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A TRIBUTE TO JUDGE FRANKLIN VAN ANTWERPEN

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It goes without saying what an honor it is to offer a tribute to the late Judge Franklin Van Antwerpen. As just one of his many law clerks over the years, I am well aware of, and humbled by, how lucky I am to be representing my fellow clerks in paying tribute to a man who touched all of our lives so deeply and personally over his decades on the federal bench.

Judge Van Antwerpen's reputation as a jurist is representative of his broader reputation among all those who were fortunate enough to know him. He was affable, kind, fair, thoughtful, and had an encyclopedic knowledge of everything that interested him, including the law. He was a seemingly endless font of information, which was consistent with his wide range of academic interests. He was an undergraduate engineer, something that he took great pride in and no doubt influenced his approach to judging. He was also an amateur, but avid, student of history—especially military history—and was never shy about sharing an interesting historical tidbit.

And of course there was his expansive knowledge of the law. Judge Van Antwerpen's experience as a state trial judge was an important part of his judicial identity and was still evident when I worked in his chambers, more than a decade after he arrived on the federal bench. He was a great believer in judicial efficiency, taking great care to ensure that his cases progressed expeditiously. He regularly took it upon himself—without the assistance of his clerks—to issue decisions on evidentiary and other procedural

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THIRD CIRCUIT HOLDS THAT MOOT CLAIMS AND LACK OF "NECESSITY" ARE NOT GROUNDS FOR DENIAL OF CLASS CERTIFICATION

Gayle v. Warden Monmouth County Correctional Institution, 838 F.3d 297 (3d Cir. 2016)

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The Third Circuit, in *Gayle v. Warden Monmouth County Correctional Institution*, 838 F.3d 297 (3d Cir. 2016), vacated a district court's denial of class certification in a suit filed by foreign nationals who claimed that the government's attempts to deport them following their criminal convictions were unconstitutional. In its opinion, the Third Circuit recognized that a court cannot rule on the merits of an individual plaintiff's claims when those claims are moot and there is, consequently, no live controversy. However, the Court clarified that where a motion for class certification under Federal Rule of Civil Procedure 23 is filed when the district court has jurisdiction over the claims of at least one putative class representative, the mootness doctrine does not bar consideration of class certification. The Court ultimately vacated the district court's denial of class certification based on its conclusion that a court must evaluate certification on the basis of the enumerated criteria contained in Rule 23, and cannot confine its analysis to the "necessity" of the class certification.

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A TRIBUTE TO JUDGE FRANKLIN VAN ANTWERPEN

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issues that he commonly faced as a state judge. This was both an act of judicial expediency and one of mercy to his clerks, as it allowed them more time to ascend the inevitable (and steep) learning curve of a new judicial clerk without threatening the Judge's commitment to timely managing his docket.

Never was this more apparent than when two capital habeas petitions found their way to the Judge's desk during my year in chambers. One of my co-clerks and I spent weeks struggling with the voluminous records, complex procedural rules, and substantive constitutional claims in those petitions, and never once did Judge Van Antwerpen pressure us to work faster or make us feel as if our (considerable investment of) time was not well spent. He appreciated the magnitude of the decisions he was being asked to make and was intent on making sure that his clerks could put the necessary amount of effort into those petitions to ensure that his ultimate decision was properly informed and supported. (It also helped a great deal that our third co-clerk was willing and able to take up the slack to ensure that the Judge's remaining docket did not come to a grinding halt.) The process of working through that petition for Judge Van Antwerpen left a lasting impression on me as a lawyer and, now, as a law professor. In addition to his dedication and analytic rigor, he taught us about the human side of the judiciary; the Judge's approach to those petitions revealed a striking combination of personal empathy and faith in the rule of law.

None of these revelations are at all surprising, of course, for those of us who knew Judge Van Antwerpen personally. The memories that will remain with me most profoundly as I think back on my time in the Judge's chambers are of his unwavering generosity and humanity, both of which were evident in his commitment to the local community and to his chambers family. The Judge was an enormous figure in Pennsylvania's Lehigh Valley, and earned his reputation by being a powerful voice for those in need. Before first taking the bench on the Northampton County Court of Common Pleas, he served indigent clients as an attorney for the Northampton County Legal Aid Society, a position he remained immensely proud of throughout his judicial career. He also had a deep commitment to criminal justice. While a federal judge, he served as Chairman of the Criminal Business Committee of the U.S. District Court and as a member of the Defender Services Committee of the Judicial Conference of the United States, where he was a vocal advocate for higher reimbursement rates for attorneys representing indigent defendants.

The community that the Judge served most directly was the one he created in his own chambers. Being the only sitting federal judge in Easton, Pennsylvania, Judge Van Antwerpen presided over a unique—and special—professional community. He was the centerpiece of the Easton courthouse, and the Judge took responsibility for, and great pride in, creating an inclusive and collaborative environment for everyone who worked there. This was especially true of his law clerks, whom Judge Van Antwerpen took obvious pride in mentoring. There were weekly Friday lunches, often at his beloved Pomfret Club, and countless conversations about everything from families and career choices to history and current events. He was an eager listener and an even better story teller. He imparted wisdom freely and with an ease and a joy that could not be matched, while helping develop us into well-trained, big-thinking and morally-grounded lawyers. Judge Van Antwerpen was not only a wonderful judge and public servant, he was a true mentor and teacher. While his passing is a great loss to the legal community, his greatest legacy will be the great many of us who are better lawyers and people for having known him.

* Professor Virelli served as a clerk in Judge Van Antwerpen's chambers during the 2000-2001 term. I would like to thank Sarah Beal, Heather Daly, and Jennifer Karmonick for their assistance with this tribute and for making the 2000-2001 term such a fun and memorable experience.

THIRD CIRCUIT HOLDS THAT MOOT CLAIMS AND LACK OF "NECESSITY" ARE NOT GROUNDS FOR DENIAL OF CLASS CERTIFICATION

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Underlying Litigation

Three foreign nationals brought a purported class action in the U.S. District Court for the District of New Jersey, challenging the constitutionality of 8 U.S.C. § 1226(c), the section of the Immigration and Nationality Act mandating the detention of aliens who have committed specific crimes. Each individual plaintiff sought relief from this mandatory detention in a putative class action, for themselves and on behalf of "all individuals in New Jersey who are or will be detained by 8 U.S.C. § 1226(c)." The district court ruled on the merits of the claim in two stages. Initially, it held that a court does not violate substantive due process principles when it fails to hold a hearing (known as a *Joseph* hearing) on issues other than whether the foreign national falls within the Section 1226(c) categories requiring mandatory detention. Subsequently, the court ruled on the adequacy of the procedures in such a hearing and held, *inter alia*, (1) that the form used by the government was constitutionally deficient; and (2) that *Joseph* hearings violate due process by not placing the initial burden on the government. The district court then denied the third motion to certify a class on the basis that it was "unnecessary" in light of the ruling on the merits, the injunctive components of which would purportedly benefit all putative class members.

On Appeal

The foreign nationals, on appeal, challenged the merits of the district court's due process rulings, as well as the court's denial of the motion to certify a class. Recognizing that, in order for a court to have jurisdiction over the merits of an action, the parties must have a personal stake throughout the litigation, and acknowledging that all three foreign nationals were released on bond prior to the district court's ruling on the merits, all parties conceded on appeal that the district court lacked the authority to reach the merits in the underlying litigation. Because the individual claims were moot at the time of the ruling on the merits, the Court agreed that the mootness doctrine barred the district court's consideration of the individual plaintiffs' claims and vacated the underlying district court judgment.

However, the Court held that the district court was still permitted to rule on the motion to certify because a different mootness standard governs class certification. The Court noted that this case invoked a long-established exception to the mootness doctrine—instances where the motion to certify a class was filed when at least one putative class representative had a live claim. In such circumstances, the district court has jurisdiction to consider class certification, notwithstanding the fact that the putative representatives' claims had become moot. The Court recognized that other Courts of Appeals have held that plaintiffs' individual claims must remain alive at the time when a motion to certify a class is actually **decided**, but adopted a different approach and held that such class claims could survive as long as jurisdiction over the individual claims was proper when a motion to certify was **filed**. Because the individual claims were still alive when the first of three motions to certify a class was filed (and because the third, operative motion related back to the first), the Court held that the district court had jurisdiction to consider the motion to certify a class.

The Court ultimately vacated the district court's class certification denial, but not because of any jurisdictional or mootness issues. Instead, the Court held that the district court erred in denying the motion on the basis that certification was not "necessary"—which is not an express requirement of Rule 23—and because the criteria that the district court was required to consider were wholly absent from its opinion. Specifically, the district court erred in failing to consider the basic requirements of numerosity, commonality, typicality and the ability of the representatives to fairly and adequately protect the interests of the putative class. A denial of certification based on lack of necessity directly contravenes *Geraghty v. U.S. Parole Commission*, 579 F.2d 238, 252 (3d Cir. 1978), where the Court held that a party seeking class certification "need not … prove that certification is necessary, but only that there was compliance with the prerequisites of Rule 23." The Court held that "necessity is not a freestanding requirement justifying the denial of class certification. However, it may be considered to the extent it is relevant to the enumerated Rule 23 criteria, including that final injunctive relief or corresponding declaratory relief be appropriate respecting the class as a whole." The Court cautioned that the "circumstances in which classwide relief offers no further benefit … will be rare and courts should exercise great caution before denying class certification on that basis." The Court also admonished district courts that in order to "facilitate appellate review, courts should make explicit findings before denying class certification on the ground that classwide relief is not appropriate."

Conclusion

The Court's decision is important in several respects. Although the Court held fast to the principle that courts can only reach the merits of individual claims where there is a live controversy, it reaffirmed that a court can rule on a motion for class certification as long as the motion was filed when at least one putative class representative maintained a live individual claim. On the latter point, the Court noted a circuit split and hinted that review by the Court *en banc* or by the Supreme Court could be warranted. In addition, and of particular relevance to practitioners and district courts, the Court emphasized the importance of district courts tracking the analytical points under Rule 23 and making detailed findings in the course of that analysis—especially if a motion for class certification is denied.

EN BANC THIRD CIRCUIT RULES THAT FILING A DUPLICATIVE SUIT WAS NOT IMPROPER FORUM SHOPPING WARRANTING DISMISSAL WITH PREJUDICE

Chavez v. Dole Food Co., 836 F.3d 205 (3d Cir. 2016) (en banc)

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Which side wins can depend on which court decides. Different courts apply different bodies of law, and sometimes those differences will change the outcome. That basic reality creates powerful incentives for litigants to get their cases into the courts where they believe they will win—to forum shop. When they do, then courts have to decide which forum-choosing efforts are allowed and which are not.

That is the main issue the en banc Third Circuit took up in *Chavez v. Dole Food Co.*, 836 F.3d 205 (3d Cir. 2016). The Court unanimously held that the district court abused its discretion when it applied the first-filed rule to dismiss a suit with prejudice. Reversing the panel outcome, the Court concluded that the plaintiff's decision to file a duplicative suit in a second forum did not justify a with-prejudice dismissal that would result in no court reaching the merits of the suit.

The *Chavez* case began as civil suits brought in 1993 by Latin American farmworkers who alleged that the defendants knowingly exposed them to toxic pesticides. More than two decades of procedural wrangling followed, resulting in a string of transfers and dismissals and refilings in various courts described by the Third Circuit as "byzantine."

In 2011, the plaintiffs began another round in the fight by filing suit in a Louisiana federal district court. The defendants moved for summary judgment, arguing that this suit was time-barred under Louisiana law. The plaintiffs feared that the Louisiana court would rule that their suit was untimely, so to hedge their bets they filed essentially the same suit in Delaware, where they believed their suit would not be time-barred. The defendants moved to dismiss the Delaware suit based on the first-filed rule, arguing that the Delaware court should defer to the earlier-filed Louisiana suit. The district court agreed and dismissed the Delaware suit with prejudice. A divided Third Circuit panel affirmed, ruling that the with-prejudice dismissal was warranted because filing the duplicative Delaware suit was "blatantly forum shopping." But the Court granted the plaintiffs' petition for en banc rehearing and unanimously reversed.

The en banc opinion turned on two related questions: whether filing the second suit was improper forum shopping, and whether dismissal with prejudice was permissible here. It answered "no" to both.

As to forum shopping, the Court explained:

> While reasonable minds may differ about what constitutes forum shopping in any particular case, the term generally denotes some attempt to gain an unfair or unmerited advantage in the litigation process. But here, the plaintiffs were indifferent as to *which* court would hear their claims; they simply wanted *a* court to hear their claims.

The Court observed that the plaintiffs gained no advantage by filing in two jurisdictions, and concluded they were "not trying to game the system" since they just wanted one court to hear the merits of their case.

As to dismissal with prejudice, it instructed that district courts applying the equitable first-filed rule "should generally avoid terminating a claim … that has not been, and may not be, heard by another court." In the "vast majority" of cases, the Court explained, a court enforcing the first-filed rule should stay or transfer the second suit: "A dismissal *with prejudice* will almost always be an abuse of discretion."

The Court left the door open for with-prejudice dismissal if the second suit is harassing or caused by the plaintiff's own failure to follow the rules in the first suit. It also said a with-prejudice dismissal could be merited by "[b]latant forum shopping or gamesmanship."

Chavez is unlikely to provide definitive answers about forum shopping issues to future litigants. Many future defendants will have little trouble arguing that the plaintiff gained some advantage by filing the second suit, and even less trouble arguing that the alleged forum shopping is "blatant." But even if *Chavez* does little to stem future litigation over forum shopping, it does send a clear signal to district courts that with-prejudice dismissals should be rare.

PRESIDENT'S NOTE

Peter Goldberger,
President, Third Circuit Bar Association

As my two-year term as President of the Bar Association of the Third Federal Circuit draws to a close, I am pleased to have a final opportunity to highlight a few of the accomplishments of our Association and to introduce the contents of our always-excellent Newsletter. With this issue, we welcome our new Chief Judge, Hon. D. Brooks Smith, and note his predecessor, Chief Judge McKee's proactive establishment of a Task Force on Eye-Witness Identification to help avoid miscarriages of justice before they occur by applying best practices in the stationhouse and courtroom alike.

The articles in this issue deftly summarize a few of the most important recent Third Circuit decisions on aspects of civil procedure. Samuel Hornak explains the *Gayle* decision, explicating why a class action can survive a mootness challenge that could be fatal to the justiciability of an individual class representative's claim. Matt Stiegler illuminates the en banc *Chavez* decision, which explains why filing a protective action in a second jurisdiction is not necessarily improper forum-shopping and why the second action, even if apparently barred by the first-filed rule, should not be dismissed with prejudice. Patrick Yingling (one of the hardworking volunteer editors of this newsletter) writes about the *Auto-Owners Insurance* case, aptly illustrating when the amount-in-controversy requirement properly looks at the collective value of multiple claims, notwithstanding the general rule against aggregation. These cases collectively demonstrate once again how our Circuit generally takes a practical approach to litigation issues that favors keeping the courthouse door open to individuals with potentially meritorious claims.

Shorter notices in this issue also remind us of recent Rules changes and tell you how you can get your own copy of the latest, revised edition of the Association's invaluable Practice Guide. (Perhaps this is the place to remind everyone to renew their memberships for 2017, as we welcome Chip Becker, of Philadelphia's Kline & Specter, as the 3CBA's new president for 2017-2018. Chip will lead our participation in the Circuit's Judicial Conference, to be held in Lancaster, Pa., in April.)

Finally, all will want to read Prof. Louis Virelli's apt tribute to Senior Circuit Judge Franklin S. Van Antwerpen, who died in July at age 75. I can second Lou's remarks about what a kind-hearted person, as well as an astute judge, he was. Our profile of Judge Leonard I. Garth, whom we also lost recently at the age of 95, will appear in the next issue.

THIRD CIRCUIT HOLDS AMOUNT-IN-CONTROVERSY REQUIREMENT SATISFIED IN INSURER'S DECLARATORY JUDGMENT ACTION, DESPITE ANTI-AGGREGATION RULE

Auto-Owners Ins. Co. v. Stevens & Ricci Inc., 835 F.3d 388 (3d Cir. 2016)

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In *Auto-Owners Insurance Co. v. Stevens & Ricci Inc.*, 835 F.3d 388 (3d Cir. 2016), the Third Circuit ruled that the amount-in-controversy requirement of 28 U.S.C. § 1332(a) was satisfied in an insurer's declaratory judgment action pertaining to coverage for an insured's settlement costs in defending a class action, even though no member of the underlying class had a claim in excess of $75,000. The Court recognized that separate claims cannot be aggregated for purposes of determining the amount in controversy, but reasoned that the amount in a declaratory judgment action should be measured by the "object of the litigation" from the plaintiff's perspective, which in this case was the full amount the insurer might owe to the insured.

The underlying class action involved a claim that the insured, Stevens & Ricci Inc., violated the Telephone Consumer Protection Act by sending nearly 19,000 unsolicited fax advertisements. With statutory damages of $500 per fax, a finding of liability could have resulted in a damage award of $9.5 million, even before trebling. The parties eventually settled for $2 million.

Prior to the settlement, Stevens & Ricci's insurer, Auto-Owners Insurance Company, filed a declaratory judgment action against Stevens & Ricci and the named plaintiff in the underlying action, Hymed Group Corporation. Auto-Owners sought a declaration that the policy did not provide coverage and that Auto-Owners did not owe Stevens & Ricci any duty to defend or indemnify. Auto-Owners asserted that the court had diversity jurisdiction under § 1332(a). Auto-Owners alleged that the amount-in-controversy exceeded $75,000 because the statutory damages in the underlying action were $500 per violation and more than 40 recipients had received the unsolicited faxes. The district court, on summary judgment, agreed with Auto-Owners that the policy did not cover the underlying litigation.

On appeal, in an opinion authored by Judge Jordan and joined by Judge Hardiman, the panel majority addressed Hymed's argument that the individual claims in the underlying action had been improperly aggregated to push the matter across the $75,000 jurisdictional threshold. The majority acknowledged that, generally speaking, the claims of several plaintiffs cannot be aggregated for purposes of determining the amount in controversy, *Werwinski v. Ford Motor Co.*, 286 F.3d 661, 666 (3d Cir. 2002), and that the amount-in-controversy for declaratory judgment actions is "measured by the value of the object of the litigation," *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333 (1977). The Court thus recognized that it was presented with the question of whether the case was properly viewed as a dispute between Auto-Owners and the many class members—which would give rise to aggregation problems—or as a dispute between Auto-Owners and its insured concerning its overall obligation to defend and indemnify under the policy.

In ruling that the latter is the proper view of the case, the Court looked to *Meridian Security Insurance Company v. Sadowski*, 441 F.3d 536, 539 (7th Cir. 2006), a similar case where the Seventh Circuit ruled that "[the insurer] has not aggregated multiple parties' claims" and that "[f]rom its perspective there is only one claim—by its insured, for the sum of defense and indemnity costs." The Seventh Circuit held that "the anti-aggregation rule does not apply … just because the unitary controversy between these parties reflects the sum of many smaller controversies." The Third Circuit panel majority agreed with this reasoning, stating that when the case is viewed "from the perspective of the insurer at the time of filing of the declaratory judgment complaint, Auto-Owners's quarrel was with Stevens & Ricci regarding its indemnity obligation under the Policy" and that "[t]he only 'amount in controversy' that the insurer was then concerned with was its total indemnity and defense obligation; it presumably had no interest in the way the indemnity sum might later be divided among the various class members."

Judge Greenaway, writing in dissent, stated that the majority's approach amounted to an end run around the anti-aggregation rule. Judge Greenaway wrote that *Packard v. Provident National Bank*, 994 F.2d 1039 (3d Cir. 1993), evidenced the Court's long-standing prohibition against measuring the amount in controversy by the defendant's total cost. The majority responded to this point by noting that *Packard* involved a claim by various class members who sought to avoid aggregation problems by arguing that the jurisdictional amount should be measured by the costs to the defendant rather than the damages to each plaintiff—and that the plaintiffs in the case before it, by contrast, did not bring suit against Auto-Owners; instead, Auto-Owners brought suit against its insured and Hymed. According to the majority, then, the plaintiff in the declaratory judgment action (Auto-Owners) was not aggregating claims to meet the amount-in-controversy requirement.

The Court's decision creates an interesting dynamic in insurance coverage disputes where an insurer may be able to bring a declaratory action and invoke federal court jurisdiction, but a plaintiff in an underlying action may not be able to bring a declaratory action and invoke federal court jurisdiction regarding the same insurance coverage dispute. Nonetheless, by clarifying that the amount in controversy is determined from the plaintiff's perspective, the Third Circuit decision in *Auto-Owners* brings certainty and a bright-line rule for district courts to apply going forward.

JUDGE SMITH SUCCEEDS CHIEF JUDGE MCKEE AS CHIEF JUDGE OF THE THIRD CIRCUIT

The Honorable D. Brooks Smith succeeded the Honorable Theodore A. McKee to become the thirteenth Chief Judge of the United States Court of Appeals for the Third Circuit on October 1, 2016. The Court considers appeals from federal courts and agencies in Pennsylvania, New Jersey, Delaware, and the Virgin Islands.

Judge Smith commented that "the Third Circuit has had extraordinary chief judges. I have served under six of them during my 28 years as a federal judge, and Ted McKee is a Chief who has demonstrated extraordinary leadership. He is exceptionally collegial, and both his collegiality and his judging exemplify his deep humanity."

Judge Smith joined the Third Circuit in 2002 after serving as Chief Judge of the U.S. District Court for the Western District of Pennsylvania. He also served as a Judge of the Pennsylvania Court of Common Pleas and the District Attorney of Blair County, Pennsylvania. He has been an Adjunct Professor at Penn State University Law School since 2011. He is a graduate of Franklin and Marshall College and Dickinson School of Law and is currently the Chair of the Penn State Law Board of Advisors. Among his many achievements and contributions while serving on the Third Circuit, Judge Smith assisted various government agencies in promoting the rule of law in countries across the globe and has led the nation's Space and Facilities Committee for the U.S. Courts.

"The Third Circuit is fortunate to have at the helm a judge with Brooks Smith's demonstrated record of leadership. Judge Smith led the judiciary through a significant courthouse space reduction plan while also helping us secure a major commitment from Congress to replace aging court facilities around the country," said James C. Duff, the Director of the Administrative Office of the U.S. Courts.

Chief Judge McKee began his term as leader of the Third Circuit in 2010 and joined the Court in 1994. Previous to that, McKee served as a Judge of the Court of Common Pleas of Philadelphia County, General Counsel of the Philadelphia Parking Authority, Deputy City Solicitor for Philadelphia, and an Assistant U.S. Attorney for the Eastern District of Pennsylvania. He has also served the community through organizations such as the Crisis Intervention Network, Concerned Black Men, New Directions for Women, Inc., and the Crime Prevention Association. On September 12, 2016, Chief Judge McKee formed the Third Circuit Task Force on Eyewitness Identifications to study and promote reliable practices for eyewitness identification and to deter unnecessarily suggestive identification procedures, which raise the risk of a wrongful conviction.

Judge Smith said, "Ted McKee is not only my colleague; he is also my dear friend. Following him as Chief Judge of the Third Circuit goes beyond what I would call a 'daunting challenge.' I may be succeeding him, but there is no way I can take his place. I am fortunate that he will continue on the court as an active judge, and as someone I will look to for advice and counsel."

Director Duff added, "For over six years, my friend and colleague Judge Ted McKee has provided outstanding service as a member of the Judicial Conference, which sets policy for the judiciary. Both men uphold a long line of dedicated leaders in the Federal Judiciary from the Third Circuit."

According to federal law, the chief judge of a United States Court of Appeals or District Court is determined by seniority and age. The most senior active judge under the age of 65 may serve as chief judge for a maximum term of seven years or until the age of 70. The Chief Judge of the Third Circuit presides over a court of appeals consisting of as many as fourteen active judges and, at present, ten senior judges. The Chief Judge also serves as the presiding officer of the Judicial Council of the Third Circuit, made up of the six most senior active court of appeals judges and the chief district court judges. The Council is charged with making all necessary and appropriate orders for effective and expeditious administration of justice throughout the Third Circuit.

The Third Circuit Bar Association thanks Judge McKee for his extraordinary leadership and wishes much success to Judge Smith as Chief Judge of the U.S. Court of Appeals for the Third Circuit.

THIRD CIRCUIT TASK FORCE ON EYEWITNESS IDENTIFICATIONS

On September 12, 2016, then-Chief Judge Theodore A. McKee of the United States Court of Appeals for the Third Circuit announced the formation of a Third Circuit Task Force on Eyewitness Identifications. This seventeen-person Task Force will be co-chaired by Judge McKee and Judge Mitchell S. Goldberg of the District Court for the Eastern District of Pennsylvania. The Third Circuit covers all federal courts in Pennsylvania, New Jersey, Delaware, and the Virgin Islands.

The members appointed to the Task Force include representative judges from the Court of Appeals and each District Court in the Third Circuit. These judges are joined by several subject-matter experts on eyewitness identifications: James V. Wade, Federal Defender for the Middle District of Pennsylvania; Charles M. Oberly, III, United States Attorney for the District of Delaware; John J. Brosnan, Assistant Special Agent-in-Charge, FBI, Philadelphia Division; Robert Czepiel, Jr., Supervising Deputy Attorney General for the State of New Jersey; Dr. Jennifer E. Dysart, Associate Professor of Psychology, John Jay College of Criminal Justice; and Professor Jules Epstein, Temple University Beasley School of Law. Chief Judge McKee's Order appointing the Task Force is available here.

With leading advocates and scholars working closely with the judges, the Task Force will make recommendations regarding jury instructions, the use of expert testimony, and other procedures and policies to promote reliable practices for eyewitness identification and to deter unnecessarily suggestive identification procedures, which raise the risk of a wrongful conviction. The Task Force plans to study available research pertaining to best practices for criminal investigations and courtroom procedures, including protocols for obtaining identifications, expert testimony during trial, jury instructions, and any other area pertaining to eyewitness identifications and testimony that can minimize the risk of wrongful convictions.

Judge McKee has set a nine-month time frame for the Task Force to complete its work and issue a Final Report and Recommendations. The Final Report is expected by June 9, 2017. The Recommendations are expected to touch upon a variety of subjects important to the accuracy of eyewitness identifications and minimizing the likelihood of wrongful convictions, including proposed jury instructions that are specific to the evaluation of eyewitness identification testimony, and the use of expert testimony to better inform jurors about eyewitness identification testimony.

Judge McKee has expressed his gratitude to the members of the Task Force for their willingness to volunteer their time and expertise to this important undertaking.

THIRD CIRCUIT PRACTICE GUIDE, THIRD EDITION

The Third Circuit Bar Association is pleased to present its guide to practice before the United States Court of Appeals for the Third Circuit. The guide provides straightforward answers to some of the more common questions we hear from lawyers whose practices may not take them to the Third Circuit on a regular basis. Complimentary hard copies will be mailed to all 3CBA members in the near future.

The Third Circuit Practice Guide is available on the 3CBA's website, www.thirdcircuitbar.org, and can be downloaded here.

NOTICE TO COUNSEL – AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

Amendments to the Federal Rules of Appellate Procedure effective December 1, 2016 lower the word limits for briefs. These amendments also convert page limits into word limits for other documents such as motions, petitions for rehearing, and petitions for mandamus.

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

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

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

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