On Appeal

May 2022 – Volume XVI, Number 1

- Third Circuit Applies the "Practical Finality" Approach to Determine Whether Decisions in Post-Judgment Execution Proceedings are Final – Page 1
- Third Circuit Grants Rule 23(f) Petition of a Class-Certification Order Without a Defined Class – Page 1
- Third Circuit Gives Civil Rights Suit Another Chance Based on Lack of Consent to Magistrate Judge's Jurisdiction – Page 4
- President's Note – Page 5
- Third Circuit Examines the Test to Permit a Criminal Defendant to Proceed *Pro Se* – Page 6
- Lobby of Joseph F. Weis, Jr. Courthouse in Pittsburgh Named in Honor of Judge D. Brooks Smith – Page 8
- Notice Regarding Operations to Address the COVID-19 Pandemic – Page 9
- Request for Proposal for Publication of the History of the United States Court of Appeals for the Third Circuit – Page 10

FOR MORE INFORMATION ABOUT THE THIRD CIRCUIT BAR ASSOCIATION, PLEASE CONTACT US AT: 3cba@thirdcircuitbar.org OR VISIT US AT: www.thirdcircuitbar.org

THIRD CIRCUIT APPLIES THE "PRACTICAL FINALITY" APPROACH TO DETERMINE WHETHER DECISIONS IN POST-JUDGMENT EXECUTION PROCEEDINGS ARE FINAL

Crystallex International Corporation v. Bolivarian Republic of Venezuela, et al., 24 F.4th 242 (3d Cir. 2022)

Dani Morrison
DLA Piper, Philadelphia, PA

When is final, "final" in the context of post-judgment execution proceedings? Should that answer vary when the award debtor is a foreign sovereign with threshold affirmative and dispositive defenses that, if denied and subject to deferred review, could render further proceedings wasteful? Or, perhaps, should general principles of finality be suspended in the post-judgment context because these decisions are more permissive of piecemeal appeals? In *Crystallex International Corporation v. Bolivarian Republic of Venezuela, et al.*, a complex case involving the execution of a judgment against a foreign sovereign subject to United States' sanctions, the Third Circuit kept it simple. Applying the "practical finality" approach, the Third Circuit held that a decision is final in this context when the district court must no longer exercise its "judgment" and is simply providing "ministerial superintendence."

(continued on page 2)

THIRD CIRCUIT GRANTS RULE 23(f) PETITION OF A CLASS-CERTIFICATION ORDER WITHOUT A DEFINED CLASS

Laudato v. EQT Corp., 23 F.4th 256 (3d Cir. 2022)

Brittany C. Wakim
Schnader Harrison Segal & Lewis LLP, Philadelphia, PA

In *Laudato v. EQT Corp.*, the Third Circuit held it was within its jurisdiction under Federal Rule of Civil Procedure 23(f) to review a district court's grant of a class certification, despite the district court's refusal to define a class. The Court reviewed, and granted, the petition to appeal under Rule 23(f) because of the pressure the certification placed on petitioners to settle and the Court's opportunity to facilitate development of the law on class certification.

(continued on page 3)

THIRD CIRCUIT APPLIES THE "PRACTICAL FINALITY" APPROACH TO DETERMINE WHETHER DECISIONS IN POST-JUDGMENT EXECUTION PROCEEDINGS ARE FINAL — continued from page 1

Background

Crystallex obtained a $1.4 billion arbitration award against the Venezuelan government, and the District Court of the District of Columbia confirmed and authorized execution of the judgment.

Crystallex sought to satisfy its judgment by filing an attachment action against a Venezuela-owned oil company, Petróles de Venezela, S.A. ("PDVSA"), in the District Court of Delaware for its Delaware-based assets. Crystallex argued that as an "instrumentality" or "alter ego" of Venezuela, PDVSA's property was amenable to attachment under the Foreign Sovereign Immunities Act ("FSIA"). After the intervention of additional parties, including Venezuela, and significant briefing, the district court held that Crystallex could attach PDVSA's assets and directed the Clerk to issue a writ in furtherance of an execution of a public sale of those assets.

In a prior, related appeal, the Third Circuit affirmed the district court's decision, rejecting jurisdictional challenges, an immunity defense under the FSIA, and challenges to the district court's alter ego determination.

The case then returned to the district court. There, PDVSA, Venezuela and other intervenors moved to quash the writ of attachment, arguing that alter ego law was misapplied. Crystallex, in turn, viewed the matter as settled and moved for a contingent auction pending issuance of a license from the Office of Foreign Assets Control ("OFAC"), which was required because of sanctions and executive orders limiting the transfer of Venezuelan and PDVSA assets. The district court denied the motion to quash on preclusion and waiver grounds, and granted Crystallex's motion in part, deciding to establish sales procedures that could be followed to the maximum extent permitted without an OFAC license. All of Venezuela, PDVSA, and the intervenors (the "Appellants") sought review of both decisions.

Third Circuit Analysis

In a decision authored by Judge Porter and joined by Judges Shwartz and Fisher, the Third Circuit determined that post-judgment decisions issued while there are pending matters that require the district court's exercise of its judgment—and not just "ministerial superintendence"—are not final.

As to PDVSA, Venezuela, and the intervenors' motion to quash the writ of attachment, the Court applied a "practical test" and held the motion was not final and appealable because the district court's judgment was still needed to resolve outstanding issues. The Court explained that a post-judgment attachment is unlike a prejudgment attachment, which is necessarily interlocutory and unappealable. Depending on the circumstances, such as an execution sale that immediately follows an attachment, a post-judgment attachment could be appealable if it leaves the district court with no duties except ministerial oversight. But that was not the case here where the district court still had to determine appropriate judicial sale procedures, resolve related objections, and determine whether a contingent auction pending issuance of an OFAC license would violate sanctions regulations.

The Court rejected each of Appellants' "pragmatic" but unpersuasive arguments. The Court first explained that even if the denial of the motion addressed a threshold affirmative defense, review must await the end of the proceedings. The Court has long followed the "sensible" rule that a mere "possibility that a ruling may be erroneous and may impose additional litigation expense is not sufficient to set aside the finality requirement imposed by Congress." A post-judgment sale warrants no exception. As to the Appellants' core argument, the Court declined to vary "ordinary principles of finality" because they claimed that post-judgment decisions are not subject to the general consequences of piecemeal appeals. The Third Circuit explained the question was whether Appellants would be denied meaningful review if the Court did not intervene. They would not. After the district court entered a final decision, Appellants could seek a stay of execution pending appeal that would permit them to avoid irreparable injury while raising their legal challenges.

Turning next to the decision to determine sales procedures, the Third Circuit held it was also interlocutory and unappealable—even under the collateral order doctrine. First, Venezuela's argument that the order "contemplate[d] a contingent action" was actually an implied admission that the order was not final, which the Court's independent review of the order confirmed. Second, because the district court's decision regarding the sale procedures would "substantially overlap with and merge into the merits of the forthcoming final decision on sale procedures," it was not collateral to the pending proceedings.

Conclusion

The Third Circuit's decision demonstrates the need for practitioners to carefully assess whether an order is interlocutory or final and appealable. Whether pre- or post-judgment, when in doubt, a good rule of thumb is to apply the "practical finality" approach. The Court has now used that test in the abstention, *see Malhan v. Secretary United States Department of State*, 938 F.3d 453 (3d Cir. 2019), and post-judgment execution contexts.

THIRD CIRCUIT GRANTS RULE 23(f) PETITION OF A CLASS-CERTIFICATION ORDER WITHOUT A DEFINED CLASS —

continued from page 1

Background

In July 2018, roughly one hundred Pennsylvania landowners filed a class-action complaint against EQT Corporation ("EQT") alleging that EQT was utilizing the landowners' underground pore space in its storage of natural gas without due compensation. In May 2020, all landowners, except for one, dismissed their claims without prejudice. The one landowner who did not dismiss his case, Domenic Laudato, later moved for class certification in February 2021, seeking approval of a class defined as all landowners who have not received compensation from EQT for natural gas storage rights.

The district court rejected Laudato's proposed class definition but nevertheless granted class certification, stating that "it would seem in everyone's best interests to resolve this case on a class basis." The court then directed the parties to meet and confer on an appropriate class definition. EQT filed a petition to appeal the class certification order under Rule 23(f).

Arguments to the Court

Rule 23(f) states, in pertinent part, "[a] court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered . . . ."

EQT argued that the Court should allow the appeal because: (1) review was necessary to correct the district court's errors; (2) review would enable the Court to reiterate the need for a "rigorous analysis of all of the Rule 23 requirements" based on the legal elements of the claims; and (3) the district court magnified the usual pressure to settle inherent in a grant of class certification by its "avowed effort" to leverage certification to drive settlement.

In response, Laudato argued that the Court should not allow the appeal. He contended: (1) since class certification was preliminarily granted, the litigation was not effectively terminated by a denial of class certification; (2) the order did not, and could not, place pressure on EQT to settle because there was no definition of the class; and (3) the order did not implicate or adjudicate any unsettled questions of law because it simply determined that the matter should proceed.

Third Circuit's Decision

The Third Circuit granted EQT's Rule 23(f) petition. In analyzing the district court's order, the Court held that it "clearly stated a grant of class certification," despite the lack of a class definition, and thus the Court could exercise its jurisdiction under Rule 23(f). Although the Committee Notes from a 1998 amendment to Rule 23 describe an appellate court's discretion under Rule 23(f) as the same discretion used by the Supreme Court in granting certiorari, the Court explained that it exercises a "very broad discretion using a more liberal standard." One of the circumstances where the Court has deemed appellate review appropriate is when class certification places inordinate pressure on defendants to settle.

The Court agreed with EQT that interlocutory review was appropriate because "a class-action-certification order that leaves unresolved a crucial element—the class definition—is no less likely to exert substantial pressure on a defendant to settle than a standard class-action-certification order." A reasonable reading of the district court's order and its related suggestions could imply an "attempt to nudge" EQT to settlement, which would serve to increase such pressure. The district court even went so far as to recommend that EQT entertain alternative dispute resolution to settle rather than continuing to litigate. Lastly, the panel explained that permitting the appeal would provide the Court "an opportunity to facilitate development of the law on class certification."

Thus, given the pressure the class certification order placed on EQT to settle, and the opportunity to develop the law on class certification, the Court granted EQT's petition for permission to appeal under Rule 23(f).

Conclusion

It has been some time since the Third Circuit has issued an opinion on the standards for reviewing a petition for permission to appeal under Rule 23(f). One practical takeaway from this case is the Court's explanation of the factors it considers when granting a Rule 23(f) petition, including the emphasis on the pressure to settle that the purported certification placed on the petitioner. Additionally, *Laudato* demonstrates that the Court will view a Rule 23(f) appeal as appropriate even if the district court has not defined the class. Moreover, the Court noted that its opinion in this case was "an opportunity to facilitate development of the law on class certification," and it is thus expected to provide guidance for practitioners going forward.

THIRD CIRCUIT GIVES CIVIL RIGHTS SUIT ANOTHER CHANCE BASED ON LACK OF CONSENT TO MAGISTRATE JUDGE'S JURISDICTION

Burton v. Schamp, 25 F.4th 198 (3d Cir. 2022)

Rebecca E. Kennedy
K&L Gates LLP, Pittsburgh, PA

Congress created the Federal Magistrates Act to help manage Article III courts' caseload and improve access to district courts. Congress, however, placed critical limitations on the jurisdiction of magistrate judges. One such limitation is Section 631(c)(1) of the Federal Magistrates Act, which requires magistrate judges to obtain "consent of the parties" in order to acquire jurisdiction. Essentially, consent is required for an Article I magistrate judge to act with the jurisdiction of an Article III district judge.

In *Burton v. Schamp*, the United States Court of Appeals for the Third Circuit examined Section 636(c)(1) to determine the meaning of "consent of the parties." The defendants argued that the Court should interpret Section 636(c)(1) broadly to include three substitutes for formal consent—waiver, implied consent, or post-judgment consent. However, the Third Circuit rejected all three substitutes as insufficient to vest the magistrate judge with subject-matter jurisdiction to decide the claims.

District Court Proceedings

On July 5, 2017, Dante Burton filed a civil rights complaint in the federal district court for the Western District of Pennsylvania against seven employees of the Pennsylvania Department of Corrections for retaliation in response to Burton's filed grievance concerning his use of the law library. The district court assigned the case to the magistrate judge for screening. Before the defendants received service or consented to magistrate-judge jurisdiction, the magistrate judge dismissed the case *sua sponte* with prejudice for failing to state a claim.

On October 18, 2017, in the consolidated companion case, Moustafa Williams filed a complaint against State Correctional Institution employees—Wetzel, Smith, and Pearson—alleging Eighth Amendment violations for failure to accommodate his special dietary needs. Williams unilaterally consented to have a magistrate judge conduct all proceedings. Thereafter, the magistrate judge dismissed the case with leave to amend before any of the defendants received service or consented to the magistrate judge. On January 11, 2018, counsel for all three defendants waived service and moved to dismiss the amended complaint. The magistrate judge dismissed the case as to Wetzel and Smith and subsequently granted Pearson's motion for summary judgment. Pearson did not consent to the magistrate judge's jurisdiction until about five months later.

Taking up Burton's and Williams' consolidated appeal, the Third Circuit addressed three issues: 1) whether a party waives his right to object to jurisdiction when he files a consent form; 2) whether consent to jurisdiction can be implied from the act of appearing before the magistrate judge and filing a motion to dismiss the complaint; and 3) whether a party's consent given after the entry of a judgment by the magistrate judge can apply retroactively.

Third Circuit's Decision

In order to decide the issue of waiver, the Court turned to the statute's plain language to determine the meaning of "parties" in the "consent of the parties" phrasing of Section 636(c)(1). The Court reasoned that "parties" is a legal term of art defined by the statute and recognized that the Supreme Court has defined the term as "one by or against whom a lawsuit is brought or one who becomes a party by intervention, substitution or third party practice." Accordingly, the Court followed its two sister circuits, the Seventh and Ninth Circuits, to hold that "parties" is unambiguous and "at least one party from each side of the 'v.' must . . . consent to a magistrate judge's jurisdiction before a magistrate judge may dismiss a complaint for failure to state a claim at the screening stage."

As for the issue of implied consent, the Third Circuit did not provide a bright-line rule as to when parties' actions can imply consent, but it did hold that consent was not implied by a mere appearance before the magistrate judge. The Court found itself constrained by *Roell v. Withrow*, 538 U.S. 580 (2003), where the Supreme Court held that implied consent exists only where the "litigant or counsel *was made aware of the need for consent and the right to refuse it,* and still voluntarily appeared to try the case before the magistrate judge." (emphasis added).

(continued on page 5)

THIRD CIRCUIT GIVES CIVIL RIGHTS SUIT ANOTHER CHANCE BASED ON LACK OF CONSENT TO MAGISTRATE JUDGE'S JURISDICTION — continued from page 4

As for the issue of whether post-judgment consent could apply retroactively, the Court deemed such consent ineffective. The Court concluded that post-judgment consent would raise constitutional issues under Article III by allowing an Article I magistrate judge to exercise Article III powers before the magistrate judge has acquired the authority to do so. As a result, the Court held that post-judgment consent could not satisfy Section 636(c)(1).

Conclusion

In sum, the Court of Appeals vacated the magistrate judge's dismissal orders and remanded the cases to the district court for proceedings consistent with the opinion. The panel concluded that the proper procedure in these cases, where there is a lack of consent under Section 636(c)(1), would be for the magistrate judge to issue a report and recommendation to the district court, which is vested with the authority to dismiss the claim and enter final judgment. *Burton* helps clarify what is necessary for consent to magistrate-judge jurisdiction and when the magistrate judge must obtain that consent.

PRESIDENT'S NOTE

Deena Jo Schneider
Schnader Harrison Segal & Lewis LLP, Philadelphia, PA

With the advent of spring, the Third Circuit Bar Association is busy working on new programming and other initiatives:

- This month the Third Circuit began to present lawyers arguing appeals before it pens engraved with the Court's name. Our Association offered to provide the pens, which we hope will serve as both a nice memento of the argument experience and a reminder of the collegial relationship between the Court and its bar.

- We are organizing an in-person gathering for younger/less experienced appellate lawyers at which judges will explain the nuts and bolts of practice before the Court. The event will include an opportunity for the participants to mingle, and we are planning to have a Zoom link permitting remote attendance and networking as well. We hope this will be the beginning of a series of programs and other initiatives for the benefit of the future of our appellate bar, and welcome input from anyone interested in helping.

- We are continuing to work on plans for another CLE program of broader appeal and events to recognize our new Chief Judge Michael Chagares and to express our appreciation of former Chief but thankfully still very active Judge Brooks Smith following the recent dedication of the Smith Lobby in the Weis Courthouse in Pittsburgh. Congratulations, Judge Smith!

- Additionally, the Third Circuit will be the focus of the next installment of the Riding the Circuits virtual CLE series offered by the ABA's Council of Appellate Lawyers, which discusses recent developments and best practices for appellate practitioners in each circuit and elsewhere. Chief Judge Chagares, Judge Felipe Restrepo, and 3CBA Board member Ilana Eisenstein will be the speakers at this late spring program, which is being organized and will be moderated by 3CBA member Karl Myers. Stay tuned for details, which we have arranged to include a promotional rate for 3CBA members.

We are always looking for people to assist in our activities, including writing for this newsletter, organizing programs and other events, and updating our means of communicating with our members. The more who are involved, the more we can do. This newsletter includes a listing of our committee chairs so you will know whom to contact – or just reach out to any Board member or me and we will connect you with the right people. Please also watch out for our upcoming dues notice and renew your membership, and encourage colleagues and friends to renew or join. We welcome Third Circuit practitioners of all backgrounds and points of view, and your modest dues help fund our efforts.

THIRD CIRCUIT EXAMINES THE TEST TO PERMIT A CRIMINAL DEFENDANT TO PROCEED *PRO SE*

United States v. Taylor, 21 F.4th 94 (3d Cir. 2021)

Zachary B. Kaye
Reed Smith LLP, New York, NY

In *United States v. Taylor*, the Third Circuit held that a district court commits reversible error in deciding a request by a criminal defendant to proceed *pro se* if the court focuses its analysis on the defendant's knowledge of the law and practical ability to mount a defense, instead of focusing on whether the defendant appreciates the risks and consequences of self-representation.

Background on Waiving the Right to Counsel

The Sixth Amendment provides both that a criminal defendant has the right to counsel and the corresponding right to decline the assistance of counsel and represent himself. To give up the right to counsel—and the significant benefits of representation—a defendant must knowingly, intelligently, and voluntarily waive the right before a court may allow him to proceed *pro se*.

In recognition of the benefits of representation and the risks of proceeding *pro se*, the Third Circuit requires that a trial court conduct a rigorous three-pronged inquiry before accepting a defendant's waiver of counsel. A court must ascertain that a defendant:

> (1) has clearly and unequivocally asserted his desire to represent himself; (2) understands the nature of the charges, the range of possible punishments, potential defenses, technical problems that [he] may encounter, and any other factors important to a general understanding of the risks involved; and (3) is competent to stand trial.

United States v. Jones, 452 F.3d 223, 230 (3d Cir. 2006). The Third Circuit requires a "penetrating and comprehensive examination of all the circumstances" before deciding a criminal defendant's request to represent himself. *Id.* at 228 (internal quotations omitted).

District Court Proceedings

In January 2020, a federal jury found Donte Taylor guilty of possession with intent to distribute controlled substances. In the lead-up to his trial, Taylor was represented by court-appointed counsel, but filed repeated *pro se* motions, prompting his attorney to move to withdraw and note that Taylor refused to accept that the laws of the United States governed him (Taylor generally advanced "sovereign citizen" arguments). The district court denied the attorney's motion.

At a later suppression hearing, the court addressed a second motion to withdraw by the attorney, who expressed concern about Taylor's legal competency. There, Taylor addressed the court directly, seeking permission to represent himself. In doing so, he acknowledged that he "d[id not] understand law" and requested that the court "deal with [him] commonly." At this point, the court noted that "some of [Taylor's] pro se motions are just so—they're of a rambling nature, and they are not founded on any rational legal principles." The court went on: "even though [Taylor] may be legally competent in that [he] understand[s] the nature of these proceedings, that's a different standard as to whether [he] [is] able to effectively represent [himself]." The court advised that trials involve complex rules and that, as a layperson, Taylor would be at a significant disadvantage should he proceed *pro se*.

The district court determined that the defendant did not need a mental evaluation, but noted that it would not allow Taylor to "turn this case into some strange journey with these theories that have absolutely no basis in law or logic." The court went on: "[Y]ou're not going to represent yourself. You're not. Your arguments make no sense. They're convoluted. They're just a waste of time. And I'm not going to turn this proceeding upside-down." The court allowed Taylor's then-counsel to withdraw after the suppression hearing, but appointed new counsel, who represented Taylor through his conviction.

Taylor appealed, claiming that the district court violated his Sixth Amendment right to represent himself when it denied his request to proceed *pro se*.

(continued on page 7)

THIRD CIRCUIT EXAMINES THE TEST TO PERMIT A CRIMINAL DEFENDANT TO PROCEED *PRO SE* —

continued from page 6

Third Circuit Decision

The Third Circuit vacated Taylor's conviction and remanded for a new trial. In doing so, it reasoned that the district court "misdirected its focus when evaluating Taylor's request to represent himself" by concentrating on Taylor's knowledge of the law and practical ability to mount a defense, and not on whether he appreciated the structural limitations, risks, and potential consequences of self-representation. In other words, the district court needed to, but did not, analyze whether Taylor appreciated the advantages of counsel, the challenges of self-representation, and the consequence of being found guilty. It is the answer to these questions—not the court's estimation of the effectiveness of a criminal defendant proceeding *pro se*—that ought to determine whether a court permits a defendant to forego counsel.

The Third Circuit observed that it, too, regarded the merits of Taylor's "sovereign citizen" arguments to be of concern. It noted, however, that the merit, or lack thereof, of such arguments "shed[] little light on the defendant's appreciation of the risks and consequences of self-representation."

Conclusion

Taylor provides two sets of takeaways; the first narrow, the second broader. First, it underscores that prosecutors and criminal defense attorneys must ensure that courts properly analyze any request by a defendant to proceed *pro se*, or else risk a new trial following appeal. Second, it suggests that the Third Circuit will carefully scrutinize judicial application of any multi-factor test. Here, the district court was far from errant or derelict in its consideration of Taylor's request; its analysis was in the ballpark of that required by the Sixth Amendment and the Third Circuit's jurisprudence. Although it was arguably relevant to the required questioning, the Third Circuit held that the district court's inquiry missed the mark.

LOBBY OF JOSEPH F. WEIS, JR. COURTHOUSE IN PITTSBURGH NAMED IN HONOR OF JUDGE D. BROOKS SMITH

Chief Judge Michael A. Chagares of the U.S. Court of Appeals for the Third Circuit has announced that the lobby of the Joseph F. Weis, Jr. Courthouse in Pittsburgh will be named in honor of Third Circuit Judge D. Brooks Smith.

"Brooks Smith is a giant in the law and his tireless service and leadership have touched so many," said Chief Judge Chagares. "He has served with great distinction as chief judge in two courts and as a member of both the Judicial Conference and the Executive Committee of the Conference. He also performed crucial work as chair of the Judicial Conference's Space and Facilities Committee, leading an ambitious nationwide project to reduce the judiciary's footprint and reduce costs, while securing funding to replace aging court facilities and building eleven new courthouses. These achievements only begin to describe Judge Smith's impact on our system of justice. He has forged a truly incredible legacy. The dedication of the Smith Lobby is a fitting honor for a judge who has devoted his life's work to promoting the rule of law and contributing so much to the people of Western Pennsylvania, the Third Circuit, and the United States."

D. Brooks Smith has been a judge of the Third Circuit Court of Appeals since 2002. He recently concluded a five-year term as chief judge of the Court before electing senior judge status. Judge Smith served as a judge of the District Court for the Western District of Pennsylvania from 1988 to 2002, and was chief judge of that Court at the time of his appointment to the Court of Appeals. Judge Smith is the only judge in the history of the Circuit to have served as both a chief district judge and chief circuit judge.

"We enthusiastically join our Court of Appeals colleagues in recognizing the decades of public service that have been the hallmark of Judge Brooks Smith's life," said Judge Mark R. Hornak, the current Chief Judge of the District Court for the Western District of Pennsylvania. "For more than 30 years, his service as a judge and chief judge of our Court, and then as a judge and chief judge of the Court of Appeals, has been exemplified by his unwavering dedication to a fundamental mission of the federal courts – the commitment to providing equal justice under law. His wide-ranging service to the federal judiciary has advanced that mission in many ways, and this recognition is a timely reflection of those many contributions."

Judge Smith's legacy of service in his community runs deep. Born in Altoona, where he has been a life-long resident, he is a graduate of the Dickinson School of Law. Before his appointment as an Article III judge, Judge Smith served as an Assistant District Attorney in Blair County; a Special Assistant Attorney General for Pennsylvania; the District Attorney for Blair County; and a Judge of the Blair County Court of Common Pleas. Judge Smith is an active mentor and teacher at Penn State University Law School, where he has been an adjunct professor since 2011 and was recently honored with an appointment as the Law School's Distinguished Jurist in Residence.

In addition to his service on both the Executive Committee of the Judicial Conference and the Judicial Conference's Space & Facilities Committee, Judge Smith was appointed, shortly after the onset of the COVID-19 pandemic, to the federal judiciary's national COVID-19 Task Force. He also served on the Judicial Conference's Advisory Committee on Criminal Rules and participated in numerous rule of law programs in Eastern European countries. Judge Smith currently chairs the Third Circuit's Courts, Community, and Rule of Law Committee, which promotes civics education and presents programs designed to foster an understanding of the role of the federal judiciary in communities across the Third Circuit.

NOTICE REGARDING OPERATIONS TO ADDRESS THE COVID-19 PANDEMIC

The United States Court of Appeals for the Third Circuit is open for business and will fulfill its constitutional and statutory obligations and responsibilities.

Oral Arguments
Oral arguments continue as scheduled. Audio of oral argument is live streamed via YouTube.

The merits panel will determine the manner of argument. The Court is currently holding in person argument and using Zoom for Government for remote appearances. Parties may file a motion requesting to appear remotely. Any motion requesting to appear remotely must demonstrate good cause.

When appearing for in person oral argument, masks should be worn at all times unless arguing at the podium. Counsel is directed to conduct a health assessment prior to appearing before oral argument and contact the Clerk's Office immediately with any concerns.

Clerk's Office Operations
The majority of the Clerk's Office continue to work remotely with a limited number of staff in the office. Counsel and parties may leave voicemail through the Clerk's Office main number at 215-597-2995 or by calling their case manager directly.

Emergency Motions
Parties who need to file motions seeking emergency relief are directed to call 267-299-4904 and leave a detailed message regarding the nature of the emergency and requested relief. Be sure to include all contact information. An attorney from the Clerk's Office will return the call.

Verbal Extensions
Requests for a verbal extension of time to file a brief and appendix must be made within 3 days from the established deadline and are limited to 14 days. 3rd Cir. L.A.R. 31.4. Verbal requests for extensions of time may be made by calling either 215-597-2995 selecting option 3 for Case Management or their case manager directly. Routine requests for extensions of time to file a brief or other document may be requested by filing a motion through the Court's ECF system or in hard copy.

Methods for Filing

CM/ECF
Counsel and pro se registered filers may continue to file through the Court's CM/ECF system.

Original Proceedings may be submitted through CM/ECF. Third Circuit CM/ECF filers may electronically submit Petitions for Review, Petitions for Writs of Mandamus, Applications and Cross Applications for Enforcement of an Agency Order, Second or Successive §2254 or §2255 Petitions, and Petitions for Permission to Appeal. Supporting documents along with related motions may also be submitted as part of the process. The filing fee, if one is required, may be paid with a credit card through Pay.gov. Payment may be made as part of the initial submission or separately once the case has been opened on the Court's docket. ECF filers can verify submission and payment through an on-demand report. See Instructions to Submit Original Proceeding listed under Manuals on the Court's website. Filers are required to comply with service of the filing in accordance with Fed. R. App. P. 25 prior to submitting an Original Proceeding through CM/ECF.

Lobby Drop Box
As access to the Clerk's Office is restricted a drop box has been placed in the Courthouse lobby. This box is monitored by Clerk's Office staff each business day. The box should not be used for emergency filings. Rather the parties should follow the instructions set out above.

By Email
Non-ECF filers can continue to send Original Proceedings and other case related filings in hard copy and by email in PDF format through the emergency_motions@ca3.uscourts.gov mailbox.

February 1, 2022

REQUEST FOR PROPOSAL FOR PUBLICATION OF THE HISTORY OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

March 10, 2022

Project overview – This request seeks proposals for a publication memorializing the history of the United States Court of Appeals for the Third Circuit.

Background – In 1982, a book titled *Studies in the History of the United States Courts of the Third Circuit 1790-1980* was published. The Third Circuit Bicentennial Committee engaged Professor Stephen B. Presser to prepare this work. Much of the book chronicles the history of the United States District Courts within the Third Circuit. As Professor Presser acknowledged in his introduction, he "had written relatively little on the Court of Appeals," (page viii), and only dedicated the final chapter in the book—thirty-two pages in length—to the Court of Appeals. The book may be accessed at: https://www.ca3.uscourts.gov/sites/ca3/files/3chistory01.pdf. In the following years, many of the District Courts within the Third Circuit published histories of their courts. The Court of Appeals for the Third Circuit now seeks to publish its own history.

Research – A robust collection of primary and secondary sources is in the Court of Appeals for the Third Circuit's archives and available for this project. These sources include judges' papers, minutes, oral histories, photographs, annual reports, Third Circuit publications, and various books and articles. In addition, the substance of *Studies in the History of the United States Courts of the Third Circuit 1790-1980* may be reproduced and otherwise employed, as the author does not own a copyright in that book.

Substantive Contents – Possible topics for the book may include the growth of the Court to its present size and changes over time, the culture and traditions of the Court, its role in shaping the law in certain areas (*e.g.*, class actions, bankruptcy) and in different epochs (*e.g.*, women's suffrage, prohibition and organized crime, Civil Rights era decisions, the internet age), the influence of technology on Court business, and the COVID-19 experience.

Project Term – Thirty-six months or less from the signing of a contract with the author or authors.

Content of Proposal – Proposals should, among other things, detail the submitter's vision for the project (including substantive content), the author(s) and each author's biography, and suggested compensation.

Deadline for Proposal – The deadline for proposals is June 30, 2022.

Submit Proposals to:
Hon. Michael A. Chagares, Chief Judge
United States Court of Appeals for the Third Circuit
James A. Byrne United States Courthouse
601 Market Street
Philadelphia, PA 19106
c/o joel_mchugh@ca3.uscourts.gov

For inquiries, contact:
Joel McHugh
Deputy Circuit Executive
United States Court of Appeals for the Third Circuit
James A. Byrne United States Courthouse
601 Market Street
Philadelphia, PA 19106
joel_mchugh@ca3.uscourts.gov

FOUNDING MEMBERS

Arlin M. Adams
Hon. William G. Bassler
Judge Harold Berger
Andrew T. Berry
Gabriel L.I. Bevilacqua
Theresa M. Blanco
Anthony J. Bolognese
Carl D. Buchholz
Robert L. Byer
Candace Cain
Mark R. Cedrone
Jacob C. Cohn
Pamela Lynn Colon
Ian Comisky
Kevin J. Connell
Stephen A. Cozen
Charles W. Craven
Thomas R. Curtin
Jane L. Dalton
Alan J. Davis
Mark Diamond
John T. Dorsey
Alan B. Epstein
David B. Fawcett
Henry L. Feuerzeig
Arlene Fickler
Ann T. Field
Paul J. Fishman
Michael Foreman
Lisa B. Freeland
Steven L. Friedman
Dennis F. Gleason
Alan S. Gold
Sidney L. Gold
Peter Goldberger
Jonathan L. Goldstein
Herve Gouraige
Robert Graci
David A. Gradwohl
Harold Green
Ruth Greenlee
William T. Hangley
James R. Hankle
John G. Harkins, Jr.
Judith E. Harris
Lawrence T. Hoyle, Jr.
Daniel B. Huyett
Carmine A. Iannaccone
Cynthia M. Jacob
John P. Karoly, Jr.
John G. Knorr II
George S. Kounoupis
Ronald A. Krauss
Ann C. Lebowitz
George S. Leone
Arnold Levin
Timothy K. Lewis
James B. Lieber
Jeffrey M. Lindy
Michael P. Malakoff
Edward F. Mannino
Kevin H. Marino
James C. Martin
W. Thomas McGough, Jr.
William B. McGuire
Bruce P. Merenstein
H. Laddie Montague, Jr.
Dianne M. Nast
Sandra Schultz Newman
Karl E. Osterhout
Robert L. Pratter
Brian M. Puricelli
Abraham C. Reich
Raymond J. Rigat
William W. Robertson
Joseph F. Roda
Lawrence M. Rolnick
Stuart H. Savett
James A. Scarpone
Howard D. Scher
Jeffrey M. Schlerf
Deena Jo Schneider
Collins J. Seitz, Jr.
Marcia G. Shein
Theodore Simon
Andrew C. Simpson
Carl A. Solano
Aslan T. Soobzokov
Antoinette R. Stone
Thomas D. Sutton
Peter W. Till
Paul H. Titus
Michael J. Torchia
John D. Tortorella
Joe H. Tucker, Jr.
H. Woodruff Turner
Stacey F. Vernallis
Robert A. Vort
Ralph G. Wellington
Barry M. Willoughby
Nancy Winkelman

FOUNDING FIRMS

Arseneault Whipple Farmer
Fassett & Azzarrello
Bifferato & Gentilotti
Blank Rome LLP
Connolly Bove Lodge Hutz
Cozen O'Connor
Duane Morris LLP
Eckert Seamans Cherin Mellott
Gibbons, PC
Hangley Aronchick Segal & Pudlin
Hoyle Fickler Herschel & Mathes
Marino & Tortorella
Marshall Dennehey Warner
Coleman & Goggin
Reed Smith LLP
Robertson Frelich Bruno & Cohen
Roda Nast
Schnader Harrison Segal & Lewis
Spector Gadon & Rosen
Harkins Cunningham LLP

COMMITTEE CHAIRS

Programs: Matthew Stiegler, Katherine M. Romano & Ilana H. Eisenstein
Rules: David R. Fine, Howard J. Bashman & Carlo D. Marchioli
Publications: Lisa J. Rodriguez & M. Patrick Yingling
Membership: Steven G. Sanders, Nilam A. Sanghvi & Donna M. Doblick
Communications: Rebecca Haywood, Lisa J. Rodriguez & Namosha Boykin
Website: Deena Jo Schneider & Andrew C. Simpson

This newsletter is compiled by the 3CBA's Publications Committee;
please address suggestions to Patrick Yingling (mpyingling@reedsmith.com).

BAR ASSOCIATION FOR THE THIRD FEDERAL CIRCUIT

OFFICERS

President:
Deena Jo Schneider
Philadelphia, PA

President-Elect:
David R. Fine
Harrisburg, PA

Secretary:
Matthew Stiegler
Philadelphia, PA

Treasurer:
Nilam A. Sanghvi
Philadelphia, PA

Immediate Past President:
Andrew C. Simpson
St. Croix, U.S. Virgin Islands

BOARD DISTRICT SEATS

District of Delaware:
Tieffa N. Harper
Wilmington, DEA

District of New Jersey:
Katherine M. Romano
West Orange, NJ

Eastern District of Pennsylvania:
Howard J. Bashman
Willow Grove, PA

Middle District of Pennsylvania:
Carlo D. Marchioli
Harrisburg, PA

Western District of Pennsylvania:
Donna M. Doblick
Pittsburgh, PA

District of Virgin Islands:
Namosha Boykin
St. Thomas, U.S. Virgin Island

BOARD AT-LARGE SEATS

Ilana H. Eisenstein
Philadelphia, PA

Rebecca Haywood
Pittsburgh, PA

Lisa J. Rodriguez
Cherry Hill, NJ

Steven G. Sanders
Newark, NJ