3 BAR ASSOCIATION FOR THE THIRD FEDERAL CIRCUIT

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UPDATES AND REMINDERS FROM THE THIRD CIRCUIT CLERK

By Marcia Waldron, Clerk of Court

The Clerk's Office would like to bring the following changes and updates to the attention of Third Circuit practitioners. As always, further information can be found at the Court's website.

Extensions of time to file briefs. Due to greater efficiencies in processing, the Clerk's Office is able to schedule cases before a merits panel shortly after the close of briefing. In fact, in some instances we must project which cases will be briefed in time for upcoming sittings. As a result, motions for extension of time, either to file a brief or to otherwise comply with the rules, are disfavored. Such motions may be denied outright or the amount of time requested may be curtailed. If a motion for extension of time is absolutely necessary, it should be filed well before the deadline for filing the brief. A notice to counsel is posted on the Court's website.

Filing briefs and appendices in Virgin Islands cases. L.A.R. 30.1(d) and 31.1(a) require counsel in Virgin Islands cases to file one additional paper copy of the briefs and appendices with the Clerk of the District Court of the Virgin Islands. The purpose of the rule was to cut down on shipping costs while having all documents available to the panel. In the last few sittings, judges have experimented with having only electronic versions of the briefs and appendices available when they are in the Virgin Islands. The experiment worked well. As a result, the court has suspended the requirement of filing extra paper copies of the briefs and appendices with the Clerk of the District Court of the Virgin Islands. A standing order suspending the rules is posted on the Court's website. If additional paper copies are needed, the clerk will specifically direct such filings. Counsel must, however, continue to file ten paper copies of the briefs and four paper copies of the appendix with the Clerk's Office in Philadelphia.

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3CBA'S FIRST AMICUS BRIEF OBTAINS GOOD RESULT REGARDING STANDARD FOR EXTENSIONS OF TIME

By Peter Goldberger, Secretary, Third Circuit Bar Association

The Third Circuit Bar Association recently achieved a partial victory in its first amicus curiae effort, when the Court on October 10, 2012, issued an order amending the one-judge, precedential opinion in Joseph v. Hess Oil Virgin Islands Corp., 651 F.3d 348 (3d Cir. 2011). As a result of the amendment, the previously announced strict standard governing extensions of time to file petitions in the Third Circuit for certiorari to the Supreme Court of the Virgin Islands has been moderated. The Court also clarified, as requested by the Association, that it would not apply the newly announced, stricter standard to motions for extension of time to file a notice of appeal, much less to routine motions for extensions of time to file briefs. (See related story, above, on revised Clerk's Office policy on extensions.)

By resolution of the Board of Governors, the Association on rare occasions will seek to advance the administration of justice and interests of its member-practitioners by taking an amicus position on a procedural or professional practice issue of special importance. The Association never takes a position on the merits of a particular case. In this case, the petitioner had sought a 30-day extension of time,

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FROM THE PRESIDENT'S DESK

This fall, the 3CBA is seeing good fruit from its efforts on behalf of its members. Our first-ever amicus brief was successful: earlier this month, the Court amended an opinion that had enunciated what we believed was an overly strict rule regarding extensions of time to file petitions in Virgin Islands cases. The article in this Newsletter explains how the Court's amended decision will benefit both practitioners and parties going forward.

As you may already know, we released our Third Circuit Practice Guide several weeks ago (read more about it below). This concise guide, produced by experienced Third Circuit practitioners on the 3CBA's Board of Governors, is full of useful information for attorneys—whether they are new to or familiar with Third Circuit practice. The Guide has gotten rave reviews. Numerous Third Circuit judges have given us positive feedback and requested copies for their clerks.

Members, too, have been pleased to receive the Practice Guide as a benefit of 3CBA membership. One wrote that with the Guide, "lawyers can have quick reference information and clients appreciate that." Another endorsed the value of membership: "Informative newsletters and Practice Guide for $40 a year?" It's true–3CBA dues are a great investment. Encourage others to join us. Share the Practice Guide with a colleague (it's available online) the next time you get a call asking about a point of Third Circuit practice or procedure. We are moving forward in our mission to improve the standards of practice, create events and educational programs to aid the Court in the administration of justice, and facilitate Bench/Bar relations. The more Third Circuit practitioners join our efforts, the more we can do on behalf of our members.

Stephen M. Orlofsky

President, Third Circuit Bar Association

3CBA PRODUCES PRACTICE GUIDE TO PROVIDE STRAIGHTFORWARD ANSWERS TO COMMON QUESTIONS

Members of the Third Circuit Bar Association recently received, both in hard copy and as a PDF, the new U.S. Court of Appeals for the Third Circuit Practice Guide, which was prepared by the 3CBA. The Guide represents a collaborative effort to address a problem brought to the 3CBA's attention by the Court: the need for a concise, handy, and straightforward reference on Third Circuit appeals.

At the request of 3CBA's President, Steve Orlofsky, and with the concurrence of the Board, Board members Jim Martin and Donna Doblick took charge of the project, contributed several chapters, and edited the final product. Jim and Donna also recruited other experienced Third Circuit practitioners as contributors: Board members Chip Becker, Chuck Craven, Lisa Freeland, Peter Goldberger, Kevin McNulty, and Andy Simpson. The 3CBA liaison judges, Dolores K. Sloviter, Judges Thomas L. Ambro, Julio M. Fuentes, D. Michael Fisher, gave valuable input on various drafts, as did Third Circuit Clerk Marcia Waldron. The result is a compact, well-indexed Practice Guide that covers topics including:

- threshold considerations,
- the mechanics of the appellate process,
- the functions of the clerk's office,
- mediation,
- motions,
- briefs and oral argument,
- en banc and post-decision proceedings,
- frequently asked questions, and
- helpful appendices including major appellate deadlines, Third Circuit electronic filing requirements, and more.

3CBA President Steve Orlofsky has called the Practice Guide "another way for the 3CBA to support the administration of appellate justice and to help raise the standards of practice in the Third Circuit, in accordance with our mission." The Practice Guide has been warmly received by the Third Circuit's judges, many of whom asked for additional copies for their law clerks. Judge D. Michael Fisher commented, "The Practice Guide will help both experienced attorneys and new practitioners in the Third Circuit. Practitioners would be wise to keep it close by and refer to it frequently."

The Practice Guide is available at the 3CBA website.

3CBA'S FIRST AMICUS BRIEF OBTAINS GOOD RESULT…—continued from page 1

as allowed by L.A..R. 112.4(a), of the 60-day period for filing a petition seeking Third Circuit review of a decision of the Supreme Court of the Virgin Islands. (The original opinion noted that under 48 U.S.C. § 1613, the Third Circuit has certiorari jurisdiction over decisions of the Virgin Islands Supreme Court. 651 F.3d at 349.)

The motion stated that an extension was needed because counsel was newly retained by the client for his Third Circuit expertise and had no prior involvement in the case, and also because of new counsel's pre-existing obligations and schedule. To the parties' surprise, while the request was granted, the order was accompanied by a full precedential opinion, issued by a single judge but reviewed by the full Court, explaining that in the future such requests would not be granted except on the basis of "unforeseen or uncontrollable events," that is, circumstances beyond counsel's and the client's control. The opinion makes clear that the retention of new counsel and counsel's workload would ordinarily not be considered to be "good cause" under this standard. In support of this decision, Judge Smith cited published opinions of certain Justices of the Supreme Court in Chambers, principally those of Justice Scalia, employing this standard on consideration of applications for extension of time to file certiorari petitions in the United States Supreme Court.

Petitioner Hess Oil moved for withdrawal or revision of the opinion, although not for reconsideration of the decision (as it had prevailed on its own extension motion). In its memorandum in support of the motion, Hess discussed the negative impact of the Court's announced standard on appellate practice (discouraging parties from seeking out and hiring expert appellate counsel) and certain mistaken assumptions and assertions contained in the opinion. In support of the motion for revision, Hess submitted an affidavit by Roy G. Englert, Esq., an experienced Supreme Court practitioner, a member of the Judicial Conference Standing Committee on Rules of Practice and Procedure, and a frequent Third Circuit advocate. Mr. Englert affirmed that Justice Scalia's practice in routinely denying extension requests and in setting a high standard for those he grants is aberrant among the Justices.

On behalf of its 325 active members, the Third Circuit Bar Association, for the first time in its history, filed an amicus brief in support of the petitioner's motion. Written by Past President Jim Martin, along with his partner at Reed Smith, current Board member Donna Doblick, the Association's amicus brief pointed out that the Court's standard would discourage parties from hiring suitable expert appellate counsel, and explained why learning about a case and identifying the best issues to raise may take new counsel on appeal a significant amount of time, and yet be beneficial to the Court. The brief also noted that in a very real sense, an appellate practitioner's schedule, in terms of the bunching up of deadlines, is often not under his or her control. Finally, the brief reiterated the experience of member lawyers in obtaining extensions of time from our own Circuit Justice, Samuel A. Alito, and other Justices, for filing Supreme Court cert petitions. This experience confirms that the ultrastrict standard applied by Justice Scalia is not the norm.

Some 15 months after the motion and amicus brief were filed, on October 10, 2012, a three-judge motions panel (comprising Judges Smith and Fuentes, with Chief Judge McKee) issued a brief order amending the published opinion. The order inserts the word "usually" in the conclusion stating the strict standard that counsel must meet to obtain an extension of time under LAR 112.4(a). The order also adds a sentence to the opinion expressly stating that the standard announced in the opinion does not apply to motions under Fed.R.App.P. 4(a) or 4(b) to extend time for filing a notice of appeal. While the Association would have preferred a complete withdrawal of the original opinion, the amendments do ameliorate its principal concerns. And the Board was pleased to see that it could take effective action, in the interest of the members, to protect against the creation of rules that make expert appellate practice, however inadvertently, more difficult for lawyers and less available to clients.

CONGRATULATIONS

The Third Circuit Bar Association Congratulates former member of the board of Governors

– Kevin McNulty –

on his recent appointment as a United States District Judge for the District of New Jersey

UPDATES AND REMINDERS FROM THE THIRD CIRCUIT CLERK…—continued from page 1

Clarification regarding motions to certify questions of state law. L.A.R. 110 states that a motion for certification of a question of state law must be included in the moving party's brief. The motion should also be separately filed on CM/ECF. Separately filing the motion allows the court and parties to better identify and track pending motions. A notice reminding counsel of this requirement is posted on the website.

***Anders* cases.** The quality of briefs from both appellants and appellees in *Anders* cases has been problematic. (In an *Anders* case, a court-appointed defense attorney seeks to withdraw from the case on appeal based on the belief that the appeal is frivolous.) The Clerk's Office has posted on the website guidelines and a checklist to aid attorneys filing *Anders* cases. The guidelines also have instructions for government attorneys filing responsive briefs in such cases. These aids were adapted from another circuit.

Appendices in agency cases. Some agencies file the entire record in electronic form on the Court's CM/ECF system. This is the usual practice in immigration cases. Because these documents are easily available on the Court's docket, we are instituting a pilot program to allow parties in agency cases to rely on and to cite to the electronic record, rather than file an appendix. A notice to the parties that no appendix is necessary is sent when the record is filed. It must be emphasized that this program applies only to agency cases. An appendix must be filed electronically and in paper form in all other cases.

Jurisdictional dismissals. Because Federal Rule of Appellate Procedure 4(b)'s timeframe for filing a notice of appeal in a criminal case is not jurisdictional, the Clerk's Office does not list a criminal case for possible dismissal due to jurisdictional defect when the notice of appeal is untimely. While this issue can be raised by the government in its responsive brief, the better practice is to file a motion to dismiss at the outset of the case *before* the filing of the appellant's brief. Filing such motions prior to briefing can be a cost-saving measure in these times of tight budgets (see next section). (Early identification of obviously untimely appeals saves both the government and counsel appointed pursuant to the Criminal Justice Act, the time and costs associated with unnecessary extension motions and the filing of full briefs.)

Budget. Like all government entities, the Judiciary is coping with declining budgets. Congress has not yet passed a budget for fiscal year 2013, which began on October 1, 2012; the government is operating under a Continuing Resolution. Under the Continuing Resolution the Judiciary is operating at funding levels that are 4.8% less than that of FY 2012. All Court of Appeals units have been downsizing, primarily through attrition, for the past few years. The Clerk's Office has lost 5 positions. One very visible sign of this decline in personnel is that we no longer have a staff person at the front counter in the afternoon. Visitors must ring a bell or pick up a telephone for service. Calling ahead is a good idea.

Other budget concerns loom. There is a possibility that automatic spending cuts provided by the Deficit Reduction Act—otherwise known as "sequestration"—could take effect in January 2013. While everyone hopes that sequestration does not happen, the Judiciary is projecting how sequestration will impact the courts and is planning for such a contingency. It is estimated that sequestration would result in a loss of $500 million from FY 2012 funding levels Judiciary-wide. Judge Julia Gibbons, Chair of the Judicial Conference Budget Committee, stated, "Quite simply, a reduction of this magnitude would cripple the operations of the federal Judiciary…"

All offices of the Court of Appeals—the Clerk's Office, Circuit Executive's Office, Library, Staff Attorney's Office, and Mediation—would be affected. Needless to say, the magnitude of such reductions would make it impossible to deliver the level of service we currently provide.

THIRD CIRCUIT PRO BONO PANEL OFFERS UNIQUE OPPORTUNITY FOR SERVICE AND PROFESSIONAL DEVELOPMENT

By Paige H. Forster, Reed Smith LLP

The Third Circuit receives a high volume of pro se appeals. In order to provide representation for pro se litigants whose appeals appear to have merit, the Third Circuit clerk's office maintains a Pro Bono Panel of practitioners who are willing to be appointed as pro bono counsel. Cases assigned to pro bono counsel consist mainly of prisoner civil rights appeals, as well as a range of employment, bankruptcy, ERISA, and immigration matters.

In 2010, I joined the Pro Bono Panel by sending a letter to the Clerk, Marcia Waldron, expressing my willingness to serve. Several months later, the Court contacted me to ask if I would be willing to take a case. Once I accepted, the Court sent me the District Court record on CD. Because I was new to the case, the Court automatically provided a 60 review period before issuing the briefing schedule, which allowed me to get up to speed.

My client, a prisoner in a New Jersey state prison, had represented himself throughout the litigation in the District of New Jersey—from the filing of his handwritten complaint alleging civil rights violations in the prison, all the way through to the District Court's grant of summary judgment for the defendants.

Although I have a fair amount of Third Circuit experience, I had never delved deeply into prisoners' civil rights issues—so I was very fortunate to receive support from a wide array of sources. First and foremost, the partners in Reed Smith's appellate group helped me to brainstorm issues and arguments. A junior associate and a few summer associates helped with research. My client, although unable to communicate frequently from New Jersey state prison, was supportive. Finally, opposing counsel were courteous and helpful.

The legal issues in the case contained two interesting overlays: first, during the time period at issue, my client was a pretrial detainee—so he asserted due process claims, rather than Eighth Amendment (cruel and unusual punishment) claims. Second, my client is confined to a wheelchair, and case law regarding the rights of wheelchair-bound prisoners is sparse. I extracted basic civil rights principles from the case law and relied on analogies and distinctions to argue that my client's rights had been violated.

In cases involving appointed pro bono counsel, the Third Circuit grants oral argument whenever possible. That practice was followed in my case, and several weeks after the briefing concluded, I received the Court's email notice that the case would be argued ten days hence. After a whirlwind review of the issues and arguments, I was off to Philadelphia, where I had the great privilege of arguing the case before Judge Fisher, Judge Greenaway, and Judge Aldisert (who sat via videoconference from his California chambers). The bench was hot, with all three judges asking insightful questions. Judge Fisher, who presided, thanked Reed Smith and me for taking on the case pro bono—and Judge Aldisert also expressed his pleasure that the appellant had been able to receive representation.

Over the summer, the Court affirmed summary judgment in favor of the defendants. I wrote to my client, sending a copy of the Court's opinion and explaining the outcome. My final action was to file a motion to formally withdraw as counsel.

I was disappointed not to have won a reversal, but I learned a great deal and—as an appellate practitioner—expanded my skill set by leaps and bounds. I had the satisfaction that comes from managing an appeal, including overseeing research, shaping strategy, mastering all of the legal and factual issues (although of course I could not have represented my client without strong support from Reed Smith and particularly its appellate attorneys). Perhaps most importantly, I had the incomparable experience of Third Circuit oral argument. And the case drew positive attention, with some senior partners at Reed Smith joining the Pro Bono Panel themselves.

Like any Third Circuit appeal, representing a client pro bono is time-consuming and absorbing. But the experience yields great rewards. Practitioners who want to gain marketable experience, fulfill pro bono obligations, and assist the Court should consider joining the Pro Bono Panel.

To express interest in joining the Pro Bono Panel, send a letter to Marcia Waldron, Clerk of Court, United States Court of Appeals for the Third Circuit, 21400 U.S. Courthouse, 601 Market Street, Philadelphia, PA 19106-1790.

To encourage lawyers to serve as appointed counsel on a pro bono basis, the Third Circuit has authorized limited recovery of up to $1,000 of expenses related to pro bono representation. More information *is available on the Court's website.*

CASE OF INTEREST: *IN RE K-DUR ANTITRUST LITIGATION*

Third Circuit Revives Circuit Split Over How to Evaluate "Reverse Payment" Settlements

By Richard Heppner, Reed Smith LLP

The United States Court of Appeals for the Third Circuit recently ruled that a patent litigation settlement agreement that includes a "reverse payment"—a payment from a name-brand pharmaceutical maker to a generic company, in exchange for the generic company's promise to delay manufacture of a generic version of a patented drug—is "*prima facie* evidence of an unreasonable restraint of trade" in violation of federal antitrust law. In re K-Dur Antitrust Litig., 686 F.3d 197, 218 (3d Cir. 2012). The opinion by Judge Sloviter—writing for a panel that also included Judge Vanaskie and Judge Stengel of the Eastern District of Pennsylvania, sitting by designation—revived a circuit split and rejected the more settlement-friendly "scope of the patent test" that has been adopted by the Second, Eleventh and Federal Circuits.

The Court's decision reversed the District of New Jersey's holding, in a case consolidated by the Judicial Panel on Multidistrict Litigation, that there was no antitrust violation. *In re K-Dur Antitrust Litig.*, No. 01-1652, 2010 WL 1172995 (D.N.J. Mar. 25, 2010) *rev'd,* 686 F.3d 197 (3d Cir. 2012). The Plaintiffs, pharmaceutical wholesalers and retailers, alleged that the Defendants, name-brand and generic drug manufacturers, violated the Sherman Act by settling earlier patent cases involving the drug K-Dur 20 ("K-Dur"). Specifically, under the terms of the settlement agreement, the Defendants—Schering-Plough Corporation and two generic drug manufacturers—agreed that Schering would make payments to the generic manufacturers totaling $75 million, and the generic manufacturers would delay their manufacture of generic K-Dur.

To encourage generic manufacturers to enter the market and lower the cost of prescription drugs, the federal Hatch-Waxman Act gives the first generic manufacturer to challenge a drug patent a 180-day exclusivity period during which the FDA cannot approve subsequent applications from other generic manufacturers. *In re K-Dur Antitrust Litig.*, 686 F.3d at 204. But, to protect valid patents, Hatch-Waxman allows name-brand pharmaceutical manufacturers to sue generic manufacturers for infringement of the patent as soon as they challenge it, triggering a stay of the FDA's approval for 30 months or until a court finds the patent invalid. *Id.* at 204.

In *K-Dur,* the generic manufacturers challenged Schering's K-Dur patent as permitted by the Hatch-Waxman Act and Schering sued them, triggering the stay. That lawsuit was settled when Schering agreed to the "reverse payments" (colloquially, a "pay-for-delay settlement").

The Third Circuit case is not the only litigation over the K-Dur patent. Several years ago, the FTC ruled that the reverse payment settlement "unreasonably restrain[ed] commerce" by improperly extending Schering's monopoly over the market for K-Dur. *Id.* at 206-07. But the Eleventh Circuit reversed the FTC's ruling, applying what has come to be known as the "scope of the patent test," also adopted by the Second Circuit and the Federal Circuit. *Schering-Plough v. FTC*, 402 F.3d 1056 (11th Cir. 2005). Under the scope of the patent test, courts evaluating reverse payment settlements presume that the drug patent in question is valid. *Id.* at 211-14. Therefore, under the scope of the patent test, a reverse payment settlement is not an antitrust violation so long as the agreed-upon delayed entry into the market does not extend beyond the term of the patent. *Id.*

The Third Circuit rejected the scope of the patent test, finding that it "improperly restricts the application of antitrust law and is contrary to the policies underlying the Hatch-Waxman Act," namely, increasing the availability of low cost generic drugs and encouraging generic manufacturers to challenge weak patents. *Id.* at 214, 217. Instead, the Court was persuaded by the reasoning of the FTC and the D.C. and Sixth Circuits that reverse payment settlements must be subjected to strict antitrust scrutiny. The Court took issue with the scope of the patent test's "almost unrebuttable presumption of patent validity," noting that the presumption of validity is a procedural device in patent litigation, not a right, and that many drug patents challenged by generic manufacturers are found invalid when litigated fully. *Id.* at 214-15. The Court also concluded that the scope of the patent test is contrary to the public interest underlying antitrust and patent law which "supports judicial testing and elimination of weak patents." *Id.* at 215-16. According to the Court, these considerations outweigh the judicial preference for settlement. *Id.* at 217-18.

Ultimately, the Third Circuit concluded that in challenges to reverse payment settlements, the factfinder "must treat any payment from a patent holder to a generic patent challenger who agrees to delay entry into the market as *prima facie* evidence of an unreasonable restraint of trade." *Id.* at 218. The restraint-of-trade presumption can be rebutted by evidence that the payment was "for a purpose other than delayed entry" or offers "some pro-competitive benefit." *Id.*[1]

Schering, which has since merged with Merck & Co., has petitioned the Supreme Court for certiorari. *Petition for Certiorari, Merck & Co., Inc. v. Louisiana Wholesale Drug Co., Inc.*, 2012 WL 3645102 (Aug. 24, 2012). Given the clear circuit split regarding reverse payment settlements and the scope of the patent test—and the fact that the Eleventh and Third Circuit holdings conflict on the validity of the same agreement—this case appears to be a strong candidate for review by the high court.

1. The Third Circuit also decided a second issue related to class certification, holding that the District Court did not err in certifying the Plaintiffs' class of wholesalers and retailers who had purchased K-Dur from Schering while the generic version was excluded from the market. *Id.* at 218-24. Defendants had argued that Plaintiffs could not satisfy the predominance requirement of Federal Rule of Civil Procedure 23(b)(3) because the damages issues would require individualized assessments of each plaintiff's antitrust injury. But the Court concluded that injury could be shown on a class-wide basis because antitrust injuries are not based on lost profits but on a plaintiff being overcharged for a product, and the variation in pricing and sales was limited. *Id.* at 219-23. And the court rejected the Defendants' argument that inherent conflicts in the class meant it could not satisfy the adequacy of representation requirement in Rule 23(a)—because some of the drug wholesalers' sales and per-pill profits dropped once generic pills were available, meaning they actually benefited from the exclusion of generic K-Dur from the market—ruling instead that those wholesalers had the same incentive to seek damages as the other class members because their damages were based on what they were overcharged and not on their profits. *Id.* at 223-24.

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