



April 2019
Volume XIII, Number 1

- Third Circuit Bar Association Welcomes Judge David J. Porter To The Court – Page 1
- Third Circuit Clarifies Need For Precision In Application Of Collateral Estoppel – Page 2
- One Lawyer's Advice To Advocates Preparing For Their First-Ever Oral Argument – Page 3
- Hon. Thomas I. Vanaskie - A Tribute To A Judge's Judge – Page 4
- Editors' Note – Page 4
- President's Note – Page 5
- Rest In Peace: Major Matthew M. Wiegand – Page 5

On Appeal

THIRD CIRCUIT BAR ASSOCIATION WELCOMES JUDGE DAVID J. PORTER TO THE COURT

Joshua T. Newborn
Reed Smith LLP, Pittsburgh, PA



On October 11, 2018, the U.S. Senate confirmed Judge David J. Porter to the U.S. Court of Appeals for the Third Circuit. Judge Porter fills the vacancy created when Judge D. Michael Fisher took senior status.

Judge Porter joins the Third Circuit after being a shareholder at Buchanan Ingersoll & Rooney PC. There, he handled hundreds of litigation matters and was the co-chair of the firm's Higher Education Industry Team.

Judge Porter was born in Kittanning, Pennsylvania, and raised in Hershey, Pennsylvania. He received his B.A. with honors from Grove City College in 1988 and his J.D. from George Mason University School

of Law (now Antonin Scalia Law School) in 1992. He clerked for the Hon. D. Brooks Smith on the U.S. District Court for the Western District of Pennsylvania from 1992-1994.

He then joined Buchanan Ingersoll, where he worked until joining the Third Circuit. At Buchanan Ingersoll, he focused his practice on commercial and constitutional litigation. He served as lead counsel in jury trials, non-jury trials, and arbitration proceedings throughout the United States.

Judge Porter's investiture ceremony was held on December 18, 2018. Speakers included Chief Judge D. Brooks Smith, Senator Pat Toomey, Hon. Alice M. Batchelder of the United States Court of Appeals for the Sixth Circuit, Hon. Michael C. Turzai, Speaker of the Pennsylvania House of Representatives, Jack Barbour, Executive Chairman, Buchanan Ingersoll & Rooney, Hon. Paul J. McNulty, former U.S. Deputy Attorney General and currently President of Grove City College, Sean M. Sandoloski, Associate Counsel to the President, and Robert Luther, III, former Associate Counsel to the President. In his remarks, Judge Porter emphasized the judicial duty to exercise judgment rather than will.

Judge Porter's chambers are located in the Joseph F. Weis, Jr. United States Courthouse in Pittsburgh. The Third Circuit Bar Association congratulates Judge Porter and welcomes him to the Court.

**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 CLARIFIES NEED FOR PRECISION IN APPLICATION OF COLLATERAL ESTOPPEL

U.S. ex rel. Doe v. Heart Solution, PC et al., 918 F.3d 300 (3d Cir. 2019)

M. Patrick Yingling
Reed Smith LLP, Chicago, IL

Marla D. Tortorice
Reed Smith LLP, Pittsburgh, PA

Federal common law allows plaintiffs to use collateral estoppel to prevent defendants from contesting liability and damages in a civil suit after a criminal conviction. Nonetheless, as shown by the Third Circuit's opinion in *United States ex rel. Doe v. Heart Solution, PC et al.*, 918 F.3d 300 (3d Cir. 2019), district courts must carefully identify the issues decided in the criminal case before applying collateral estoppel. Reasonable doubt as to which issues were decided by a prior judgment should be resolved against estoppel.

District Court Proceedings

Nina Patel and her husband, Kirtish Patel, pled guilty to defrauding Medicare through their involvement with Ms. Patel's healthcare company, Heart Solution, PC, and Mr. Patel's healthcare company, Biosound Medical Services. During Ms. Patel's plea colloquy, Ms. Patel agreed that she and her husband "falsely represent[ed] to Medicare that the neurological testing being performed at Biosound Medical Services was being supervised by a licensed neurologist, when, in fact, it was not" and that "Biosound Medical Services and Heart Solution, PC, [were] paid at least [\$1.18 million] by Medicare . . . for diagnostic neurological testing that was never supervised by a licensed neurologist."

While the Patels' criminal proceedings were pending, a relator brought a *qui tam* suit under the federal False Claims Act (FCA) against Ms. Patel, Mr. Patel, Biosound, and Heart Solution. The relator claimed the defendants violated two provisions of the FCA by (1) knowingly presenting or causing to be presented a false or fraudulent claim, and (2) knowingly making, using, or causing to be made or used a false record or statement material to a false or fraudulent claim. 31 U.S.C. § 3729(a)(1)(A) & (B). The relator also brought common law claims, including fraud, unjust enrichment, disgorgement of profits, and payment by mistake of fact. At about the same time the Patels were pleading guilty to the criminal charges, the United States intervened in the FCA case.

The district court granted summary judgment to the United States, finding that the Patels' guilty pleas and accompanying colloquies established all elements of the FCA and common law claims and collaterally estopped the defendants from contesting liability. Ms. Patel and her company, Heart Solution, appealed.

Third Circuit Reversal and Remand

On appeal, Ms. Patel and Heart Solution challenged Ms. Patel's FCA liability based on unsupervised neurological testing performed at her husband's company, Biosound. The Court rejected these arguments but it proceeded to zero in on an issue that was not prominently presented in the parties' briefing: whether the district court was precise enough in its application of collateral estoppel.

The Court concluded that Heart Solution itself could not be estopped based on Ms. Patel's criminal conviction and plea colloquy. The United States charged and convicted only Mr. and Ms. Patel—not Heart Solution. While Ms. Patel's plea testimony and conviction spoke to *her* role in the scheme, they did not establish that Heart Solution played any role.

The Court also addressed Ms. Patel's liability. While Ms. Patel's conviction and colloquy estopped her from denying the elements of the FCA and common law fraud claims (because she admitted making false claims), they did not estop her from denying liability for the remaining common law claims—unjust enrichment, disgorgement of profits, and payment by mistake of fact. As the Court recognized, an essential element of all three of these claims is that the defendant retained funds. Ms. Patel admitted that she submitted false claims to Medicare about the neurological testing at her husband's company, Biosound, and admitted that Biosound and Heart Solution were paid approximately \$1.18 million from Medicare for unsupervised neurological testing, but these admissions did not preclude the possibility that Mr. Patel and Biosound retained the entire benefit and that Ms. Patel and Heart Solution retained nothing. Because there was "reasonable doubt as to which issues were decided by a prior judgment," the Court could not conclude that collateral estoppel applied to these common law claims.

The Court thus affirmed judgment on Ms. Patel's liability under the FCA and common law fraud, but reversed the remaining portions of the district court's summary judgment orders and remanded for further proceedings.

Conclusion

The prospect of civil liability after a criminal conviction can be demoralizing for a defendant. Add the fact that collateral estoppel may prevent the defendant from denying civil liability, and things can begin to look especially grim. But the Court's opinion in *Heart Solution* shows that criminal convictions do not lead ineluctably to civil exposure. Rather, it confirms the need to apply the doctrine in a careful and precise manner. The party seeking to use collateral estoppel bears the burden of showing the doctrine applies, and any reasonable doubt as to which issues were decided by a prior judgment must be resolved against estoppel. As far as standards go, that is a high one, and Third Circuit practitioners would do well to take note of it.

ONE LAWYER'S ADVICE TO ADVOCATES PREPARING FOR THEIR FIRST-EVER ORAL ARGUMENT

Matthew Stiegler

Law Office of Matthew Stiegler, Philadelphia, PA

Oral arguments are like childbirth: it may feel wonderful once it's over, but before and during it's mostly just hard. If you're preparing for your first oral argument, you may be feeling all kinds of *un-*wonderful: overwhelmed, anxious, and increasingly certain you're about to be exposed to the world as a rare dullard. And alive as never before to each and every path to losing your case.

But hey: don't worry. That's normal! Healthy, even. Plenty of successful appellate advocates feel that way before every single argument. I do. The worst oral argument I ever gave was the one I felt most comfortable about beforehand.

If you're preparing for your first oral argument, I have a few suggestions:

- **Learn from others.** Go and watch an argument session in person. Watch video of arguments. Listen to the audio of these arguments by some first-rate advocates. You'll be amazed how much you'll pick up just by paying attention to what works and what doesn't.
- **Don't burn out beforehand.** Oral argument is like a marathon race where you're only timed for the final 400 meters. Many novice advocates panic early, achieve peak mastery well before the argument, and arrive at the courtroom worn out, tired of the sound of their own voice, and fuzzy on the finer points. Even if you find out well in advance that argument has been granted, keep in mind that intense focus in the days beforehand is far more important than starting early. And get as much sleep as you can the several days before the argument, since most of us sleep poorly the night before.
- **As you prepare, focus on anticipating hard questions and preparing direct, clear answers.** You're not giving an interrupted speech, you're having a formal, stylized conversation with three people you're trying to persuade. During the course of the argument, the judges will do you a spectacular favor: they'll tell you exactly what reasons might keep them from ruling in your client's favor. And your #1 job—truly, more important than remembering to pick your nose as few times as possible while at the podium—is to *hear* the concerns the judges are raising and then to give your most persuasive *responses* to them. Not to wriggle past the tough questions so that you can get back to what you want to say. And you can only do that if you put in the work beforehand to figure out what those questions are likely to be and how best to answer them.
- **Prepare multiple layers of responses.** While it's important to get your best points out directly and clearly, it's also important to have a back-up plan. Sometimes that point you thought was rock-solid instead goes over like a lead balloon. When judges aren't satisfied with your initial response and keep pushing, you need to be ready to give them something more and/or something different. They're telling you they're not persuaded on this point yet, so here you need to go deeper, which means you need to have multiple layers of responses prepared.

Here's what I mean. Say one of your main points is that trial counsel's failure to object to a trial error was deficient performance, and your strongest argument is that the error should have been obvious because it was based on a Supreme Court case decided the year before. So you make that point in a couple sentences. If the panel doesn't push back, great, you go on to your next main point. But if the panel does push back, you're ready. In your pocket you've got other good arguments on this point—say why that Supreme Court case isn't distinguishable, how other circuits have ruled the way you want, how the lawyer's other blunders show that this error wasn't intentional, and how the other side implicitly conceded the point in district court. If the judges keep pressing you, you're able to keep advancing the ball.

If you didn't prepare multiple layers of responses on your key points, then when your first punch doesn't land you're stuck repeating yourself like a broken robot, mumbling something about standing on your briefs, or lamely changing the subject while your face goes full beet red.

- **Do at least one moot.** Lots of lawyers (including some I respect highly) don't do moots before circuit arguments, but I believe moots (that is, practice arguments with other lawyers playing the role of the judges peppering you with questions) are essential for all of us not named Charles Alan Wright. I suggest two moots, the first one three to five days before your argument and the second the morning before.
- **Focus on nailing the basics.** When a judge speaks, you don't. When a judge asks a question, answer it directly and immediately: "Yes, because ..." not, "I'll get to that next ..." When you don't know an answer, say so. Breathe. And, perhaps most importantly, treat opposing counsel (and the district court judge, if you're the appellant) with absolute professionalism: explain why their position is wrong, *not* why they're bad people out to distort the record and hoodwink the court.

For more comprehensive coverage of Third Circuit practice, there's a detailed Third Circuit practice manual by PBI Press and a shorter (and free) online practice guide by the Third Circuit Bar Association. Both are outstanding. For authoritative answers to specific procedure questions, the circuit clerk's office is a lifesaver.

Oral argument is hard, and preparing for your first one can feel overwhelming. But if you put in the work and commit to getting the fundamentals right, you'll give the judges and your client what they need, and you might even make it out alive.

HON. THOMAS I. VANASKIE - A TRIBUTE TO A JUDGE'S JUDGE

[Sean H. Suber](#)
Winston & Strawn LLP, Chicago, IL

We've all heard of a "judge's judge," but what does that really mean? Some say it is a judge who is intelligent, independent, courteous, patient, fair, and hard-working. Others say it is a judge who displays compassion, respect, humility, courage, open-mindedness, and common sense. Judge Vanaskie stood out because he exhibited all of these qualities and more during his nearly twenty-five year tenure as a district judge in the Middle District of Pennsylvania and a circuit judge on the Third Circuit, and I was honored to serve as one of his many law clerks over that quarter-century of public service.

Judge Vanaskie was indeed a judge's judge. As Judge Caputo from the Middle District of Pennsylvania put it, Judge Vanaskie "sums up all the good things we want to have in a judge." He "was a pioneer," according to Judge Mariani from the Middle District. And Judge Munley explained that Judge Vanaskie was "a remarkable person," a "leader of our court," and "a friend, one you could always go to for advice." I couldn't agree more.

Judge Vanaskie was intelligent and principled. During my short time assisting him on the bench, I witnessed him clarify the "modified categorical approach" to criminal offenses in a precedential opinion for the court. He outlined the proper approach to dealing with claims involving "unreasonably small capital" in bankruptcy proceedings. And at the end of the term, he wrote a powerful dissent in an en banc case that ultimately won the day when the Supreme Court agreed that the federal ban on sports gambling was unconstitutional. These were some of the most complex cases of the term, and they were briefed and argued by some of the most esteemed practitioners in the country. As I saw first-hand, Judge Vanaskie tackled each case—no matter how big or small, how simple or complex—with rigor and attention to detail, leading one judge from Pennsylvania to note that Judge Vanaskie "was highly regarded by the bench and the bar for his scholarly opinions."

What stood out above all else, however, was Judge Vanaskie's surpassing sense of fairness and compassion, especially in appeals involving pro se litigants. These cases tend to be given short shrift by our judicial system. Certainly not by Judge Vanaskie, though. He was fair and respectful to all—from the lawyers before him, to the litigants, to each and every member of the court staff in Scranton and Philadelphia. And nothing exemplified this more than his leadership in the "CARE Court" program that he led in the federal courthouse in Scranton, where he spearheaded a re-entry program that partnered with the Probation Office, Public Defender's Office, and the United States Attorney's Office to meet monthly with offenders who were at high risk of recidivism and provide intensive supervision and assistance to enable successful re-entry into the community.

In the end, Judge Vanaskie was a judge's judge because he was a humble judge. And if you ever have the opportunity to sit down with him and hear about his path from Shamokin, Pennsylvania, to being a standout college football player at Lycoming College, to working as a construction laborer, to attending law school and ultimately ending up on the Third Circuit, you'd understand why. His experiences have shaped who he is. He is a man of many accomplishments, but he has learned the most from his mistakes. He has learned that it is more important to do things the right way and be above the fray. That is what I will always take away from my time working with him, and that is something we can all learn from the judge's judge.

EDITORS' NOTE

In recent years, the Third Circuit has held its Bench-Bar Judicial Conference every other year. Before that, the Bench-Bar Conference was held every third year. The Court will return to the every third year format, at least for the next conference, which will take place in Philadelphia sometime in the spring of 2020. We will provide information on the Philadelphia conference in an upcoming issue.

As Joshua Newborn wrote in the opening article of this issue, we welcome Judge Porter to the Court. And we would be remiss not mention that Judge Paul Matey's nomination to the Court was confirmed by the Senate on March 12, 2019 and he received his judicial commission on March 18, 2019. We welcome Judge Matey to the Court and will feature an appropriate profile of the Court's newest judge in our next issue.

PRESIDENT'S NOTE

[Andrew C. Simpson](#)

Andrew C. Simpson P.C., U.S. Virgin Islands

I am honored to write to you as the new president of the Third Circuit Bar Association. I stand on the shoulders of too many appellate giants to name, but they include those who have preceded me as president and those who serve with me on the current Board of Governors.

Our Association serves lawyers who practice before the Third Circuit by (1) improving practice before the Court (such as proposing—or commenting upon proposed—rules of practice); (2) offering CLE programs devoted to appellate advocacy; (3) publishing our Third Circuit Practice Guide; and (4) facilitating Bench/Bar relations with the Circuit.

What do the next two years hold for those goals? For starters [and Save the Date], on May 15, 2019 we host our second reception at the Third Circuit at 5 p.m., after the en banc arguments held that day. Our Court is known for its collegiality and this is an opportunity for practitioners to interact with Third Circuit judges and staff outside of the formality of an oral argument. Next, an updated version of the Third Circuit Practice Guide is in the final stages of editorial review and should be published shortly. Our acclaimed appellate advocacy CLE program will continue to “ride the Circuit” to bring the program to you. And, we are already communicating with the Circuit Executive’s office to discuss how the Association can assist with the next Third Circuit Bench/Bar Judicial Conference (planned for Spring 2020 in Philadelphia).

In the near future, look for a much improved (and continuously updated!) website. It’s a long involved process but the steps are in place to make it happen and we are moving forward. When that is launched, our ability to communicate with our members and offer more appellate resources will increase exponentially.

In addition to our traditional activities, I anticipate that over the next two years, our Association may need to take a more active role in defending the Third Circuit as an institution. We have all witnessed partisan attacks on the judiciary (from all sides) and, as the national political divide grows seemingly wider, it is inevitable that the Circuit will be subjected to such unwarranted assaults. Yet, the Court cannot easily respond and still be perceived as being above the partisan fray. Our Association can further the administration of justice—without getting involved in partisanship—by reminding the public of the independence of the judiciary and the Third Circuit’s well-earned reputation as a non-partisan judicial body committed to even-handed outcomes.

The Association’s success depends upon the contributions of many. It starts with our membership—your modest dues help fund what we accomplish. If you haven’t already renewed your membership, please take this opportunity to do so. And, please, encourage a colleague to join as well. The Board of Governors’ contribution is huge. The officers and governors are actively involved in the management and direction of the organization. Colin Wrabley and Patrick Yingling produce and edit *On Appeal* and are vital to what we do. If appellate law is important to you, please consider joining with my able and esteemed colleagues. There are always opportunities for members to get involved. Let me know of your interest and we will find a way to put your talents to work. I’m looking forward to the next two years and seeing what we can accomplish together.

REST IN PEACE: MAJOR MATTHEW M. WIEGAND

We were deeply saddened to learn that Major Matthew M. Wiegand, USMC, the son of Third Circuit Executive Margaret Wiegand, passed away in a helicopter crash in the line of duty on March 30, 2019. As described in his [obituary](#), he packed a great deal into an all-too-brief life. Donations in his memory may be made to the Wingman Foundation, 10915 Via Brescia, Unit 909, San Diego, CA 92129 or <https://www.wingmanfoundation.org/>. May the memory of him be a blessing and bring his and Margaret’s families comfort.

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. Hangle

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 & Azzarello
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

Membership/Dues: Donna M. Doblick

Rules: Deena Jo Schneider and David Fine

Programs: Nilam Sanghvi and Matthew Stiegler

Publicity/Newsletter: Colin E. Wrabley and M. Patrick Yingling

Website: Deena Jo Schneider and Steve Sanders

OFFICERS

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

President-Elect:
Deena Jo Schneider
Philadelphia, PA

Secretary:
David Fine
Pittsburgh, PA

Treasurer:
Matthew Stiegler
Philadelphia, PA

Immediate Past President:
Charles L. Becker
Philadelphia, PA

DIRECTORS

Howard Bashman
Willow Grove, PA

Edson Bostic
Wilmington, DE

David Fine
Harrisburg, PA

Dolace McLean
St. Thomas, U.S. Virgin Islands

Lisa J. Rodriguez
Haddonfield, NJ

Steve Sanders
Newark, NJ

Nilam Sanghvi
Philadelphia, PA

Matthew Stiegler
Philadelphia, PA

Robert A. Vort
Hackensack, NJ

Witold (Vic) J. Walczak
Pittsburgh, PA

This newsletter is compiled by the 3CBA's publicity/newsletter committee; please address suggestions to the committee's chair, Colin Wrabley (cwrabley@reedsmith.com).