3 BAR ASSOCIATION FOR THE THIRD FEDERAL CIRCUIT

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THIRD CIRCUIT CLARIFIES ITS PRELIMINARY INJUNCTION JURISPRUDENCE

Reilly v. City of Harrisburg, 858 F.3d 173 (3d Cir. 2017)

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Reilly v. City of Harrisburg, 858 F.3d 173 (3d Cir. 2017), as amended (June 26, 2017), clarifies Third Circuit jurisprudence on preliminary injunctions and emphasizes the Government's heavy burden to show narrow tailoring in a First Amendment case.

Background

In *Reilly*, the plaintiffs filed an action challenging a Harrisburg ordinance that, they claimed, impermissibly restricted their First Amendment right to protest near abortion clinics. The plaintiffs also sought a preliminary injunction. The district court applied intermediate scrutiny and accepted as true the plaintiffs' allegation that Harrisburg had not considered less-restrictive alternatives. The district court nonetheless denied a preliminary injunction because plaintiffs had not borne their burden of establishing that they were likely to succeed on the merits of their First Amendment challenge.

The plaintiffs appealed the order denying their motion for a preliminary injunction. The Third Circuit remanded for further consideration because the district court "misallocated the burden of demonstrating narrow tailoring." And "to assist in that effort and to clear up confusion caused by opinions in our Court that are in tension," the Third Circuit also clarified "how the analysis [on remand] should proceed."

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THIRD CIRCUIT EXPLICATES DISCRETION TO ABSTAIN IN ACTIONS INVOLVING BOTH DECLARATORY AND LEGAL RELIEF

Rarick v. Federated Service Insurance Co., 852 F.3d 223 (3d Cir. 2017)

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Federal courts have broad discretion to decline jurisdiction in actions seeking *declaratory* relief. But they have very limited discretion to decline jurisdiction in actions seeking *legal* relief. In *Rarick v. Federated Service Insurance Co.*, 852 F.3d 223 (3d Cir. 2017), the Third Circuit addressed a court's discretion to decline jurisdiction when a complaint seeks both declaratory and legal relief. After acknowledging a three-way circuit split on the issue, the Court concluded that when a complaint seeks both declaratory and legal relief, a district court must determine whether the legal claims are independent of the declaratory claims. If independent, the court has a "virtually unflagging obligation" to hear them; if not, the court retains discretion to decline jurisdiction over the entire action.

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THADDEUS STEVENS AT THE 2017 JUDICIAL CONFERENCE

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One of the unexpected pleasures of the recent Judicial Conference in Lancaster was discovering that the conference hotel was literally attached to the historic home and law offices of Thaddeus Stevens (1792-1868), a giant in U.S. Constitutional history. Stevens represented the Lancaster County area in Congress from 1859 to the time of his death. A key figure among the "Radical Republicans," Stevens is portrayed by Tommy Lee Jones in the 2012 Spielberg movie, *Lincoln*. Stevens actively participated between 1863 and 1866 in drafting—and then pressed through Congress—the Thirteenth and Fourteenth Amendments (the former of which was ratified in 1865 and the latter in 1868). If, as most would agree, the Reconstruction Amendments established a new Constitutional order, both for guarantees of liberty and with respect to federalism, then Stevens deserves to be remembered as a Framer.

When I learned the Judicial Conference was to be held in Lancaster, I made a mental note to try to visit—and pay homage at—what I assumed would be one of the city's most important historic attractions, an exhibit at Stevens' former home. But the hotel's front desk staff knew nothing about it, and when I stopped by the Lancaster Visitor Center across the street, I learned that a plan to restore Stevens' home and office and to open a museum there had foundered some years ago for lack of sufficient funding. The Visitor Center docent did inform me that the address was just a block away, where I could see the buildings from the outside, at least.

But the next day produced an exciting surprise. Two receptions that were part of the Conference were held in the hotel's lower level. And in that space, one wall was of glass, overlooking the half-completed excavation and barely-begun renovation of Stevens' home and law office. Also visible was the home Stevens had purchased next door for his long-time domestic companion, Lydia Hamilton Smith, who was from a local, free African-American family. Large historical posters at the glass wall in this reception area celebrated the lives of Stevens and Smith, who remained together 20 years, in both Lancaster and Washington, until Stevens' death.

Prominent in the dig area was an old cistern, which (the placards explained) archeologists had discovered was not used to store water. Instead, it had a human-sized opening in the side, connected by a tunnel to the basement of the house. In short, Stevens and Smith were not only ardent abolitionist reformers, but also activists. Previously unknown to historians, their homes apparently served as a station on the Underground Railroad. For me, the energy and education of the Conference programs were fully matched by this journey into Lancaster's contribution to America's long march toward justice and a more perfect union. The story of Thaddeus Stevens and Lydia Hamilton Smith perfectly illustrates how progress along that arc of history has always involved an interplay of official legal reform and committed private action.

THIRD CIRCUIT EXPLICATES DISCRETION TO ABSTAIN IN ACTIONS INVOLVING BOTH DECLARATORY AND LEGAL RELIEF — continued from page 1

The case on appeal stemmed from two district court actions: *Rarick v. Federated Service Insurance Co.* and *Easterday v. Federated Insurance Co.*, where plaintiffs filed class actions against Federated Insurance Company based on the denial of claims for uninsured motorist benefits. The plaintiffs sought damages and a declaration that Pennsylvania law required Federated to provide uninsured motorist coverage. After Federated removed both cases, the district courts adopted a "heart of the matter" test to determine whether they had discretion to decline jurisdiction. In both cases, the district courts found that the crux of the litigation was declaratory, declined jurisdiction, and remanded to state court. The plaintiffs appealed and the cases were consolidated.

On appeal, in an opinion authored by Judge Hardiman and joined by Judges Chagares and Scirica, the Court vacated the judgments and remanded for further proceedings. The panel first acknowledged three different approaches to determining whether a district court may decline jurisdiction when a complaint seeks both declaratory and legal relief. The Second, Fourth, and Fifth Circuits have adopted a bright line rule requiring a court to hear any action that seeks legal relief, even when a party's claim for legal relief is ancillary to its claim for declaratory relief. In contrast, the Seventh and Ninth Circuits have adopted an "independent claim" test requiring a court to assess whether the legal claims are independent of the declaratory claims: if independent, the court must adjudicate the legal claims unless there are exceptional circumstances; if not, the court may decline jurisdiction over the entire action. Finally, district courts in the Third Circuit, following the approach taken by Eighth Circuit, had employed the "heart of the matter" test, which examines the relationship between the claims and determines the essence of the dispute.

The Third Circuit adopted the independent claim test applied by the Seventh and Ninth Circuits. Under that test, when a complaint contains claims for both legal and declaratory relief, the district court must determine whether the legal claims are independent of the declaratory claims. If independent, the court has a "virtually unflagging obligation" to hear the claims. If dependent, the court retains discretion to decline jurisdiction over the entire action. The panel decided that the independent claim test was most appropriate because it gives district courts the flexibility that the bright line test precludes—while the bright line test is more easily applied, "it unduly curtails a district court's unique and substantial discretion to abstain from hearing claims for declaratory relief." In addition, the independent claim test has advantages over the "heart of the matter" test because it prevents plaintiffs from evading federal jurisdiction through artful pleading.

Parties often have reasons for preferring a federal or state court forum, and attorneys often need to advise clients on the likelihood that an action can be litigated in the preferred forum. For federal court actions involving both legal and declaratory relief claims, the Third Circuit's *Rarick* decision provides increased certainty for attorneys advising on such matters, as well as increased clarity for district courts tasked with assessing their jurisdictional obligations and discretion.

THIRD CIRCUIT CLARIFIES ITS PRELIMINARY INJUNCTION JURISPRUDENCE

— continued from page 1

Standards for Preliminary Injunctions

The Court first took up the standard for granting a preliminary injunction. According to the Court's ruling in *Delaware River Port Authority v. Transamerican Trailer Transport, Inc.*, 501 F.2d 917 (3d Cir. 1974), the movant had to show only "(1) a reasonable probability of eventual success in the litigation, and (2) that it will be irreparably injured ... if relief is not granted[.]" A district court then could consider, where appropriate, "(3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest." The Third Circuit in *Reilly* held that "[t]his standard for preliminary equitable relief remains; we have repeated that a district court—in its sound discretion—should balance those four factors so long as the party seeking the injunction meets the threshold on the first two."

The *Reilly* Court was "aware . . . [of] an inconsistent line of cases within" the Third Circuit holding "that all four factors must be established by the movant and the 'failure to establish any element in its favor renders a preliminary injunction inappropriate.'" The *Reilly* Court ultimately traced that inconsistency to *ECRI v. McGraw-Hill, Inc.*, 809 F.2d 223, 226 (3d Cir. 1987), which misread *SI Handling Systems, Inc. v. Heisley*, 753 F.2d 1244, 1254 (3d Cir. 1985). But *Heisly*, the *Reilly* Court explained, "was not out of line with our precedent that the factors are to be balanced so long as the first two factors (likelihood of success on the merits and irreparable harm) are satisfied. Thus the conflicting line of cases and corresponding confusion" stemmed from "compounded subtle misinterpretations of our longstanding jurisprudence." And because the Third Circuit, sitting en banc, had not overruled *Transamerican Trailer Transport*, that case remained good law—unless, of course, an intervening Supreme Court decision had abrogated it.

The *Reilly* Court then addressed an assertion in a 2008 Supreme Court opinion (*Winter v. National Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008))—that "[a]t first blush" lent support for a divergent standard in which all four factors are effectively critical in equal recourse. But after examining prior and subsequent Supreme Court decisions granting or denying equitable relief, the Third Circuit in *Reilly* concluded that they were consistent with the standard articulated in *Transamerican Trailer Transport*. Thus, the *Reilly* Court adhered to its "precedent that a movant . . . must meet the threshold for the first two 'most critical' factors: it must demonstrate that it can win on the merits (which requires a showing significantly better than negligible but not necessarily more likely than not) and that it is more likely than not to suffer irreparable harm in the absence of preliminary relief. If these gateway factors are met, a court then considers the remaining two factors and determines in its sound discretion if all four factors, taken together, balance in favor of granting the requested preliminary relief."

Burden To Show Likelihood of Success

The district court "observed that Defendants failed to produce evidence that 'made a clear showing' the ordinance was narrowly tailored. At the same time, the district court "determined that Plaintiffs bore the burden of demonstrating their likelihood of success on the merits, and they failed to do so on the scant record before it." The *Reilly* Court held that the district court had erroneously placed the burden on plaintiffs.

As the *Reilly* Court explained, the plaintiff normally bears the burden to prove a likelihood of success on the merits. But "in First Amendment cases, where 'the [g]overnment bears the burden of proof on the ultimate question of [a statute's] constitutionality, [plaintiffs] must be deemed likely to prevail [for the purpose of considering a preliminary injunction] unless the [g]overnment has shown that [plaintiffs'] proposed less restrictive alternatives are less effective than [the statute].'" Both parties were unaware of this narrow exception. The City of Harrisburg thus had made no effort to create a record establishing "that [plaintiffs'] proposed less restrictive alternatives are less effective than [the statute]." But it also meant that the plaintiffs had not objected to the district court's erroneous burden-shift.

The best course of action, the *Reilly* Court concluded, was a do-over under the correct legal standard. Because neither party was aware of the applicable burden-shifting standard, the Court afforded the defendants the opportunity to meet their burden of showing that the ordinance was narrowly tailored appropriate to the government interest involved. The district court would then be able to consider anew the request for preliminary injunctive relief in the clarified context noted above.

Conclusion

Reilly is an important case for Third Circuit practitioners. It clarifies that movants seeking preliminary injunctions need only establish a likelihood of success and irreparable harm. If they make that showing, then a district court may exercise its discretion, in appropriate cases, to consider the possibility of harm to other interested persons from the grant or denial of the injunction and the public interest. *Reilly* is also important because it reminds litigants that a plaintiff raising a First Amendment challenge to a speech-restricting ordinance will be presumed to have shown a likelihood of success unless the government shows that the plaintiff's proposed less restrictive alternatives are less effective than the statute.

2017 ATTORNEY BAR STATUS CAMPAIGN

The Third Circuit has concluded its 2017 campaign to update its attorney rolls pursuant to Rule 17.2 of the Rules of Attorney Disciplinary Enforcement. Counsel who did not respond to the personal email which was sent in February by updating their contact information or who were admitted longer than 5 years ago, have not entered an appearance within the last 5 years, and do not have a valid email address on file with the Clerk's Office have been moved to inactive status.

An attorney must have active status in order to appear before this Court. R.A.D.E. 17.3. Counsel who have been moved to inactive status may request a change to active status by completing the Attorney Admission Renewal/Adjustment of Status Form.

Counsel may access the Attorney Admissions Checker for his or her current status and the date that he or she last entered an appearance. Please refer to the Attorney Admissions page on the Court's website for additional information and answers to frequently asked questions.

Dated: June 5, 2017

REQUEST FOR COMMENTS ON PROPOSED RULES AMENDMENTS

The Judicial Conference Advisory Committees on Appellate, Bankruptcy, Criminal, and Evidence Rules have proposed amendments to their respective rules and forms, and requested that the proposals be circulated to the bench, bar, and public for comment. The proposed amendments, advisory committee reports, and other information are attached and posted on the Judiciary's website.

Opportunity for Public Comment

All comments on these proposed amendments will be carefully considered by the advisory committees, which are composed of experienced trial and appellate lawyers, judges, and scholars. Please provide any comments on the proposed amendments, whether favorable, adverse, or otherwise, as soon as possible, but no later than Thursday, February 15, 2018. All comments are made part of the official record and are available to the public.

SUPREME COURT OF THE UNITED STATES SET TO ADOPT ELECTRONIC FILING

The Supreme Court's new electronic filing system will begin operation on November 13, 2017. A quick link on the Court's website homepage will provide access to the new system, developed in-house to provide prompt and easy access to case documents. Once the system is in place, virtually all new filings will be accessible without cost to the public and legal community.

Initially the official filing of documents will continue to be on paper in all cases, but parties who are represented by counsel will also be required to submit electronic versions of documents through the electronic filing system. The filings will then be posted to the Court's docket and made available to the public through the Court's website. Filings from parties appearing pro se will not be submitted through the electronic filing system, but will be scanned by Court personnel and made available for public access on the electronic docket.

Attorneys who expect to file documents at the Court will register in advance to obtain access to the electronic filing system. Registration will open 4-8 weeks before the system begins operation. Additional information about the system is available through the "Electronic Filing" quick link on the Supreme Court's website: https://www.supremecourt.gov/.

Further information contact: Kathleen L. Arberg (202) 479-3211

August 3, 2017

PRESIDENT'S NOTE

Charles "Chip" Becker
Kline & Specter PC, Philadelphia, PA

I hope that this finds everyone well and enjoying the summer months. The Third Circuit Bar Association has made some good progress since our last newsletter. Most importantly, it was able to participate in a meaningful way in the Third Circuit Judicial Conference that recently took place in Lancaster, PA. This included hosting a Wednesday evening reception preceding the bench-bar dinner, coordinating a Thursday evening dine-around followed by a dessert reception with the judges, and planning two CLE programs that took place on the last day of the conference—one entitled "Professional Ethics in the Appellate Process" that featured some excellent commentators on legal ethics, and another entitled "What Attorneys Hope Judges Know and Vice Versa" that was intended as a healthy exchange of views between bench and bar and hopefully achieved that goal.

I was glad to see many of you at the conference, which was well-attended and successful by every measure. For this we owe a special debt of gratitude to Circuit Executive Margaret Wiegand and her staff for their tireless efforts in planning, organizing, and facilitating the conference. Thank you!

Since the judicial conference, the Association has been focused on a couple of initiatives. One is revamping the website. I am hopeful that before long we will be able to present a new website that is current, useful, and a strong adjunct to the Association's work. Another is developing some fresh CLE programming that will advance the Association's goal of promoting quality appellate advocacy throughout the Third Circuit. We are working hard in these areas, and please stay tuned on both of these fronts.

In the meantime, let me thank Peter Goldberger for his splendid article on Thaddeus Stevens published in this edition, and to Patrick Yingling and Steve Sanders for their informative case notes. This newsletter has been excellent for so many years and we are fortunate to have such outstanding contributors on an ongoing basis. If you have an idea for an article, please let us know!

VACANCY ANNOUNCEMENT: TEMPORARY LAW CLERK

Announcement Date: August 11, 2017

Position Title: Temporary Law Clerk

Position Type: Full-Time, Temporary – Not to Exceed 9/15/2017

Location: Philadelphia, PA

Closing Date: Open until filled (preference given to applications received by 8/18/2017)

Classification Level: JSP-11 ($64,820 - $84,263) based on qualifications and experience.

Position Overview:

Article III Federal Appellate Court Judge seeks a recent law school graduate as a full-time temporary law clerk to provide law-related and administrative support. This position will run for three weeks starting August 28, 2017. At the conclusion of that period, there will be an opportunity to apply for a permanent position in chambers, continuing in the same job duties in the position of Judicial Assistant/Paralegal. The incumbent conducts legal research, prepares legal memoranda, helps prepare the judge for oral argument, coordinates and helps train interns, and assists in the drafting of orders and opinions in both civil and criminal cases. In addition, the incumbent handles the filing of orders and opinions, interfaces with the public, other court units, and other chambers as needed, coordinates the judge's scheduling and travel, and oversees the day-to-day operations of chambers. This position is located in the judge's chambers and reports directly to the judge.

Representative Duties and Responsibilities include:

- Reviews legal submissions (such as motions, petitions, and the parties' briefs) in both civil and criminal appeals.
- Conducts legal research, drafts bench memoranda, and assists in drafting of opinions and orders.
- Manages docket and prioritizes projects to ensure that opinions and orders are timely filed, votes tracked, and motions cleared in a timely manner.
- Performs administrative functions, such as cite checking, editing, proofreading, docketing in electronic case filing (CM/ECF) system, telephone communications, written correspondence, and scheduling. Responsible for greeting visitors, interfacing with other court personnel, and general administrative support.

Qualification Requirements:

Applicant must be a law school graduate (or be certified as having completed all law school studies and requirements and merely awaiting conferment of degree) from a law school approved by either the American Bar Association or the Association of American Law Schools, and have demonstrated one of the following accomplishments or proficiencies:

- Standing within the upper third of the law school class;
- Experience on the editorial board of a law review of such a school;
- Graduation from such a school with an LLM degree; or
- Proficiency in legal studies that, in the opinion of the appointing judge, is the equivalent of one of the above.

Desirable qualifications include: detail-oriented, reliable, excellent oral and written communication skills, superb analytical skills, an aptitude for working well under pressure, understanding of court processes, familiarity with Federal Rules of Civil and Criminal Procedure and Federal Rules of Appellate Procedure, and an ability to work well as part of a team. Prior experience providing administrative support or office management is preferred but not required.

Required Experience:

Excellent academic credentials. Superior research and writing skills. Strong work ethic and organizational skills. Ability to prioritize tasks and juggle competing demands. Exceptional ability to communicate and relate to coworkers and others with professionalism and integrity. Self-motivated, able to manage multiple tasks and meet competing deadlines. Applicant must possess proficient typing and personal computer skills.

Conditions of Employment:

Must be a United States citizen, or must meet the requirements established by current appropriations law. Positions with the U.S. Courts are excepted service appointments. Excepted service appointments are "at will" and can be terminated with or without cause by the Court. The appointment is provisional and contingent upon the satisfactory completion of a background check. Direct deposit of pay required.

Application Instructions:

Submit cover letter, resume, writing sample, law school transcript, and letters of recommendation, as well as references, via email to "templc@ca3.uscourts.gov". Only candidates selected for an interview will be notified. Unsuccessful candidates will not receive further notice.

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