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Introduction

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INTRODUCTION

HONORABLE DOLORES K. SLOVITER
CHIEF JUDGE
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I am honored to have been asked to introduce the special 20th Anniversary Issue of the Third Circuit Review. The introductory issue and the 10th Anniversary Issue were both introduced by my colleague, then Chief Judge Collins J. Seitz. At the inception, he challenged the *Villanova Law Review* to combine "analysis with perspective," reminding the student writers and editors that judges operate under constraints that do not bind their reviewers.[1] Ten years later, he charged the *Review* to continue to concentrate in depth on the factors that are critical to probing analysis.[2] These remarks still retain their pertinence.

After two decades of Third Circuit Reviews there is now a body of publications that permits us to put the work in perspective. I note initially that *Villanova Law Review*'s undertaking to study the work of the Third Circuit year after year accentuates the symbiotic relationship that exists between the court and the law schools within its geographic area. A law school as close as Villanova is to the nerve center of the Third Circuit Court of Appeals in Philadelphia has a number of opportunities to use the court as a resource. It is convenient for students to work in the judges' chambers as interns in the summer, and sometimes part-time during the academic year. The law school administration often calls upon area judges to teach courses at the law school as adjunct faculty or to lecture on specific topics. The Philadelphia area judges frequently accept the law school's request to participate in its moot court competitions. In this manner, Villanova law students have become familiar with the work of the judges and the courts within the Third Circuit, leading many of them to seek and secure clerkships in those courts. In effect, the area courts serve as a valuable training ground for many Villanova students.

At the same time, the judges are the beneficiaries of the uninhibited ideas and perceptive questions that often occur to those

1. Collins J. Seitz, *Introduction, Third Circuit Review*, 19 VILL. L. REV. 279, 280 (1973).

2. *See* Collins J. Seitz, *Introduction, Third Circuit Review*, 28 VILL. L. REV. 650, 651-52 (1982-83).

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with a fresh approach. Judges need to be asked "Why?" and "Why not?" more regularly. A law journal's annual review of the court's cases provides that opportunity. Among other reasons, it is more likely to be read by the judges of that court than is an isolated casenote on one of the court's opinions appearing in a distant law journal.

At the same time, of course, the casenotes that comprise the annual review are the vehicle for the law review writers and editors to study intensively the area of the law at issue. The style of casenotes that was in vogue when I was an editor of a different law review are in disuse today. Then, we would compress into four or five paragraphs the facts and holding of the case, the legal issue, the wide range of precedent, the arguments pro and con, and our conclusion which, typical of student analysis, was frequently critical.[3] It was a useful academic exercise, and the need to be concise forged a discipline of restraint with language that remains with many of us decades later.

On the other hand, casenotes of that ilk have now become obsolete in this day of computerized legal research, when a few key punches can bring forth all the relevant citations. The inevitable time lag between an opinion's publication and its review in a law journal generally makes most student comment about the case redundant. Even if the United States Supreme Court has not already ruled on the subject in the interim, other courts of appeals will have extensively analyzed the case under consideration. It follows that the casenotes in the Villanova Third Circuit Reviews, as in most law reviews today, generally contain discussions more extensive than the particular case.

As I reviewed the Third Circuit Reviews for the past twenty years in preparation for this introduction, it seemed to me that the basis for the inclusion of the reviewed cases was not always clear. Some years the Annual Review has featured cases that would be on any objective observer's list of the most significant recent Third Circuit cases.[4] Surprisingly, other equally, if not

3. *See, e.g.*, *Recent Cases*, 103 U. PA. L. REV. 437 (1954).

4. *See, e.g.*, Halderman v. Pennhurst State Sch. & Hosp., 612 F.2d 84 (3d Cir. 1979) (en banc) (Pennhurst residents have right to treatment or habilitation in least restrictive environment under federal and state statutes), *reviewed by* Frederick C. Bader, Third Circuit Review, 25 VILL. L. REV. 884, 1054 (1979-80); *In re* Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069 (3d Cir. 1980) (Seventh Amendment does not guarantee jury trial where facts and issues too complex for resolution by jury), *reviewed by* Mark L. Collins, Third Circuit Review, 26 VILL. L. REV. 559, 720 (1980-81); Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240 (3d Cir. 1983) (computer program, whether in object code

more, influential decisions have been overlooked.[5]

Some of the Third Circuit Review Editors have recognized the limitations of the conventional series of unrelated casenotes and have been willing to experiment with more innovative formats. One of the most successful, for this reader, was the format chosen by the 1979 Third Circuit Review Editor Dieter G. Struzyna who explained that that issue included, in addition to the conventional casenote for review of single decisions, "more expansive 'mini-comments' and 'comments' for analyses of broader areas of the law."[6] He expressed his view "that this format facilitates the widest possible coverage of recent developments within the Third Circuit without sacrificing the neutral perspective which only an academic context provides."[7]

One particular advantage of the Volume 24 format was the decision to divide the review into topic areas, so that comments, mini-comments, and casenotes relating to a particular topic were grouped together. Such grouping permits the law review to study the unique culture that each court develops over time. I define "culture" for this purpose as the court's method of approaching and deciding legal issues, which is essentially the analytic framework by which the court approaches cases before it, and which may, but does not necessarily, affect the outcome of the appeal. It is more a question of the direction the court will take in analyzing an issue than determining how the issue will be resolved. Some members of the court may be aware of it only intuitively, adopting the court's culture by group dynamic.

Intensive study of the court's decisions in a discrete field of law helps explain the court's approach to practicing lawyers, whose knowledge of the court is often confined to cases in which they are involved. An annual review of the court's leading decisions in a particular area offers a significant opportunity to delve beyond the disposition of a single case to the more difficult matter of the court's approach to a line of cases. Admittedly, this may be too ambitious a project for an exclusively student-written and student-edited publication. The studies of this type devoted to

or source code, is "literary work" subject to copyright), *cert. dismissed*, 464 U.S. 1033 (1984) *reviewed by* Janet E. Fisher, Third Circuit Review, 29 VILL. L. REV. 741, 894 (1983-84).

5. *See, e.g.*, United States v. Downing, 753 F.2d 1224 (3d Cir. 1985) (declining to apply *Frye* test focusing exclusively on general acceptance to determine admissibility of novel scientific evidence).

6. *Editor's Preface, Third Circuit Review*, 24 VILL. L. REV. 193, 193 (1978-79).

7. *Id.*

the Third Circuit that have been written were undertaken by faculty members.[8]

Indeed, one may legitimately ask whether it is presumptuous to suggest that the jurisprudence of a court of appeals merits the type of concentration usually reserved for the Supreme Court. Obviously, the Supreme Court's decisions have a permanence that no lower court can approach.

On the other hand, the *Villanova Law Review* made the decision 20 years ago that it was appropriate to devote a substantial portion of one issue to the Third Circuit's decisions. As a reader with a particular interest, I believe that decision continues to be justifiable. The Supreme Court has, in recent years, reviewed less than one percent of the decisions of federal courts of appeals.[9] Therefore, almost all of our decisions are effectively the final word in the case at hand. The value of a concentrated focus on the court's decisions in a defined area of law is that it illuminates the nature of the judicial process as well as explicates the substantive law.

For example, I have not seen any study in a law journal of the Third Circuit's relatively recent opinions interpreting the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968 (1988), although the *Review* has recently published a useful symposium on some issues under RICO.[10] I have the impression that such a study from the "neutral academic perspective" referred to by Mr. Struzyna would be highly revelatory of our general approach in statutory cases. A brief review of some of those cases may illustrate the point.

When the Supreme Court decided in *Sedima, S.P.R.L. v. Imrex Co.*,[11] that the Second Circuit had erred in requiring a "racketeering injury" to sustain a RICO claim, and that the only injury necessary to confer standing on a plaintiff is injury flowing from the predicate acts, the lower federal courts were left to face the increasing application of RICO in contexts beyond the organized crime scenario that had precipitated its enactment.

The Third Circuit followed the lead of *Sedima* in declining "to

8. *See, e.g.*, Ellen Wertheimer, *Award of the Costs of Taking An Appeal in the Third Circuit*, 31 VILL. L. REV. 1005 (1986).

9. *See* THE FEDERAL APPELLATE JUDICIARY IN THE 21ST CENTURY 260 (Cynthia Harrison & Russell R. Wheeler eds., 1989), *corrected by Errata Sheet* (June 18, 1990).

10. *See* Symposium, *RICO: Something for Everyone*, 35 VILL. L. REV. 853 (1990).

11. 473 U.S. 479 (1985).

read additional limits into RICO once a plaintiff has made out all of the elements required for a finding of liability under the statute's explicit provisions."[12] However, as we began to parse the statutory components of a RICO cause of action, we found ample bases to confine the type of claims that could be filed.

By far the most troublesome issue under RICO during this period of time was divining what Congress meant when it proscribed a "pattern of racketeering activity" in section 1962(a).[13] Judge Seitz, writing for the court in *Barticheck v. Fidelity Union Bank/First National State,*[14] expressed "concern over civil RICO's increasing use in attempts to reach 'garden variety' business fraud and the potential utility of the pattern requirement as a means of curtailing this trend."[15] Thus, *Barticheck* enunciated a test for "pattern" that considered "the number of unlawful acts, the length of time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the unlawful activity."[16]

Barticheck was approvingly cited by the Supreme Court when it first considered the pattern requirement in *H.J. Inc. v. Northwestern Bell Telephone Co.*[17] Although the Court held that a single scheme to bribe state officials over a six-year period stated a valid claim under RICO, the Court also stated that the predicate acts must show both continuity and relationship to constitute a pattern under RICO. The Court's definition of continuity was somewhat elusive,[18] and the lower courts struggled to apply the test in diverse fact situations.

An early post-*H.J. Inc.* Third Circuit case found plaintiffs' allegations sufficient to withstand dismissal on pattern grounds,[19]

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12. Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342, 1348 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989).

13. 18 U.S.C. § 1962(a) (1988). That section of the statute provides that:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest . . . any part of such income . . . in acquisition of . . . or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

Id.

14. 832 F.2d 36 (3d Cir. 1987).

15. *Id.* at 40.

16. *Id.* at 39.

17. 492 U.S. 229, 235 n.2, 241 (1989).

18. *See id.* at 241.

19. *See, e.g.*, Swistock v. Jones, 884 F.2d 755 (3d Cir. 1989) (single injury, single victim doesn't foreclose pattern in light of allegations of numerous predicate acts of wire and mail fraud made over a period of fourteen months); Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162 (3d Cir. 1989) (open-ended scheme

but shortly thereafter we began to apply a common sense approach, influenced by our view of the congressional intent. In *Marshall-Silver Construction Co. v. Mendel*,[20] we held that Congress would not have intended RICO to apply in a case in which the threats to put a construction company out of business occurred over only five days, followed by a bankruptcy filing and media publicity that terminated after seven months.[21] We stated that RICO should apply only to a significant societal threat, and suggested that the scheme at issue was yet another example of a "garden variety fraud."[22]

Likewise, in *Banks v. Wolk*[23] we noted that "*H.J. Inc.* had not rendered obsolete our prior multi-factor pattern inquiry" under *Barticheck*.[24] Applying this analysis, we affirmed the dismissal of allegations against certain individual defendants because, as to them, the scheme was an attempt to "defraud a single investor of his interest in a single piece of real estate over a relatively short period of time," "amount[ing] to nothing more than an isolated incident of 'garden variety' real estate fraud."[25]

We continued this somewhat narrow view of the pattern requirement in *Kehr Packages, Inc. v. Fidelcor, Inc.*,[26] where we applied the *Barticheck* factors to uphold dismissal of a RICO complaint against a bank and several individual defendants because the complaint merely alleged "a short-term attempt to force a single entity into bankruptcy, and contain[ed] no additional threat of continued criminal activity."[27] We reconciled the state of RICO law in the Third Circuit in *Hindes v. Castle*,[28] where we upheld dismissal of a RICO claim by an unsuccessful candidate for Lieutenant Governor of Delaware against the successful candidates for Governor and Lieutenant Governor. We concluded that because the allegedly fraudulent solicitation of campaign contributions ended with the election, there was no threat of continuing racketeering activity and hence there was no claim under RICO. We explained that we would continue to add to the body of RICO

to defraud investors and employees lasting two years sufficed to allege RICO pattern).

20. 894 F.2d 593 (3d Cir. 1990).

21. *Id.* at 597.

22. *Id.*

23. 918 F.2d 418 (3d Cir. 1990).

24. *Id.* at 423.

25. *Id.* at 422, 423.

26. 926 F.2d 1406 (3d Cir.), *cert. denied*, 111 S. Ct. 2839 (1991).

27. *Id.* at 1417.

28. 937 F.2d 868 (3d Cir. 1991).

case law incrementally "[u]ntil the Supreme Court further clarifies the RICO requirements or Congress takes some action to throw more light on the elements of the claim."[29]

The restrained approach by the Third Circuit in interpreting the pattern requirement of RICO has also been applied to other statutory elements. In *Brittingham v. Mobil Corp.*,[30] a case arising under section 1962(a), which prohibits the use or investment of racketeering income, we focused on the need to show an injury different from that caused by the pattern of racketeering. Because the injury alleged was merely the investment of the money derived from the corporate activity, we sustained the dismissal.[31]

Similarly, under section 1962(b), which proscribes acquiring an interest in the enterprise through a pattern of engineering, we have held that there must be a nexus shown between the interest acquired and the alleged racketeering activity.[32]

We applied this precedent in our recent opinion in *Lightning Lube, Inc. v. Witco Corp.*,[33] where we sustained a dismissal of the section 1962(b) charge for failure of the complaint to explain what additional injury resulted from the defendant's interest or control of the enterprise. Finally, our opinions under section 1962(c) have strictly applied the requirement that the "person" charged with a violation of section 1962(c) must be distinct from the "enterprise."[34]

In short, our RICO cases seem to have been characterized by our view that "civil RICO does not become the claim of choice for every fraud suit,"[35] and reflect our deference to what we understand to have been Congress' underlying intent in enacting RICO. It is likely that the judges of the court are too close to the opinions to be able to analyze what they show about our court's process of statutory interpretation, but some careful objective observer may be able to draw some insights from them. Indeed, while this Introduction is not the vehicle to compare our RICO interpretations with those of one or more of the other circuits, it also would be instructive if some student editor were to consider

29. *Id.* at 876.

30. 943 F.2d 297, 303-05 (3d Cir. 1991).

31. *Id.* at 299; *accord Glessner v. Kenny*, 952 F.2d 702, 708-10 (3d Cir. 1991).

32. *See, e.g.*, Banks v. Wolk, 918 F.2d 418, 421 (3d Cir. 1990).

33. Nos. 92-5476, 92-5543, slip op. at 60, 1993 U.S. App. LEXIS 23286 (3d Cir. Sept. 10, 1993).

34. *See, e.g.*, *id.* at 61, 63; Hirsch v. Enright Refining Co., 751 F.2d 628, 633-34 (3d Cir. 1984).

35. *Glessner*, 952 F.2d at 715.

whether our approach has been characteristic of that utilized by our sister courts or is, instead, unique to us.

Another promising area for commentators interested in the evolution of Third Circuit law is our court's series of cases developing the common-law right of access to judicial records and documents. The highly publicized Abscam prosecutions compelled us to confront what had become a relatively closed access policy in many of the district courts in this circuit (and undoubtedly elsewhere as well). The trial of two present and past members of Philadelphia's City Council featured video and audio tapes that graphically showed the defendants' participation in some of the Abscam activities charged. When the district court denied permission to the networks to copy, for the purpose of broadcasting to the public, tapes that had been admitted into evidence, this court reversed, enunciating in *Criden I* a pervasive common-law right "to inspect and copy public records and documents, including judicial records and documents."[36]

After that opinion, we were faced in other cases with a series of appeals by parties or representatives of news media seeking to enforce the public right to inspect and copy judicial records, and we consistently applied the presumption of public access, irrespective of the composition of the panels that heard the appeal. Thus, in *Publicker Industries, Inc. v. Cohen*,[37] we held that presumption was applicable to transcripts of a hearing for a preliminary injunction.[38] In later cases we applied the same presumption to settlement documents that were on file with the court, notwithstanding the view prevailing in some quarters, including district courts, that such documents are inherently confidential.[39]

Similarly, under our broad view of the right of public access we held that papers filed in connection with a motion for summary judgment in a case arising out of alleged bribes by Westinghouse to Philippine public officials should no longer be sealed,[40]

36. United States v. Criden (*Criden I*), 648 F.2d 814, 819 (3d Cir. 1981) (quoting Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978)); *see also* United States v. Criden (*Criden III*), 681 F.2d 919 (3d Cir. 1982) (ordering release of tapes with certain redactions).

37. 733 F.2d 1059 (3d Cir. 1984).

38. *Id.*; *see also* United States v. Smith, 787 F.2d 111 (3d Cir. 1986) (holding that transcripts of conferences at sidebar or in chambers were presumptively available).

39. *See, e.g.*, Bank of America Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs., 800 F.2d 339 (3d Cir. 1986).

40. *See* Republic of the Philippines v. Westinghouse Elec. Corp., 949 F.2d 653 (3d Cir. 1991).

and that the transcript of a civil trial and exhibits admitted in evidence relating to highly publicized cigarette lighter accidents were to be made available to interested persons.[41]

In our most recent foray into this field of law, we continued our trend toward open access, concluding that the presumptive right of public access that we had sustained as to summary judgment material applied as well to other pretrial motions of a nondiscovery nature, whether preliminary or dispositive, and to the material filed in connection therewith, but we declined to extend that right as to discovery motions and their supporting documents.[42]

Our commitment to the principle of public access to filed documents has also been evident when the issue has been access to judicial hearings. Thus, in an appeal by news gathering organizations and individual reporters who had been excluded, along with the public, from a pretrial suppression hearing in a criminal case against a defendant described as "a powerful and prominent politician in Philadelphia," we reiterated the importance of a public trial in criminal cases.[43] Because we could no longer direct that a hearing already completed be opened to the public, we required that the district court take immediate steps to make available to the public the record of the hitherto closed hearing.[44]

That issue arose again in the Abscam cases, where once again a district court held in camera hearings, this time in connection with pretrial motions to dismiss filed by defendants. In reversing, we enunciated the broad principles that

> (l) the public has a first amendment right of access to pretrial suppression, due process, and entrapment hearings;
> (2) that motions for closure of such hearings must be posted on the docket to give notice to the public; and
> (3) that a district court, before closing a pretrial hearing, must consider alternatives to closure and state on the record its reasons for rejecting them.[45]

41. Littlejohn v. BIC Corp., 851 F.2d 673 (3d Cir. 1991).

42. *See* Leucadia, Inc. v. Applied Extrusion Technologies, Inc., 998 F.2d 157 (3d Cir. 1993).

43. United States v. Cianfrani, 573 F.2d 835, 842 (3d Cir. 1978) (relying on Sixth Amendment), *criticized by* Gannett Co. v. DePasquale, 443 U.S. 368, 381 n.9 (1979) (criticizing Third Circuit's decision in *Gannett* for departing from plain meaning of language of Sixth Amendment).

44. *See id.* at 860.

45. United States v. Criden (*Criden II*), 675 F.2d 550, 554 (3d Cir. 1982).

It may be that a comparison of our expansive approach to the public right of access with our restrictive approach to the elements of RICO reflects only the difference between our obligation to be deferential to Congress when interpreting statutes and the freedom we exercise in our occasional forays into federal common law. If these lines of cases reflect some other trends, they require more objective study than can be given by those of us who are participants in the process.

I do not suggest that the Third Circuit Review editors rush to assign to second year law review students preparation of comments on either the Third Circuit's RICO cases or our right to access cases. In fact, the 1985 Third Circuit Review contained a casenote on *Publicker* which, in the footnote discussion, referred to some of the earlier Third Circuit cases on right of access.[46] It may be that because *Publicker* was decided early in our series of cases it could not have been recognized as part of a continuum of cases expanding the common-law right of access.

All I am suggesting is that there is room for analysis of the developing jurisprudence by the Third Circuit in discrete areas of the law, if promising areas can be identified. In that event, student commentary more expansive than casenotes might be of value to both the students and profession.

In this connection, it is of some interest that a recent survey by Stanford Law Review of law review usage by attorneys, professors, state judges and federal judges rated the value of student-written notes almost equal to that of student-written case commentaries.[47] This suggests that not all readers will agree with my preference for inclusion in the Third Circuit Review of student-written developments focused on one topic or related topics. I certainly do not intend to discourage inclusion of casenotes in the annual review. The careful study of an appellate opinion, the relevant authority, and the opposing arguments has important educational value.

Nonetheless, I would hope that the Third Circuit Review editors would at least give some consideration to the value of longer development pieces. Such projects offer the advantage of requiring several students to work together in research and writing of a

46. *See* Wendy L. Bell, Third Circuit Review, 30 VILL. L. REV. 980, 986 n.31, 989 n.49 (1985); *see also* Stephen V. Siana, Third Circuit Review, 28 VILL. L. REV. 723, 729-30 (1982-83) (reviewing *Criden II* and discussing relationship with *Cianfrani*).

47. *See* Max Stier et al., *Project Law Review Usage and Suggestions for Improvement*, 44 STAN. L. REV. 1467, 1496 (1992).

longer piece, an experience that could prove useful for later professional development. Indeed, some former law review editors surveyed by Stanford noted the absence of such an experience.[48]

Whatever format the Third Circuit Reviews take in future years, the past twenty years have shown that they provide students an opportunity to intensively study selected areas of the law, to review critically and constructively the work of their peers, and to perfect rigorous legal analysis and writing. We of the Third Circuit are privileged that our work product is the subject of such concentrated academic attention, and we eagerly look forward to each year's forthcoming issue.

48. *See id.* at 1491-92.