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# On Appeal

## **THIRD CIRCUIT AMENDS TIME PERIODS IN LOCAL APPELLATE RULES**

By Peter Goldberger (Ardmore, PA) and George Leone (Camden, NJ)  
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In the January Newsletter, we discussed the amendments to the Federal Rules of Appellate Procedure, which – in tandem with all other federal rules – were amended effective December 1, 2009, to adopt a simple “days are days” method for computing time periods. The January article also discussed the pending proposals to amend the Third Circuit’s Local Appellate Rules to correspond to the new national rules. The Third Circuit Bar Association submitted suggested additions to the proposed rules.

To recap the December 2009 amendments, Rule 26 of the Federal Rules of Appellate Procedure (the computation of time rule, which also applied to local rules) formerly excluded Saturdays, Sundays, and holidays from all time periods of ten or fewer days. Thus, ten-day periods effectively were at least fourteen days long under the old rules. The December 2009 “days are days” reform deleted that provision from Rule 26, so that periods of ten days or fewer are now only ten *calendar* days (unless the final day falls on a weekend or holiday).

On March 3, 2010, the Circuit promulgated its time counting amendments. The full order (which includes changes not discussed here) is 24 pages long, and can be examined at or downloaded from the Court’s [website](#). The Circuit adopted some of the Association’s proposals so that some time periods remain the same: the time to pay for a transcript (LAR 11.1), enter an appearance for appellant (LAR 46.2), and answer an objection to a bill of costs (LAR 39.4(c)). These periods were changed to fourteen days from the prior ten, keeping them effectively about the same as they were under the previous counting rules of Rule 26.

By now amending several time periods, however, the Circuit made certain periods effectively shorter, only ten *calendar* days long. For many years, the Third Circuit’s Local Appellate Rules had permitted a longer period for filing responses to particular kinds of motions than would have been allowed under

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## **CHANGES IN COMPOSITION AND LEADERSHIP OF THE THIRD CIRCUIT BENCH**

### **Transition in Chief Judge post from Judge Scirica to Judge McKee**

On May 4, 2010, Judge Anthony J. Scirica finished his seven-year term as Chief Judge of the Third Circuit and Judge McKee assumed the post. As Chief Judge, Judge Scirica was a key force behind the founding of the 3CBA, and he has been a strong supporter ever since. Judge McKee has also been active with 3CBA meetings and programs since our inception.

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## CHANGES IN COMPOSITION AND LEADERSHIP...—continued from page 1

The 3CBA is indebted to Judge Scirica for his vision for a bar association particularly focused on the Third Circuit—and his active work to support and foster the growth of the 3CBA since its beginnings. We look forward to working closely with Judge McKee and assisting him in advancing the 3CBA's agenda: raising the standards of appellate practice, helping to develop rules of practice, promoting events and programs, and facilitating bench/bar relations.

### Judges Greenaway and Vanaskie confirmed

The 3CBA congratulates the Third Circuit's two newly-appointed judges, and we look forward to working with them as well. The Third Circuit's two longstanding vacancies were filled this spring when the Senate confirmed Judge Joseph A. Greenaway, Jr. and Judge Thomas I. Vanaskie to the Third Circuit. Judge Greenaway fills the vacancy left by now-Justice Alito's 2006 nomination to the Supreme Court, and Judge Vanaskie fills the vacancy left by Judge Van Antwerpen's assumption of senior status, also in 2006. With these

confirmations, all fourteen seats on the Third Circuit are filled.

Judge Greenaway was a judge in the District of New Jersey from 1996 until his confirmation to the Third Circuit. Prior to that, he was employed by Johnson & Johnson and as Assistant United States Attorney (District of New Jersey). His experience in private practice at Kramer, Levin, Nessen, Kamin & Frankel in New York was punctuated by a clerkship in the Southern District of New York.

In addition to his civil and criminal litigation experience and his experience on the bench, Judge Greenaway has been an adjunct professor at law schools in New Jersey and New York and has coached youth sports teams. He has degrees from Columbia University and Harvard Law School.

Judge Greenaway's transition to the Court has been marked by the helpfulness of his new Third Circuit colleagues and the Circuit's staff. "From the moment I was nominated, everyone on the court has been fantastic, enormously generous with their time and advice," Judge Greenaway recently commented. In his short time on the Circuit, he

is convinced that the Third Circuit must "be the most collegial circuit court in the nation." Judge Greenaway was particularly impressed with his colleagues' collegiality and preparedness at its recent en banc hearing in June, and he is looking forward to many years working with all of his new colleagues.

Judge Vanaskie was a judge in the Middle District of Pennsylvania from 1994 until his confirmation to the Third Circuit. Before being appointed to the district court, Judge Vanaskie was a private practitioner in Scranton, Pennsylvania.

As a district court judge, Judge Vanaskie served on committees and gave presentations and talks related to court information technology and the implementation of electronic case filing. He has been active in various schools, associations, and nonprofit organizations in the Scranton and Wilkes-Barre area. He graduated from Lycoming College, where he played football (he is an inductee into the Pennsylvania Sports Hall of Fame). He received his J.D. from Dickinson School of Law. Judge Vanaskie recently commented that, like Judge Greenaway, he has also felt extremely welcomed by his colleagues on the Third Circuit.

## FROM THE PRESIDENT'S DESK

As president of the 3CBA, it is my pleasure to work with many of you, who are accomplished appellate practitioners, and with Third Circuit judges and other court personnel. I am approaching the end of my term, and during the next few months I will focus on two key areas: programs and membership.

As far as programs are concerned, the 3CBA—an organization of experienced and committed appellate litigators, generously assisted by judges and others—is uniquely positioned to offer high quality, practical, and affordable CLEs. We have sponsored or co-sponsored CLE's at the Third Circuit Judicial Conference and in every district in the Circuit save two: the Western and Middle Districts in Pennsylvania. This summer and fall those two "loopholes" will be closed. See the report in this issue on our summer Pittsburgh CLE on waiver of arguments in trial courts. This promises to be a highly informative event, with a terrific panel, and an accompanying reception.

Later in the fall, we will sponsor a program in the Middle District; look for information on this one in an upcoming issue of the newsletter. Both programs will also be publicized on our website and by e-mail to our members. A special thank-you to our Program chair Bob Graci for spear-heading these efforts.

With respect to membership, attracting and keeping active members is crucial to our mission. Through our members, we can further the 3CBA's goals: raising the standards of appellate practice, helping to develop rules of practice, promoting events and educational programs to aid the Court in the administration of justice, and facilitating bench/bar relations. Please continue to participate in programs, send us your feedback, and consider telling a colleague about the 3CBA. A piece by our Membership chair, Chip Becker provides further [information](#) on this vital goal.

And speaking of membership, many 3CBA members had the pleasure of gathering in Philadelphia in February at a 3CBA reception at the federal courthouse attended by several Third Circuit judges. We had the opportunity to socialize, enjoy some refreshments and, especially, to thank former Chief Judge Scirica for his strong dedication to the 3CBA in its founding and beyond. We were also among the first to welcome and congratulate Judge McKee on his new role as Chief Judge. Special thank-yous to the Third Circuit "pros"—Marcia Waldron, Toby Slawsky, Gail Comas, Susan English and Shannon McGrath—for making this event such a success.

As always, I welcome your questions and comments; feel free to contact me. Have a great summer.

James C. Martin

President, Third Circuit Bar Association

## THIRD CIRCUIT AMENDS TIME PERIODS...—continued from page 1

Rule 27, the federal rule governing motions generally. By not increasing the ten-day period provided in certain local rules, the Circuit has made the local periods the same as the nationwide periods. For Third Circuit practitioners used to the old time frames, the Circuit's decision not to amend these rules is effectively a reduction in the time allowed to take certain actions.

The ten-day periods that the Circuit declined to amend—and thus effectively shortened—include LAR 22.1 (answer to application for certificate of appealability, and reply thereto), 30.5 (motion to deny costs, and response thereto), 107.2 (time to show cause why appeal should not be dismissed for failure to prosecute), and 108.2 (objection to application for attorneys' fees).

In the same manner, as a result of the Circuit's decision not to amend one of its local rules, the time to file the required case-opening forms in many civil cases has been effectively reduced from two weeks to ten calendar days. In the large fraction of civil appeals that is subject to the Court's mediation program, the civil appeal information statement and mediation statement are due, under LAR 33.2, within ten days after docketing of the appeal. Because this ten-day period was not amended (despite the Third Circuit Bar Association's recommendation), the local rule now demands action within ten *calendar* days, even though the same words formerly meant ten business days and thus allowed a period of at least two weeks.

One other change in the local rule amendments, not directly tied to the new time-counting system, is to now allow five calendar days, rather than the former three, for responses under LAR 9.1 to motions in the court of appeals to grant or deny bail in criminal cases, whether pending trial and/or sentencing or pending appeal.

## SAVE THE DATE! CLE CO-SPONSORED BY 3CBA

**August 25, 2010**

Fairmont Pittsburgh Hotel · Three PNC Plaza · CLE: 2:30-4:45 p.m.

Followed by a one-hour reception upstairs on Reed Smith's terrace

Registration Fee \$40

Presumptively approved for 2.0 CLE credits for PA (substantive)



save the date

The Third Circuit Bar Association, along with the Federal Practice Committee of the Pennsylvania Bar Association, presents:

**WATCH OUT FOR THE WAIVES: A LATE-SUMMER CLE ON HOW GOOD LAWYERS WAIVE GOOD ARGUMENTS ON APPEAL**

Join us for a two-hour CLE in which we explore common ways good trial lawyers discover - to their chagrin - that they've waived some of their best arguments on appeal. This CLE is designed for federal court practitioners who do not appear regularly before the U.S. Court of Appeals for the Third Circuit and for more experienced appellate lawyers as well. The panel will engage in a lively discussion about how and when a litigant must preserve issues and arguments in the district court, and several judges will be on hand to offer practical tips and advice. Learn how to avoid being pulled under by *the waves!*

featuring  
Hon. D. Michael Fisher, *U.S. Court of Appeals for the Third Circuit*  
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Witold Walczak, *American Civil Liberties Union (moderator)*  
...and more.....

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## CASE OF INTEREST: *NEW JERSEY V. FULD*, NO. 09-2891 (MAY 17, 2010)

Third Circuit holds *Mohawk's* hard line in collateral order doctrine opinion

By Paige H. Forster  
 Reed Smith LLP

Applying *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599 (2009), the Third Circuit has ruled that an order denying a motion to remand is not reviewable under the collateral order doctrine. *New Jersey v. Fuld*, 604 F.3d 816 (3d Cir. May 17, 2010) (opinion [here](#)). In doing so, the Circuit followed the Supreme Court's lead in narrowly reading the collateral order doctrine.

The genesis of the *Fuld* case was New Jersey's 2008 purchase, on behalf of its state employees' pension fund, of \$180 million worth of stock in Lehman Brothers Holdings, Inc. Three months later, Lehman filed for bankruptcy. New Jersey subsequently sued Lehman's officers and directors in New Jersey state court under state law and the federal Securities Act of 1933 for misstatements and omissions regarding the value of Lehman's assets. The directors removed to federal district court on grounds that the case was "related to" the Lehman bankruptcy within the meaning of 28 U.S.C. §§ 1334(b) and 1452(a). New Jersey moved to remand, citing the provision of the Securities Act that "prohibits the removal from state court of cases arising under the Act." 604 F.3d at 818. The district court denied the remand motion.

New Jersey initially filed a petition for interlocutory appeal under 28 U.S.C. § 1292(b). The District Court certified the question for appeal, but a Third Circuit motions panel denied the petition. New Jersey contemporaneously filed a notice of appeal, citing the collateral order doctrine as the basis for the Third Circuit's jurisdiction.

The parties agreed that the first two prongs of the collateral order test were met because the order "conclusively determin[e] the disputed question" and "resolve[d] an important issue completely separate from the merits." *Id.* at 820. The parties' dispute, and the bulk of the Third Circuit's analysis, related to the third prong: whether the order denying remand was "effectively unreviewable on appeal from a final judgment." *Id.*

New Jersey argued that the order was effectively unreviewable because "its interest in having the Securities Act claim heard in a New Jersey state court . . . will be lost if the case proceeds to final judgment" in federal court. *Id.* Judge Sloviter, writing for a unanimous panel that included Judge Hardiman and Judge Jane A. Restani (Chief Judge, U.S. Court of International Trade, sitting by designation), began the analysis with a summary of *Mohawk*. In that case, the Supreme Court determined that discovery orders requiring the production of potentially privileged documents are not "effectively unreviewable." *Id.* The *Mohawk* Court reasoned that erroneous production orders can be rectified on appeal after final judgment. *Id.* Although the privileged documents would already be in the hands of opposing counsel, the Supreme Court concluded that a satisfactory solution would be to retry the case with the privileged documents excluded from evidence. *Id.*

Echoing the logic of *Mohawk*, the Third Circuit rejected New Jersey's argument that the district court's remand decision would be "effectively unreviewable" on appeal from a final judgment by that court, holding that "[i]f New Jersey's arguments in favor of remand are correct, . . . an appellate court can vacate the order denying remand with instructions to remand the case to the New Jersey court." *Id.* at 822. The Court also was unmoved by New Jersey's invocation of the cost and delay of litigation. *Id.* at 823 ("Congress considered the expense of litigation when it fashioned the final judgment rule of § 1291, and we cannot second-guess its policy choice. . . .").

*Fuld* signals the Third Circuit's commitment to *Mohawk's* narrow reading of the collateral order doctrine. *Fuld* also highlights the importance of the § 1292(b) petition for permission to file an interlocutory appeal. The opinion stated that the merits panel was "bound by" the motions panel's earlier denial of New Jersey's petition, but did not endorse that denial. *Id.* at 824 ("[W]e cannot say that we would have denied a petition to hear the appeal under 28 U.S.C. § 1292(b)."). Thus, the Court implied that a § 1292(b) petition may have been New Jersey's best option for obtaining review prior to final judgment—while simultaneously making it clear that this option was no longer on the table given the motions panel's rejection of the petition.

*Fuld* leaves for another day the interesting question posed by the dueling removal provisions of the Securities Act (which forbids removal) and the bankruptcy removal statute (which allows it). Nevertheless, given the questions that it does resolve, *Fuld* demonstrates the ascendancy of a narrow reading of the collateral order doctrine. In light of *Mohawk* and *Fuld*, the routes to a pre-judgment appeal continue to be few and tightly constrained.

## THIRD CIRCUIT MAKES ORAL ARGUMENT RECORDINGS AVAILABLE ONLINE

The Third Circuit has begun making recordings of oral arguments available online. The Court has also established an RSS feed, so if you already monitor various websites through an RSS reader, it is easy to add the Third Circuit oral argument site and receive notifications when new arguments are posted. Whether you use RSS or simply check the website from time to time, you can stay abreast of Third Circuit cases of interest—and prepare for, then review, your own oral arguments.

Cases are listed in order by docket number; some posted arguments go back as far as 2007.

## THE 3CBA: ACCOMPLISHMENTS AND REASONS TO GET INVOLVED

By Charles L. Becker, Esq.  
Kline & Specter, P.C.

Three years have passed since the Third Circuit Bar Association was launched in 2007. No longer a fledgling organization, the 3CBA has emerged as a major force in promoting practice in the Third Circuit and supporting the Court itself. The time is ripe to consider the organization's accomplishments and renew the case for membership in the 3CBA.

The 3CBA has worked since its formation to (1) improve the standards of practice before the Third Circuit; (2) promote improved rules of practice, (3) promote events and educational programs to aid the Third Circuit in the administration of justice, and (4) enhance bench/bar relations with the Third Circuit. The 3CBA has concrete achievements in each of these four areas.

First, in partnership with other bar associations or with the Third Circuit itself, the 3CBA has provided numerous educational programs on federal appellate practice to venues throughout the Circuit. The programs have addressed the "dos and don'ts" of federal appellate practice and focused on more specific matters, such as Third Circuit motion practice, ethics in appellate advocacy, and certification of issues to state supreme courts.

Second, the 3CBA has made multiple proactive suggestions for the improvement in the Third Circuit's local rules of appellate procedure and other circuit-wide rules. It provided substantive comments on the local rules when they were generally revised in 2008. It commented on the proposed local rules relating to certiorari practice to the Virgin Islands Supreme Court. Most recently, it commented on proposed amendments to the Third Circuit's disciplinary rules. These efforts have enhanced the clarity and effectiveness of the Circuit's rules for practitioners and the Court.

Third, the 3CBA has supported the Third Circuit Judicial Conference by sponsoring a reception at the beginning of each conference open to the public and providing educational programming in the Conference itself.

Fourth, the 3CBA has worked hard to foster good bench/bar relations and the work is bearing fruit. By working with its liaison judges and staff, 3CBA has fostered discussions about the Third Circuit's culture, case management and resolution, and the bar's relationship with the judges and staff.

To continue these good works, we need help. We urge you to stay or get involved in the 3CBA. Annual dues are only \$40 – a modest sum hoped to promote broad engagement in the 3CBA's commitment to the Third Circuit. In addition, you are welcome to become involved in our Rules Committee, Program Committee, or any other committee through which the 3CBA performs its work. We also ask that you help recruit others to support the mission. Especially in an age of federal budgetary constraint, we cannot assume that our institutions will function well and smoothly without support from critical stakeholders. For the Third Circuit, those critical stakeholders include the appellate lawyers who practice regularly before it. But the stakeholders also include non-appellate lawyers who rely on the Court's work product for litigation, regulatory and transactional purposes.

For anyone with questions about membership in the 3CBA, please visit our website at [www.thirdcircuitbar.org](http://www.thirdcircuitbar.org), contact me at [charles.becker@klinespecter.com](mailto:charles.becker@klinespecter.com), or contact any of the 3CBA's officers or board members. We look forward to hearing from you.

## NEW EDITION OF THIRD CIRCUIT APPELLATE PRACTICE MANUAL COMING THIS SUMMER!

PBI Press has announced that the second edition of the *Third Circuit Appellate Practice Manual* will be released by the end of the summer. An indispensable resource for practitioners in the Third Circuit, the Manual covers all aspects of Third Circuit practice in chapters authored by leading appellate counsel, members of the Third Circuit Clerk's Office, and other experts. The second edition of the Manual will be accompanied by a searchable companion CD-ROM.

The Manual contains 26 chapters that cover topics including:

- Now That the Trial is Over: Preserving Issues on Appeal in the Federal Court System (new to the Second Edition)
- Should I Appeal? Ethical and Practical Issues
- May I Appeal? Basics of Appellate Jurisdiction and Writ Relief
- Motion Practice
- The Heart of the Matter: Scope and Standards of Review
- Post-Judgment Proceedings and Petitions for Rehearing

3CBA leaders and members were integral in launching the first edition of the Manual and have continued their contributing roles in preparing the second edition. The 3CBA's first president, Nancy Winkelman, and its current president, James C. Martin, are the editors of the Manual, and many of the contributing authors are 3CBA members. The 3CBA is proud to continue its work with PBI Press on this essential appellate resource.

For more information on how to get your hands on the updated Manual, click [here](#) and watch future issues of On Appeal.

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