3 BAR ASSOCIATION FOR THE THIRD FEDERAL CIRCUIT

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HON. RUGGERO J. ALDISERT 1919-2014 – A TRIBUTE BY TWO OF HIS LAW CLERKS

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The many remembrances of Judge Aldisert already written are a testament to his gigantic power to influence and inspire. He cast a very long intellectual shadow. We write as two of his former law clerks (during the 1986-1988 court terms) to share some of our thoughts by way of tribute to the Judge. We are mindful of the many other law clerks who served the Judge, and of the many judges, lawyers, litigants and others whose lives Judge Aldisert touched in some way. We hope that, within this Third Circuit community, our thoughts might help to spark a special recollection of your own.

Judge Aldisert was straightforward. On the first day of our clerkship, he advised us that he had decided (for health reasons) to step down as Chief Judge of the Third Circuit, to take senior status at the end of the year and, thereafter, to move to Santa Barbara, California. He gave one of us (holding a one-year clerkship) the chance to immediately decide to accept the new terms or to depart to begin a law firm career slightly earlier than planned. That was an easy decision. To the other clerk, who held a two-year clerkship and would be making the move from Pittsburgh to Santa Barbara mid-course, he gave 24 hours to decide. Also an easy decision in concept, but one complicated by the second clerk's girlfriend's recent move to Pittsburgh (effectively sight unseen) from Michigan, to begin a career at a firm and in a town in which she knew almost nobody. That clerk made the move west, and the couple endured the long-distance relationship for a year, married, and remain so.

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3D CIRCUIT ISSUES DIVIDED OPINION DEFINING WHICH ORDERS ARE REVIEWABLE UNDER RULE 23(f)

In Re: National Football League Players Concussion Injury Litigation, No. 14-8103 (3d Cir. Dec. 24, 2014)

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Football players, head injuries, and football players' head injury-related litigation continue to receive widespread attention in mainstream and sports media. In December, a divided panel of the Third Circuit gave the legal media an opportunity to step to the fore when it issued an opinion on purely procedural matters in *In re: National Football League Players Concussion Injury Litigation*, the multi-district litigation in the Eastern District of Pennsylvania involving consolidated claims filed by over 5,000 retired NFL players.

The district court issued an order preliminarily approving a proposed class action settlement and "conditionally certif[ying]" a settlement class and subclasses. Before the settlement fairness hearing, seven objectors filed a petition to appeal that order under Federal Rule of Civil Procedure 23(f), which

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HON. RUGGERO J. ALDISERT 1919-2014 – A TRIBUTE BY TWO OF HIS LAW CLERKS

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Judge Aldisert was tireless in his dedication to the Court. The Judge had an astonishing capacity for work. He never rushed matters that required his attention, but refused to waste time on things that did not. He commonly blitzed through briefs as soon as they arrived in chambers. He issued preliminary memos for each case on whether it would require a bench memo, should be recommended to the panel for summary disposition (such as by judgment order or memorandum opinion), or was controlled in some way (not revealed in the briefs) by existing U.S. Supreme Court or Third Circuit precedent that the Judge already knew and would be accessible to a law clerk only through supplemental research. In the very short lull preceding his move to Santa Barbara, and as a brand-new Senior Judge, Judge Aldisert decided to take some trials in order to ease the district court's docket. In one of them, a jury trial, the Judge advised us: "Boys, it's been a long time since I had a jury trial [it had been 18 years], so you'd better stay on your toes!"

The Judge was devoted to his clerks, both present and former. The Judge and Mrs. Aldisert treated us like family. They invited us and our spouses or significant others to dinner with them and their children, when available. After our clerkships, the Judge was always keen to learn of our new accomplishments or cases, and also to learn news of other clerks who had not had an opportunity to check in. His was a family that was always growing. The Judge's law clerks constantly added to the immense satisfaction he took from helping us on our career in law, which he himself loved so dearly.

The Judge deeply admired his colleagues on the bench. Nothing gave Judge Aldisert quite the same intellectual satisfaction as discussing a difficult case with his colleagues following oral argument. We clerks never were admitted to the case conferences themselves, but the Judge unfailingly convened us immediately thereafter to discuss the consequences, the opinion assignments and (always a special treat) the prospect of a dissent. The Judge formed many deep friendships on the Third Circuit, as well as with justices and judges from the Supreme Court, other circuits, districts and states. One of his particularly close friends was Third Circuit Judge Hunter (James Hunter III, 1916-1989), with whom the Judge corresponded via the government email service. Each having entered the Marines in 1942, they identified each other using only their respective Marine Corps officer service numbers (the Marine Corps discontinued these numbers in 1972). The Judge did enjoy the fact that his number slightly preceded Judge Hunter's.

Judge Aldisert loved to write. He had a powerful and direct writing style when writing a majority opinion, but his individual opinions, and particularly his dissents, revealed a personal flourish. His opinions elicited admiration from the reader for the Judge's command over expression, even if the reader might disagree with the outcome. In a typical "Aldisert dissent," the Judge once wrote of his departure from the majority's handling of a perceived procedural flaw committed by the U.S. Attorney's Office in a criminal case. The Judge's concluding line reads: "I would not be the circus hand following the prosecutorial elephant around the sawdust trail."

The Judge was a stickler for detail. His view was that standards must be kept. He liked briefs to be wrapped in twill tape of a certain width (also called barrister's tape or "red tape"). He liked the felt pads beneath his desktop glass to be a certain diameter. And he liked cases to be cited for the correct propositions, and for lawyers to know and follow the rules. For a time, he maintained an "Aldisert style guide" for law clerks so that we could learn his preferences and limit the need for stylistic editing. There was not much grey area in the Judge's chambers.

For all of his personal intensity and expectation that others live up to his high standards, the Judge had a wonderful sense of humor. During our period of clerkship, the Judge had numerous clerkship applicants who filtered through chambers and invariably presented resumes studded with remarkable academic and extracurricular achievements. Our routine usually was for the law clerks to separately interview the applicants and describe the duties and life of an appellate law clerk. Afterwards, the applicant would be invited to sit with and be interviewed by the Judge, often with several of the clerks in silent attendance. At the end of the interview, the Judge commonly would ask "How did you do on the 'favorite movie' question?" Ostensibly a trick question, the movie question simply was to determine how the applicant would handle the surprise, and also whether the applicant could laugh at him or herself. As the Judge would say, there were very many *good* answers to the movie question, but only one *correct* answer: "Ghostbusters."

We are very grateful for the opportunity to have started our careers with Judge Aldisert, and are lucky to have many fond memories of him that will never disappear.

John Iole (1986-1987)

John Goetz (1986-1988)

John Iole and John Goetz have practiced together at the Pittsburgh Office of Jones Day since 1989. John Goetz's tenure there predates John Iole's by three weeks.

3D CIRCUIT ISSUES DIVIDED OPINION DEFINING WHICH ORDERS ARE REVIEWABLE UNDER RULE 23(f)

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the Third Circuit granted. In a 2-1 decision authored by Judge Smith and joined by Judge Jordan, the Court dismissed the objectors' appeal of the preliminary approval and conditional certification order for lack of jurisdiction. The Court began by observing that Rule 23(c) was amended in 2003 to delete language that a class certification "may be conditional." Rule 23(f), the Court continued, provides that an appellate court may permit an interlocutory appeal from an order granting or denying class certification—and gives the court broad discretion in determining whether to grant review. However, that broad discretion applies only to review of an order issued pursuant to Rule 23(c). The court reasoned that because conditional certification orders are no longer contemplated by the text of Rule 23, and are not permitted under post-2003 Third Circuit precedent, an order conditionally certifying a class is not a Rule 23(c) order that is reviewable under Rule 23(f). Therefore, the Court concluded, the district court's order was an interlocutory order that it lacked jurisdiction to review.

The Court made clear that it did not disapprove of what the district court actually did, and that the substance of its order complied with the rules (and sound class action case management). The Court took issue with the court's terminology, though, instructing that "'conditional certification' should not be a preferred term of art in this Circuit," and that district courts instead should "note that they are conducting a 'preliminary determination' regarding class certification."

Judge Ambro dissented. Although he would have denied discretionary review in order to avoid inefficient piecemeal litigation, he argued that the district court's conditional certification fell within the class of orders reviewable under Rule 23(f) and that the petition therefore should not have been dismissed for lack of jurisdiction. Judge Ambro based his analysis on the language of Rule 23(f), which permits an appeal "from an order granting … class action certification," rather than an order "issued pursuant to Rule 23(c)(1)." He also pointed to the Advisory Committee note to Rule 23, which gives the Court "unfettered discretion [in deciding] whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari."

Although the heart of the ruling—and the dissent—is straightforward and turns on a textual analysis of Rule 23, both opinions took the opportunity to discuss related subjects. Thus, in addition to having an immediate effect on the language that district courts use when preliminarily certifying a class, the opinions also provide valuable insight and analysis on the history of Rule 23(f) appellate review, the procedures for amending the federal rules, the definition of judicial *dicta*, and the nature and authoritative weight of both Advisory Committee notes on the Rules and the Federal Judicial Center's *Manual for Complex Litigation*.

THIRD CIRCUIT ADHERES TO TEXT OF 28 U.S.C. § 1446(b) TO HOLD REMOVAL UNTIMELY

A.S. v. SmithKline Beecham Corp., 769 F.3d 204 (3d Cir. 2014)

M. Patrick Yingling
Reed Smith LLP, Pittsburgh, PA

Removal of a case from state to federal court can be a simple process. However, even this simple process can take interesting twists and turns, as evidenced by the Third Circuit's recent decision in *A.S. v. SmithKline Beecham Corp.*, 769 F.3d 204 (3d Cir. 2014). In *A.S.*, the Court of Appeals clarified the requirements for removal when it addressed the efforts of GlaxoSmithKline LLC ("GSK") to remove a case to federal court. The Court held that GSK's second removal (after a remand) was untimely under 28 U.S.C. § 1446(b) both because it was filed more than 30 days after GSK's receipt of the complaint and because removal on the basis of diversity jurisdiction may not occur more than one year after the commencement of the action.[1]

In September 2011, the plaintiffs (a child who suffers from a congenital birth defect and a mother who ingested Paxil, a drug produced by

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PRESIDENT'S NOTE

Peter Goldberger,
President, Third Circuit Bar Association

Greetings to my fellow members of the Third Circuit Bar Association from your new President. Succeeding past presidents Nancy Winkelman, Jim Martin, Steve Orlofsky, and Lisa Freeland is an honor that I will try to live up to. If you don't remember voting for me, don't worry ... under our By-Laws the officers are elected by the Board of Governors, which itself is self-perpetuating. I was among the Association's initial Board members in November 2006, and have been pleased to serve since then.

Our Association aspires to support and enhance the professionalism of Third Circuit practice in all respects. This includes appellate practice skills, pertinent areas of substantive and procedural knowledge, and ethics. We also seek to provide and maintain channels of communication between Bench and Bar, on any issues that may be of interest or concern to either. I truly feel that the Third Circuit is my professional home, having briefed my first appeal in this Circuit in 1979 and first argued before the Court in 1985, an amazing 30 years ago. I count about 200 more since then. I am eager to give back to the Court, and to help bring along those practitioners who are less experienced.

During the two years of my term, I hope to see the Association return to giving regular CLE programs and hosting social events, upgrade our website, expand our membership, and continue our outreach to the Court in terms of refining the rules of practice and sharing practitioners' concerns. We seek to be a professional home for both the occasional and the regular appellate practitioner, whether based in a government agency, a public interest organization, a law school clinical or other faculty, a solo office, or a small, medium or large law firm.

If you want to become more involved with the Association, we are always looking for new blood at the Committee level (website, newsletter and rules of procedure, for example, can always use additional participation). From that involvement, participation as a Board member could be a logical next step. So, my warmest wishes for the new year to our members, old and new. I look forward to hearing from you with any ideas you may want to share.

THIRD CIRCUIT ADHERES TO TEXT OF 28 U.S.C. § 1446(b) TO HOLD REMOVAL UNTIMELY — continued from page 3

GSK) filed suit against GSK in the Philadelphia County Court of Common Pleas, alleging that Paxil causes birth defects. GSK removed the case to the U.S. District Court for the Eastern District of Pennsylvania based on diversity jurisdiction. The district court remanded, finding that GSK was a citizen of Pennsylvania and thus ineligible to remove the case on diversity grounds. After remand, the Third Circuit, in a separate case, *Johnson v. SmithKline Beecham Corp.*, 724 F.3d 337 (3d Cir. 2013), decided that GSK was a citizen of Delaware. Within 30 days of the *Johnson* decision, GSK re-removed the *A.S.* case, and the district court denied the plaintiffs' motion to remand. The plaintiffs then sought interlocutory review under 28 U.S.C. § 1292(b) on the question of whether a defendant may remove a case a second time based on diversity jurisdiction more than one year after the commencement of the case. The district court certified the question, and the Court of Appeals accepted the appeal. Ultimately, the Court, in a unanimous panel opinion authored by Judge Shwartz and joined by Judge Smith and Judge Roth, held that GSK's re-removal was untimely and reversed the district court's order denying remand.

The Court of Appeals began by addressing the timeliness of GSK's re-removal under the first paragraph of § 1441(b), which provides that "[t]he notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based[.]" GSK argued that § 1446(b)'s first paragraph did not bar re-removal because the paragraph does "not impose any time limits on successive removals." The Court of Appeals, however, found that although the first paragraph does not explicitly mention *successive* removals, it does explicitly forbid *untimely* removals, and GSK's re-removal was untimely because it was not filed within 30 days after its receipt of the complaint.

The Court of Appeals then ruled that the untimeliness of the re-removal under the first paragraph of § 1441(b) was not relieved by the second paragraph of § 1441(b), which provides that "[i]f the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of [diversity jurisdiction] more than 1 year after commencement of the action." The Court of Appeals concluded that GSK could not rely on the second paragraph because there was no "amended pleading, motion, order or other paper" to trigger the 30-day time limit. According to the Court, the terms "amended pleading, motion, order or *other* paper" only address "developments within a case" and, therefore, opinions and orders from other cases generally do not qualify.

Finally, the Court of Appeals ruled that the re-removal was barred due to the second paragraph's one-year limitation, which prohibits removal of diversity cases more than one year after the case commences. Despite GSK's arguments, the Court held that the case involved no "intentional misconduct" or "extraordinary circumstance" warranting equitable tolling of the one-year period. Additionally, the Court of Appeals declined to hold that the second notice of removal could "relate back" to the first. Instead, the Court reasoned that in order for a second notice of removal to relate back, there must be something pending in the district court to which the notice can relate. When the district court initially remanded the case, it disposed of the first notice of removal with a final order, divesting itself of jurisdiction, and thus, there was nothing to which the second notice of removal could relate.

There are lessons to be taken from *A.S.* For one, the removal statute at § 1446(b) provides exacting requirements that courts within the Third Circuit are unlikely to disregard, even in circumstances where equity might call for flexibility. Additionally, the appeals process of § 1292(b)—although often invoked unsuccessfully—can be used in appropriate circumstances to seek review of an interlocutory order.

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[1]The Court noted in its opinion that "[b]ecause this case was commenced in 2011, all citations to § 1446 are to the version in effect during 2011. Section 1446(b) was amended by the Federal Courts Jurisdiction and Venue Clarification Act of 2011. The amended version applies to cases commenced after January 6, 2012."

AMENDMENTS TO RULE 6 OF THE FEDERAL RULES OF APPELLATE PROCEDURE

On December 1, 2014, amendments to Rule 6 of the Federal Rules of Appellate Procedure, which concerns bankruptcy appeals, went into effect. The amendments made three substantive changes to the rule. First, they clarified in subdivision (b)(2)(A)(ii) that whenever a party files a notice of appeal from a bankruptcy court's judgment, order, or decree, and the bankruptcy court subsequently alters or amends that judgment, order, or decree, then an amended notice of appeal must be filed only if a party intends to challenge the alteration or amendment. Second, the amendments added a new subdivision (c), which provides that the Federal Rules of Appellate Procedure apply to permissive direct appeals from a bankruptcy court to a court of appeals under 28 U.S.C. § 158(d)(2). Third, because the Federal Rules of Appellate Procedure originally were drafted on the assumption that the record on appeal would be available only in paper form, the amendments in subdivisions (b)(2)(B), (C), and (D) recognize that the record sometimes will be transmitted electronically, in which case the circuit clerk is required to note on the docket the date when the electronic record was made available, which will serve as the date when the record was filed. The text of the amendments can be found in the Chief Justice's official communication to Congress, which is available here.

PUBLIC NOTICE - U.S. BANKRUPTCY JUDGESHIP VACANCY - DISTRICT OF NEW JERSEY

Chief Judge Theodore A. McKee of the United States Court of Appeals for the Third Circuit announces the application process for a bankruptcy judgeship in the District of New Jersey, seated in Newark. A bankruptcy judge is appointed to a 14-year term pursuant to 28 U.S.C. § 152. Applications must be submitted electronically by February 23, 2015. To apply, go to www.ca3.uscourts.gov for more information or call the Circuit Executive's Office at 215-597-0718.

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