally filed a complaint.

Morgan Verkamp quickly removed the action to federal court and moved to dismiss the complaint for lack of personal jurisdiction. Both parties suggested in the alternative that the case be transferred to their respective states of Ohio and Texas. Without considering transferring the case, the District Court dismissed the action with prejudice, holding that Pennsylvania state court did not have personal jurisdiction over defendant Morgan Verkamp.

Third Circuit's Decision

On appeal, the Third Circuit affirmed and held that Morgan Verkamp did not waive its personal jurisdiction defense by taking part in pre-complaint discovery for the time period between Danziger's filing of the writ of summons and the subsequent filing of the complaint. Under Pennsylvania law, defendants can raise the defense of personal jurisdiction via preliminary objections filed in response to a pleading. A writ of summons, however, is not a pleading but a tool by which to compel pre-complaint discovery. Morgan Verkamp's first opportunity to raise the defense of personal jurisdiction only arose upon Danziger's filing of the complaint a year and a half into the litigation. Active participation in litigation can only waive the defense of personal jurisdiction *after* the filing of the complaint. If Danziger's argument were to be accepted, it could result in plaintiffs utilizing writs of summons to effectively compel a waiver and force defendants to submit to personal jurisdiction. The Court declined to adopt such an interpretation.

In addition, on a question of first impression, the Court held that Morgan Verkamp did not consent to personal jurisdiction by removing the case to federal court instead of filing preliminary objections in Pennsylvania state court. The Court followed the established jurisprudence of the First, Second, and Eighth Circuits in holding that removal to federal court does *not* waive defenses that a defendant would otherwise have in state court. Removal is not akin to an appeal; the federal court exercises *original* rather than appellate jurisdiction over a case that has been removed. The Court therefore recognized that Morgan Verkamp's motion to dismiss for lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2) was proper because Morgan Verkamp did not waive the defense either by participating in pre-complaint discovery or by removing to federal court.

Finally, the Court ruled that the District Court did not abuse its discretion in declining to transfer the case to either Ohio or Texas. As such, the Court opted to affirm the dismissal, rather than remand. Because the statutes of limitations in Ohio and Texas have not yet run for Danziger's claims, the action may be refiled by the plaintiff in either state for further proceedings on the merits.

Conclusion

In summarizing the case, the Court stated it succinctly, "removal to federal court changes the field of play, but not the game being played" and "the District Court need not find [the parties] a new playing field."

PRESIDENT'S NOTE

Andrew C. Simpson
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What a difference a few months can make. Instead of the 3CBA preparing for sponsoring the opening reception for the Third Circuit's Judicial Conference and putting the finishing touches on some excellent CLE programs that we had prepared for the conference, we find ourselves hunkered down under stay-at-home orders issued by our respective state and territorial governments.

The Court, of course, had no realistic choice but to cancel the conference. When we received the news, the 3CBA reached out to encourage that it be rescheduled at the earliest possible date. We also offered to assist with any of the logistics that might be necessary. We consider the conference an important factor in maintaining the excellent bench–bar collegiality that the Third Circuit and the district courts within the Circuit are justly known for and we want to help foster that in any way possible.

With the COVID-19 crisis still making it difficult to plan for the future, the advance planning that is necessary to put together such an event, and concerns about mass gatherings, it may be some time before the Court can schedule the next bench-bar conference. But, when that time comes, the 3CBA will be ready to shoulder a laboring oar to assist as requested. In the meantime, we hope you, your families and your co-workers are safe and remain that way.

CLERK'S OFFICE ACCEPTING ORIGINAL PROCEEDINGS AND CASE FILINGS FROM NON-ELECTRONIC FILERS BY EMAIL

Amended April 13, 2020

The United States Court of Appeals for the Third Circuit remains open and operational during the COVID-19 pandemic. The Third Circuit Clerk's Office is conducting remote operations during this time and will continue to process all filings submitted to the Court.

Counsel and parties who are registered CM/ECF filers should continue to submit case filings through the Court's CM/ECF system.

Counsel and pro se litigants who need to file a new original proceeding, such as a Petition for Review, a Petition for Writ of Mandamus or Prohibition, or a Motion for Leave to File a Second or Successive Habeas Petition may send the documents in PDF format to the Clerk for filing via email addressed to emergency_motions@ca3.uscourts.gov.

Litigants who cannot file through the Court's CM/ECF system may also submit documents for filing in PDF format by email addressed to emergency_motions@ca3.uscourts.gov. Please include the appeal number in the subject line of the email.

PDF files should NOT be password protected. Parties may continue to submit filings through the U.S. Mail and overnight mail.

The Court of Appeals has installed its own drop box located on the first floor of the Courthouse for appellate filings. You should not place documents intended for the District Court in the Court of Appeals drop box. Prior to depositing documents, you may use the time stamp located on the District Court drop box or write the date and time on the Court of Appeals filings. Filings which are time sensitive should not be placed in the drop box and instead should be emailed to emergency_motions@ca3.uscourts.gov.

Any party who intends to file an emergency motion should call 267-299-4904 and leave a detailed message regarding the nature of the emergency and contact information.

SUPREME COURT RULES THAT A BANKRUPTCY COURT'S ORDER ADJUDICATING A MOTION FOR RELIEF FROM THE AUTOMATIC STAY CONSTITUTES A FINAL, IMMEDIATELY APPEALABLE ORDER

Ritzen Group, Inc. v. Jackson Masonry, LLC, 140 S. Ct. 582 (2020)

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Generally, in civil litigation, a court's decision is considered "final" for purposes of appeal when the litigation ends so that there is nothing else for the court to adjudicate—in other words, when an entire case is concluded. The regime in bankruptcy, however, is different. A bankruptcy case, unlike other civil cases, is an aggregation of multiple individual controversies. The Supreme Court previously held in *Bullard v. Blue Hills Bank*, 575 U.S. 496, 501 (2015) that orders in bankruptcy cases qualify as "final" when they definitively dispose of discrete disputes within the overarching bankruptcy case. With the *Bullard* decision as a guide, the Supreme Court in *Ritzen Group, Inc. v. Jackson Masonry, LLC*, 140 S. Ct. 582 (2020) recently addressed the issue of whether a dispositive ruling on a creditor's motion for relief from the automatic stay is a final, appealable order and unanimously held that a bankruptcy court order unreservedly granting or denying relief from the automatic stay is a final, immediately appealable order.

Background

The dispute stems from a breach of contract claim in Tennessee state court between Ritzen Group, Inc. ("Ritzen") and Jackson Masonry, LLC ("Jackson"). Before trial began in the state court, Jackson filed for bankruptcy under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Middle District of Tennessee, triggering the Bankruptcy Code's automatic stay provision, 11 U.S.C. § 362(a), and putting the litigation on hold.

Ritzen filed a motion in the Bankruptcy Court for relief from the automatic stay, seeking an order allowing the trial to proceed in state court. After a hearing, the Bankruptcy Court denied the motion. The Bankruptcy Code and the Federal Rules of Bankruptcy Procedure require parties to appeal from a final order within 14 days after entry of the order. 28 U.S.C. § 158(c)(2); Fed. R. Bankr. P. 8002(a). Ritzen did not appeal from the order denying the motion within those 14 days.

Ritzen then filed a proof of claim against the bankruptcy estate, asserting its breach of contract claim. Following an adversary proceeding, the Bankruptcy Court found that Ritzen, not Jackson, was the party in breach of the contract and disallowed Ritzen's claim against the bankruptcy estate. Without objection from Ritzen, the court confirmed Jackson's plan of reorganization.

Thereafter, Ritzen filed two separate notices of appeal in the District Court for the Middle District of Tennessee challenging the Bankruptcy Court's order denying relief from the automatic stay and its resolution of the breach of contract claim. The District Court rejected the first of Ritzen's appeals as untimely, holding that under section 158(c)(2) and Federal Rule of Bankruptcy Procedure 8002(a), Ritzen's time to appeal expired 14 days after the Bankruptcy Court's entry of the order denying relief from the automatic stay. Turning to the appeal from the Bankruptcy Court's rejection of Ritzen's breach of contract claim, the District Court ruled against Ritzen on the merits.

On further appeal, the Court of Appeals for the Sixth Circuit affirmed the District Court, holding that Ritzen's motion for relief from the automatic stay qualified as a "discrete proceeding," culminating in a dispositive decision. Therefore, the Court of Appeals concluded that Ritzen's appeal was not timely, as the 14-day appeal clock ran from when the Bankruptcy Court entered the order denying Ritzen's motion to lift the stay.

The Supreme Court granted *certiorari* to resolve the issue of whether bankruptcy court orders denying relief from the automatic stay are final and, therefore, immediately appealable under 28 U.S.C. § 158(a)(1).

The Supreme Court's Decision

The Supreme Court unanimously affirmed the Sixth Circuit. First, the Supreme Court looked to its ruling in *Bullard*. There, the Supreme Court held that a bankruptcy court's order rejecting a proposed plan at confirmation was not "final" and immediately appealable under section 158(a) because it did not conclusively resolve the relevant proceeding. The Supreme Court further noted in *Bullard* that the plan confirmation process is not a discrete or independent proceeding within the context 28 U.S.C. § 158(a), as it involves back and forth negotiations and, at times, submissions of amended or new plan proposals.

Comparing the description of the plan confirmation process in *Bullard* to that of stay relief adjudication, here, the Supreme Court held that a bankruptcy court's ruling on a stay relief motion is a discrete proceeding that is final and immediately appealable. The Supreme Court ruled that adjudication of a stay relief motion initiates a discrete procedural sequence, including notice and a hearing. This, the Supreme Court explained, is consistent with its holding in *Bullard* and the statutory text itself.

Ritzen argued that an order denying stay relief simply decides the forum for adjudication of adversary claims (bankruptcy court or state court) and, therefore, should be treated merely as a preliminary step in the claims adjudication process, rather than a discrete proceeding that is immediately appealable. However, the Supreme Court responded that Ritzen incorrectly characterized denial of stay relief as determining nothing more than the forum for claim adjudication. Resolution of a motion for stay relief can have large practical consequences, the Supreme Court explained, such as increasing creditors' costs, delaying collection of a debt, or causing collateral to decline in value. Furthermore, many motions to lift the automatic stay do not involve adversary claims against the debtor that would be pursued in another forum, such as non-judicial efforts to obtain or control the debtor's assets.

The Supreme Court also addressed Ritzen's argument that if the bankruptcy order adjudicating stay relief was held to be final and immediately appealable, it will encourage piecemeal appeals and unduly disrupt the efficiency of the bankruptcy process. The Supreme Court disagreed, explaining that classifying

(continued on page 9)

SUPREME COURT RULES THAT A BANKRUPTCY COURT'S ORDER ADJUDICATING A MOTION FOR RELIEF FROM THE AUTOMATIC STAY CONSTITUTES A FINAL, IMMEDIATELY APPEALABLE ORDER — continued from page 8

orders that conclusively resolve stay relief motions as final will avoid, rather than cause, delays and inefficiencies because it will permit creditors to establish their rights expeditiously outside the bankruptcy process. The rule Ritzen urges, the Supreme Court asserted, would force creditors who lose stay relief motions to fully litigate their claims in bankruptcy court and then, after the bankruptcy case is over, appeal and seek to redo the litigation all over again in state court.

Conclusion

After *Ritzen*, adjudication of a motion for relief from the automatic stay is a discrete proceeding culminating in a final, appealable order. From a practitioner's perspective, this decision is a good reminder that it is crucial to file an appeal from an order granting or denying stay relief within 14 days.

THIRD CIRCUIT TASK FORCE ON EYEWITNESS IDENTIFICATIONS RELEASES ITS REPORT AND BEST-PRACTICE RECOMMENDATIONS

Chief Judge D. Brooks Smith of the United States Court of Appeals for the Third Circuit has announced the release of the "2019 Report of the Third Circuit Task Force on Eyewitness Identifications." The Report was recently published in the *Temple Law Review*, 92 TEMP. L. REV. 1 (2019), and is available for viewing here.

On September 9, 2016, then Chief Judge Theodore A. McKee appointed a group of prominent judges, lawyers, scholars, and members of the law enforcement community to serve on the Third Circuit Task Force on Eyewitness Identifications. The Task Force was co-chaired by Judge McKee of the Third Circuit Court of Appeals and Judge Mitchell S. Goldberg of the United States District Court for the Eastern District of Pennsylvania. The Task Force was created, in part, in response to scientific developments in the field of eyewitness identification and a recognition that some courts have taken note of these developments and applied them in a number of criminal cases. The Task Force was charged with making recommendations to promote more reliable practices for eyewitness investigation and to effectively deter unnecessarily suggestive identification procedures, which raise the risk of wrongful convictions. Eyewitness misidentification is considered the single greatest source of wrongful convictions in the United States. At the time the Task Force was formed, no other federal court had undertaken a project aimed at examining the issues raised by eyewitness identification.

In conducting its comprehensive review of the research and scholarship in the field of eyewitness identification, the Task Force held meetings both as a whole and in subcommittees. It eventually drafted provisional reports of its findings, ultimately adopting its 2019 Report setting forth detailed recommendations on best practices to minimize the risk of an erroneous eyewitness identification. The recommendations set forth in the Report include: lineups and photo arrays should be administered "double-blind" or, where that is not practical, at least blinded; standard preliminary instructions should be adopted, reduced to writing, and given to a witness before any identification procedure; witnesses should be physically separated from other witnesses during the entire identification process; witnesses should be instructed not to discuss the matters about which they have been interviewed with one another, and to avoid media and social media accounts of the event; and all law enforcement departments should require training in appropriate procedures for enhancing the probability of an accurate eyewitness identification decision. As the Report concludes, adopting best practices can minimize the risk of a misidentification at the start of the criminal justice process, which is critical before a case reaches a jury trial because jurors seldom are aware that eyewitness identifications may be unreliable.

Many courts, legislators, prosecutors, and law enforcement agencies have studied the scientific research and already implemented reforms. Judge McKee, as Co-Chair of the Task Force, has expressed the hope that the 2019 Report of the Third Circuit Eyewitness Identifications Task Force will spur further study and reform, which in turn will "help to advance the continuing effort to reduce erroneous convictions based upon inaccurate eyewitness identifications."

January 27, 2020

FULL-TIME UNITED STATES MAGISTRATE JUDGE VACANCIES AT NEWARK, NEW JERSEY AND CAMDEN, NEW JERSEY

The United States District Court for the District of New Jersey has announced that it is seeking candidates for the position of full-time United States Magistrate Judge in the Newark vicinage and the Camden vicinage.

In accordance with Section 631(b)(5) of Title 28, United States Code, the Court has established a Merit Selection Panel to assist in the selection of the full-time United States Magistrate Judges through review of applicants and the making of recommendations to the Court.

The appointment of a full-time Magistrate Judge is for a term of eight (8) years. The present salary is $191,360 per year. To be eligible for appointment, the individual must be a member of good standing of the bar of the highest court of any state or the District of Columbia for at least five years, be less than 70 years of age, and not be related to a Judge of the District Court. Any candidate selected will be subject to a full field investigation by the Federal Bureau of Investigation and an Internal Revenue Service audit, after which the Court will make the appointment.

The duties of the position are demanding and wide-ranging and will include: (1) conduct of various pretrial matters and evidentiary proceedings on delegation of judges of the district court; (2) trial and disposition of civil cases upon consent of the litigants; (3) conduct of most preliminary proceedings in criminal cases; (4) trial and disposition of misdemeanor cases.

The committee invites all qualified members of the bar who are interested and who would like to be considered for appointment to submit a completed application no later than July 10, 2020 to the following address:

William T. Walsh, Secretary
Merit Selection Panel
Martin Luther King, Jr. Federal Building & U.S Courthouse
50 Walnut Street, 4th floor
Newark, NJ 07102

Or by email to applications@njd.uscourts.gov

Application forms are available from the Clerk's Office at the above address or on the Court's web site.

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This newsletter is compiled by the 3CBA's publicity/newsletter committee; please address suggestions to the committee's chair, Colin Wrabley (cwrabley@reedsmith.com).