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\$5.75 Mil. Award Stands for Creditors Of Nursing Home

BY SARANAC HALE SPENCER
Of the Legal Staff

A federal judge has let stand a \$5.75 million jury award to creditors in a complex bankruptcy case that has volleyed between the Western District of Pennsylvania and the Third Circuit since it was transferred from the bankruptcy court in 2010.

U.S. District Judge Arthur J. Schwab of the Western District of Pennsylvania had initially sided with the defendants, the administrators in charge of the Lemington Home for the Aged in Pittsburgh, granting them summary judgment in 2010 on all claims brought by creditors of the defunct nursing home. The U.S. Court of Appeals for the Third Circuit reversed his decision, holding that the plaintiffs had brought sufficient evidence to support their claims in front of a jury.

After various intervening appeals, the case went to trial earlier this year. The jury returned

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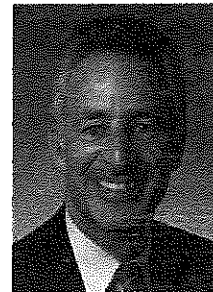
U.S. EB-5 Immigrant Investor Program Gets Watchful Eye

BY GINA PASSARELLA
Of the Legal Staff

Recent news that the Pennsylvania Turnpike Commission is looking to raise \$200 million through a U.S. immigration program that gives foreign investors green cards for their investments has some questioning whether the deal gives immigrants easy access to permanent residency.

But immigration lawyers who work on these complex deals say it's just the opposite, with the foreign investors taking the bulk of the risk and the real room for malfeasance found in the U.S. regional centers that serve as the middle man between foreign investors and U.S.-based entities looking for financing.

As EB-5 visas granted under the 21-year-old Immigrant Investor Program soar in popularity, they have not only garnered the attention of entities seeking cheaper methods of raising cash, but have also received a closer eye from regulators at the Securities and Exchange Commission, U.S. departments of Treasury



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situation for all parties involved done on the up-and-up.

"This is not a 'buy' situation," said Jonathan Grode, a Canadian-based Green and Spiegel's U.S. subsidiary in Philadelphia. Grode also teaches business immigration law at Temple University's Beasley School of Law.

Under the Immigrant Investor Program established in 1992, EB-5 regional centers can be approved to operate as a pseudo-lender and administrator of projects that promote economic growth and job creation in a certain

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TOP VOTE
OF 2012



Pa. Bar Association Proposes Changes to Judicial Conduct Code

BY AMARIS ELLIOTT-ENGEL
Of the Legal Staff

The Pennsylvania Bar Association adopted a proposal to change the Pennsylvania Code of Judicial Conduct at its May meeting, and the state bar will be sending its draft for the Pennsylvania Supreme Court's consideration shortly.

PBA President Forest N. Myers said the

the 1974 Code of Judicial Conduct, which was based upon the 1970 American Bar Association's Model Code of Judicial Conduct. The ABA has updated its model code two times, but Pennsylvania has not made any substantial changes, Myers said.

The proposed rules would give the public "the confidence that the judges and justices are operating ethically and have the highest degree of integrity," Myers said.

barring judges from serving as officers, directors or employees of any business entity, directing judges to consider only evidence presented in a matter and not to conduct independent investigations, and not to appoint lawyers to any positions if the counsel contributed more than \$2,500 to their campaigns in the last two years.

Former PBA President Thomas G. Wilkinson Jr. established the task force last

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a verdict against 15 of the 17 defendants for \$2.25 million, with \$3.5 million in total punitive damages.

The defendants then filed for judgment as a matter of law, a new trial, or a remittitur. Schwab wasn't persuaded by any of the arguments.

"After being instructed to try this case by the United States Court of Appeals for the Third Circuit, the court finds no compelling reason to disturb the jury's verdict because they were rightfully the ultimate finders of fact," Schwab said in *Official Committee of Unsecured Creditors v. Baldwin*.

Last fall, the appeals court had weighed in on the structure of the trial at the request of the defendants, who had argued that Schwab's seven-and-a-half-hour allotment of time for each side to present its case was unreasonable, given the complexity of the suit. The Third Circuit declined to grant the extraordinary measure of a writ of mandamus, but did

urge Schwab to reconsider the time limit in order to avoid a retrial. He did.

During the six-day trial, the plaintiffs used almost 11 hours out of their 13-hour allotment and the defendants used almost 14 hours out of their 16-hour allotment, Schwab said in a footnote.

Regarding the defendants' argument that they were entitled to judgment as a matter of law with respect to the plaintiffs' deepening insolvency claim because that type of claim hasn't been recognized in Pennsylvania, Schwab answered that he is bound by Third Circuit precedent that has predicted that the state Supreme Court would adopt that cause of action.

"The United States Court of Appeals for the Third Circuit has held that a claim for deepening insolvency may be advanced against the directors and officers of a nonprofit such as the home," Schwab said, citing the appeals court's earlier opinion in the case.

The defendants also argued that they would be entitled to judgment as a matter of law on the claim that they had breached their duty of care to the nursing home. In 2010, Schwab

had granted them summary judgment on that claim, but that decision was reversed by the Third Circuit.

The defendants argued that they had reasonably relied on reports, so they didn't breach their fiduciary duty. However, Schwab noted that they can't rely on reports if there is reason to doubt their validity, as was the case here.

"A jury verdict for plaintiff is supportable on this count because it was unreasonable for the board to rely upon such information given by officer defendants. ... Furthermore, director defendants ignored the advice given by counsel regarding the legal implications that were involved with sending out notice to the home's residents and to state agencies and instead unreasonably persisted on relying upon officer defendants' reports," Schwab said.

Similarly, on the third claim — made by the officer defendants — that they are entitled to judgment as a matter of law regarding the duty of loyalty claim, Schwab had granted them summary judgment in 2010. The Third Circuit reversed.

Schwab did grant judgment as a matter of

law at trial to the directors on this claim.

The plaintiffs only had to prove that the officers had used their positions to get personal profit or an advantage for the duty of loyalty claim, Schwab said.

"The evidence at trial supports the jury's finding that the officer defendants were concerned with their own self-interest and not with the home's financial condition," Schwab said. "This supports a verdict against officer defendants as to their fiduciary duty of loyalty."

Neither Arthur Zamosky of Bernstein-Burkley P.C. in Pittsburgh, who represented the plaintiffs, nor Mark Hamilton of Cipriani & Werner in Pittsburgh, who represented the defendants, could be reached for comment.

Saranac Hale Spencer can be contacted at 215-557-2449 or spencer@ahm.com. Follow her on Twitter @SSpencerTLL.

(Copies of the 46-page opinion in Official Committee of Unsecured Creditors v. Baldwin, PICS No. 13-1118, are available from The Legal Intelligencer. Please call the Pennsylvania Instant Case Service at 800-276-PICS to order or for information.)

Conduct

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Committee, chaired by Pennsylvania Superior Court Judge Anne E. Lazarus and appointed by the Supreme Court, worked for about two years to make its recommendations.

Pennsylvania Chief Justice Ronald D. Castille said the present code is aspirational, while the new model from the ABA has more specific rules and puts the burden on judges instead of lawyers for behaving ethically and prudently. But there are "deficiencies in the present code," Castille said.

impartiality and would involve the judges with lawyers or other people who have frequent transactions that are likely to bring those parties into the judges' court, Reich said. For example, judges would not be allowed to serve on the boards of banks, Reich said.

The PBA's version would take away the discretion on judging the circumstances of when litigants are likely to come before the court, Montgomery said.

Another difference between the ad hoc group and the PBA's proposals is a prohibition against nepotism in hiring decisions, Reich said.

Rule 2.13(A) would require that "a judge,

have a dollar amount, Reich said.

Lazarus was not available for comment Monday.

Reich said he was thankful that Lazarus' work product was made available to the task force for its review.

While Lazarus' recommendations were reviewed and the ABA's model rules were task force made an independent judgment on each canon, Montgomery said.

Rule 2.9(C), which would direct judges only to consider "evidence presented in a matter and prohibits a judge from doing an independent investigation," would require