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THIRD CIRCUIT BAR ASSOCIATION WELCOMES JUDGE CHERYL ANN KRAUSE TO THE BENCH

On July 7, 2014, the U.S. Senate unanimously confirmed Cheryl Ann Krause to the U.S. Court of Appeals for the Third Circuit. Judge Krause fills the vacancy created when Judge Dolores K. Sloviter assumed senior status.

Prior to joining the Third Circuit, Judge Krause spent eight years as a partner in the Philadelphia office of Dechert LLP, where she specialized in white-collar criminal defense and government investigations. Before that, she was a shareholder in the Philadelphia office of Hangley Aronchick Segal Pudlin & Schiller.

Judge Krause was born in St. Louis and raised in suburban Philadelphia. She received her B.A. *summa cum laude* from the University of Pennsylvania in 1989 and her J.D. with highest honors from Stanford Law School in 1993. Following law school, Judge Krause clerked for Judge Alex Kozinski on the U.S. Court of Appeals for the Ninth Circuit (1993 to 1994) and Justice Anthony M. Kennedy on the U.S. Supreme Court (1994 to 1995). She was an associate at Davis Polk & Wardwell in New York City from 1996 to 1997 before serving as an Assistant U.S. Attorney in the Southern District of New York from 1997 to 2002.

Since 2003, Judge Krause has regularly taught courses at the University of Pennsylvania Law School, where she founded and led an appellate litigation externship program. In 2011, she founded the Philadelphia Project, a partnership between Dechert LLP and the Public Interest Law Center of Philadelphia, to improve the quality of education for children with disabilities. Additionally, from 2007 to 2014, Judge Krause served as outside counsel for the City of Philadelphia's Board of Ethics and on the Board of Directors of the Committee of Seventy, a non-partisan civil organization focused on fair elections and government integrity.

Judge Krause's formal investiture took place on September 22, 2014. Justice Anthony M. Kennedy administered the oath of office. In addition to Justice Kennedy, speakers included

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"WHO DECIDES?" – THE THIRD CIRCUIT HOLDS THAT COURT, NOT ARBITRATORS, PRESUMPTIVELY DECIDE WHETHER AN ARBITRATION CAN PROCEED ON A CLASS BASIS

Opalinski v. Robert Half International Inc., 761 F.3d 326 (3d Cir. July 30, 2014)

Kim M. Watterson & Richard L. Heppner Jr.
Reed Smith, LLP, Pittsburgh, PA

When one party to an arbitration agreement initiates a *class* action, and the other party seeks to compel *individual* arbitration, who decides whether the arbitration proceeds on an individual or a class basis—the court or the arbitrator? Whether a case proceeds individually or as a class action is obviously consequential. And the "who decides" question can be equally consequential. An arbitrator's decision on whether class arbitration is allowed is given great deference under the Federal Arbitration Act ("FAA") and will be upheld if it "even arguably" construes the arbitration agreement. By contrast, district courts are bound by established canons of contract construction and their decisions on class arbitration are subject to *de novo* appellate review. Although courts for years had believed that whether to allow class arbitration was a procedural question left to the arbitrators, the U.S. Supreme Court has recently, twice noted that "who decides" is an open question. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 680 (2010); *Oxford Health Plans LLC v. Sutter*, 133 S.Ct. 2064, 2069 n.2 (2013). The Third Circuit is the second Circuit to address this open question, reaching the same conclusion as the Sixth Circuit.

In *Opalinski v. Robert Half International Inc.*, 761 F.3d 326 (3d Cir. 2014), a panel of the Third Circuit held that the fundamental differences between classwide and individual arbitration mean that courts, not arbitrators, decide whether an arbitration agreement allows for class arbitration, unless the parties have explicitly agreed otherwise. In August, the Third Circuit declined to rehear the panel's decision *en banc*.

Plaintiffs David Opalinski and James McCabe brought a putative class action in New Jersey District Court alleging Defendant Robert Half International ("RHI") failed to pay overtime in violation of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq*. RHI moved to compel individual arbitration based on arbitration provisions in the plaintiffs' employment agreements. Those provisions said nothing about either the availability of class arbitration or who decided whether class arbitration was authorized. The District Court held that the arbitrator should decide whether the employment agreements allowed for classwide arbitration and compelled arbitration.

Early in the arbitration, the arbitrator ruled that the employment agreements authorized class arbitration. RHI moved the District Court to vacate that ruling, but the District Court denied the motion. RHI appealed, arguing that the District Court, not the arbitrator, should have decided whether class arbitration was permitted.

The Third Circuit first ruled that RHI had not waived the "who decides" issue by failing to appeal from the District Court's initial order compelling arbitration, because that was not a final order and RHI had made its objection known all along.

The Court then turned to the central "who decides" question which, it explained, was subject to a two-part analysis. First, the panel had to determine if the availability of class arbitration is a "question of arbitrability" (*i.e.* a gateway issue that the parties cannot be presumed to have agreed to arbitrate). If it were a "question of arbitrability," then a presumption would apply that the district court decides the question; if it were not, then courts would presume that the arbitrator decides it. *See First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944-45 (1994). Second, the panel had to determine whether the presumption was overridden in this case.

On the first, the panel explained that whether the availability of class arbitration is a gateway "question of arbitrability" was an open legal question. Although a plurality of the Supreme Court treated it as a non-gateway issue in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 451-53 (2003), the Supreme Court's subsequent cases have noted that the issue remains undecided. Specifically, in *Stolt-Nielsen*, the Supreme Court emphasized that the *Bazzle* decision was "only [a] plurality." 559 U.S. 662, 680 (2010). And in *Oxford Health Plans*, the Supreme Court stated that it "has not yet decided whether the availability of class arbitration" is for a court or for an arbitrator to resolve. 133 S.Ct. 2064, 2069 n.2 (2013). Nor, the *Opalinski* panel explained, had the Third Circuit previously decided the issue. Although the Third Circuit had stated in *Quillion v. Tennett HealthSystem Philadelphia, Inc.*, 673 F.3d 221, 232 (3d Cir. 2012), that "the actual determination as to whether class action is prohibited is a question of interpretation and procedure for the arbitrator," the panel explained that statement was dicta because the parties to that case had *agreed* that the arbitrator would decide the issue.

Opalinksi held that the availability of classwide arbitration is a "question of arbitrability," presumptively for the district court to decide, because it fell into the two categories of questions that the Third Circuit has held are so fundamental that they must be questions of arbitrability: (1) questions implicating "whose claims the arbitrator may resolve," and (2) and questions implicating "the type of controversy submitted to arbitration." *See Puleo v. Chase Bank USA, N.A.*, 605 F.3d 172, 178 (3d Cir. 2010). The class arbitrability decision clearly affects "whose claims the arbitrator may resolve" because classwide arbitration subjects the claims of all the absent class members to arbitration. Similarly, whether to allow classwide arbitration affects "the type of controversy submitted to arbitration." The panel recognized the difference between an individual action and a class action is not merely procedural, noting that the Supreme Court has called the difference "fundamental" because "class action arbitration changes the nature of arbitration." Those differences, the panel explained, render class arbitration "qualitatively separate from deciding an individual quarrel."

The panel drew support from the Sixth Circuit's decision in *Reed Elsevier v. Crockett*, which found that class arbitrability was a question of arbitrability for the courts to decide, because the question is so "fundamental to the manner in which the parties will resolve their dispute" and is "vastly more consequential than even the gateway question whether they agreed to arbitrate." 734 F.3d 594, 598-99 (6th Cir. 2013). And, the panel noted that no other Circuits had considered the issue.

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THIRD CIRCUIT BAR ASSOCIATION WELCOMES JUDGE CHERYL ANN KRAUSE TO THE BENCH

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Senator Bob Casey, Senator Pat Toomey, SEC Chair Mary Jo White, Dechert LLP Chair Andrew Levander, Chief Judge Theodore A. McKee, and former White House Counsel Kathryn Ruemmler, who read the Presidential Commission.

On her transition to the Court, Judge Krause stated: "I am immensely grateful and humbled by the opportunity to return to public service in this capacity. I look forward to working with my esteemed colleagues and the bar and am fully committed to continuing the Court's traditions of excellence and collegiality."

Judge Krause's chambers are located in the James A. Byrne United States Courthouse in Philadelphia.

The Third Circuit Bar Association congratulates and welcomes Judge Krause to the Court.

EN BANC COURT SPLITS ON WHEN OBJECTION IS REQUIRED TO PRESERVE PROCEDURAL ERROR AT SENTENCING

United States v. Flores-Mejia, 759 F.3d 253 (3d Cir. July 16, 2014)

Peter Goldberger
President-Elect, Third Circuit Bar Association

In a criminal sentencing, as with any other proceeding in federal court, counsel for the parties must be alert to the commission of possible error that may warrant a future appeal in the event counsel's client does not prevail, and must consider whether an objection to that error has been sufficiently preserved. In *United States v. Flores-Mejia*, 759 F.3d 253, the Third Circuit recently split 9-5 on the question of how the governing rules apply when the error complained of is the district court's failure at sentencing to fulfill its legal obligation to give "meaningful consideration" (as explicated in unchallenged prior case law) to each justification advanced by a party for a lower or higher penalty, relative to the advisory U.S. Sentencing Guidelines range.

Over a sharply worded dissent authored by Judge Greenaway, the majority (per Judge Roth) overruled panel precedent to hold that unless the district court's assessment of a mitigating or aggravating circumstance has been earlier made clear and objected to at that time, the aggrieved party must object after the sentence is imposed and explained in order to preserve this "procedural error" for possible appeal. In doing so, the *en banc* Court flipped the Third Circuit from one side to the other of a circuit split. Since either the government or the defendant can appeal a sentence, 18 U.S.C. §§ 3742(a)-(b), the new rule governing objections announced in *Flores-Mejia* is equally applicable to both sides. Moreover, because of similarities between the criminal and civil rules, the *Flores-Mejia* decision may affect all federal practitioners.

Any assertion of error to which no timely objection was lodged in the district court will subject the aggrieved party to "plain error" review on appeal, which is ordinarily much less favorable to the appellant than the review afforded to preserved claims of error. Fed.R.Crim.P. 52(b). While there is no equivalent Rule of Civil Procedure (nor is the plain error rule mentioned in the Rules of Appellate Procedure), the same doctrine is followed in civil cases as well. *See Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 256 (1981); *Bereda v. Pickering Creek Indus. Park*, 865 F.2d 49, 53 (3d Cir. 1989). The obligation to object is explained in Fed.R.Crim.P. 51 and in similar terms in Fed.R.Civ.P. 46. The dissenters in *Flores-Mejia* argue that the majority's new rule is contradicted by the terms of Rule 51, including its abrogation of the former requirement to take an "exception" to an overruled objection in order to preserve the issue for appeal. Given the similarity of the civil and criminal rules in this respect, the new decision is a must-read not only for criminal defense lawyers and prosecutors, but also for civil practitioners who are used to prior Third Circuit interpretations of Civil Rule 46.

At a federal sentencing, the parties argue their respective positions on points of law (which the judge often rules upon seriatim as they are presented, but not necessarily), and also present any evidence in support of justifications for a higher or lower sentence. Counsel then present summation-like arguments suggesting what they consider to be the appropriate punishment, and the defendant is entitled personally to deliver an "allocution." The judge then must impose the sentence and provide "at the time of sentencing" an oral statement of "the reasons for its imposition of the particular sentence." 18 U.S.C. § 3553(c). Delivery of the in-court statement of reasons can in some cases precede the

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EN BANC COURT SPLITS ON WHEN OBJECTION IS REQUIRED TO PRESERVE PROCEDURAL ERROR AT SENTENCING

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formal imposition of sentence, while in other cases it may follow the formal imposition. But in most cases the two are inextricably intertwined. It is in this context that the *Flores-Mejia* majority holds that an objection to a procedural error such as the failure to give "meaningful consideration" to a party's arguments must ordinarily be lodged after sentence is imposed. Under the former rule, no objection was required after sentence is imposed to preserve a claim that the court had inadequately explained the sentence or that it failed to give sufficient consideration to a factor already argued during the proceedings.

There are a number of unusual aspects to *Flores-Mejia*. Most intriguing is that while the *en banc* majority announces a new application of the "plain error" standard of appellate review, creating, in many circumstances, a new obligation for counsel to object after sentence is imposed, it deviates from standard appellate-court practice by declining to apply its central holding to the case at hand. That is, not only is the new procedural rule made prospective only (that is, the obligation of post-imposition-of-sentence objection applies only to sentencings conducted after the July 16, 2014, date of the *en banc* opinion), but the majority also did not apply its newly announced rule to the case before it. *See* 759 F.3d at 259 & n.7.

No member of the Court commented upon this unusual outcome. Nor did any member of the Court, whether among the majority or the dissenters, address how the judicial announcement of a purely prospective rule, not applied in the case at hand, complies with Article III's prohibition on advisory opinions. And no judge addressed whether the form of prospectivity the Court announces comports with the bright-line rule established in *Griffith v. Kentucky*, 479 U.S. 314 (1987) (for criminal cases) and *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993) (civil cases). Both of these decisions hold that newly announced interpretations of legal rules (whether constitutional or legislative) apply not only to the case before the Court but also to other cases then pending on direct appeal. If there is a way to distinguish those cases from the situation in *Flores-Mejia*, no member of the Court mentioned it.

Some readers may also find the *en banc* decision less than satisfying because the majority does not choose to engage deeply with the dissenters on their main point. The dissent argues that the plain wording of Fed.R.Crim.P. 51 (no different, in this respect, from Fed.R.Civ.P. 46) does not require an objection after a ruling is made, so long as the party has made clear at the time of seeking a ruling what "action the party wishes the court to take." The majority responds only in few sentences and a brief footnote to the dissenters' several pages of exegesis of Rule 51's language. 759 F.3d at 257 & n.4. It appears that the majority is saying that since the sentencing judge's obligation in this context is to give "meaningful consideration" to each argument presented to it, a party cannot claim that consideration has been less than "meaningful" until the explanation has been finally articulated, which occurs when the court delivers its oral statement of reasons in connection with imposition of the sentence.

Some practitioners may also be disappointed that the opinion does not mention the provision of Criminal Rule 51(b) (echoing Civil Rule 46) that excuses counsel's failure to raise an issue below when the party lacks "an opportunity to object." The *Flores-Mejia* decision thus leaves entirely open the question of what constitutes "an opportunity to object" once sentence is imposed. Perhaps because the majority determined not to apply the new rule it announced to the case at hand, the opinion does not describe how in Mr. Flores-Mejia's case the judge articulated his statement of reasons in relation to the formal imposition of sentence, nor how the district judge proceeded after imposing the sentence. It therefore is not yet clear what will be deemed in future cases to qualify as a genuine opportunity to object, and whether that opportunity must exist, in order to count, at a time when the judge could lawfully alter the sentence without violating 18 U.S.C. § 3582(c), or whether it suffices that the judge might then simply elaborate the statement of reasons. Practitioners are also left to wonder what sort of objection after imposition of sentence will be deemed sufficient. May counsel summarily state that they reiterate all prior objections? May they simply assert that the court's consideration of the mitigating (or aggravating) factors was insufficient, or must they identify the particular factors that counsel claims have been slighted?

It is perhaps surprising to point out that all of the judges who agreed to establish a new rule making sentencing appeals more difficult voted to *reverse* the sentence in this case on the defendant's appeal, while (counter-intuitively) most of the judges who favored a more lenient rule voted to affirm. The nine judges in the majority held that under the former, now prospectively-overruled procedure the record failed to demonstrate adequate consideration of defense counsel's argument in mitigation; Mr. Flores-Mejia was thus entitled to a remand for resentencing. Judge Fuentes, in a one-judge concurrence in the judgment, disagreed with the abrogation of the prior rule and creation of a new one but agreed that under the "old rule" Mr. Flores-Mejia should be resentenced. But the other four of the five judges who would adhere to the existing rule *dissented*, not only from the opinion but also from the judgment, because in their view the district court had in fact given (and manifested on the record) sufficient consideration to the defense argument in mitigation, such that, in their view, there was no procedural error in any event. 759 F.3d at 260 n.2.

Regardless of whether one finds the majority or the dissent more persuasive, as long as this precedent stands counsel must operate under its guidance. Cautious counsel will therefore renew any and all procedural objections after the sentence is announced, if there is any doubt about whether a prior objection might later be deemed insufficient or premature. Counsel in a variety of forms of litigation should also consider whether other discretionary rulings that depend upon judicial consideration of multiple factors may also require a further objection, after the judge's ruling is announced. The risk of waiver is apparent, and caution now dictates that an objection be made despite an earlier assertion of counsel's position.

THIRD CIRCUIT RETAINS CERTIORARI JURISDICTION OVER SOME V.I. APPEALS BUT UNANSWERED QUESTIONS ABOUND

United Indus. Serv., Transp., Prof'l and Gov't Workers of N. Am. Seafarers Int'l Union v. Gov't of the V.I., ___ F.3d ___ (3d Cir. Aug. 25, 2014)

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

In August, the Third Circuit concluded that Congress's termination of the Court's certiorari jurisdiction over decisions of the Virgin Islands Supreme Court applied only to cases *filed* in the Virgin Islands *Superior Court* (*i.e.*, the trial court) on or after the effective date of the Act that withdrew the jurisdiction—December 28, 2012. *United Indus. Serv., Transp., Prof'l and Gov't Workers of N. Am. Seafarers Int'l Union v. Gov't of the V.I.*, ___ F.3d ___, 2014 WL 4179481 (3d Cir. Aug. 25, 2014).[1] Because there were over 7000 cases pending in the Superior Court as of September 30, 2012[2] and that court's backlog is substantial, the practical ramifications of this decision are that the Third Circuit will continue to have certiorari jurisdiction for many years to come.

In its precedential ruling in *United Industrial*, the court answered the question it had "refused to reach" in *Kendall v. Daily News Publishing Co.*, 716 F.3d 82, 86 (3d Cir. 2013): whether the Third Circuit retained certiorari jurisdiction over proceedings that were filed in the Virgin Islands courts before the date of enactment of H.R. 6116 (the Act ending the Court's jurisdiction). The main point of contention with respect to this issue was that H.R. 6116 stated that the "amendments made by this Act apply to cases commenced on or after the date of the enactment of this Act," but did not indicate whether this meant cases commenced in the Superior Court, the Virgin Islands Supreme Court, or the Third Circuit (*i.e.*, the date of filing a writ of certiorari). Drawing upon U.S. Supreme Court precedent and traditional canons of statutory construction, the Third Circuit concluded that Congress intended to terminate the Court's certiorari jurisdiction over cases filed in the *Superior* Court on or after the effective date of the act (December 28, 2012). 2014 WL 4179481 at *10.

The Court's decision has important ramifications for Virgin Islands practitioners. The Third Circuit's certiorari jurisdiction extends to questions of either federal or territorial law whereas the U.S. Supreme Court's certiorari jurisdiction applies only to questions of federal law. Thus, if a case that was filed in the Superior Court on December 27, 2012 is ultimately appealed to the Virgin Islands Supreme Court and decided on the basis of local law, the Third Circuit would have jurisdiction to grant certiorari and overturn that decision. By contrast, if the same case was filed in the Superior Court one day later, the Third Circuit would have no jurisdiction over the V.I. Supreme Court's decision and the U.S. Supreme Court likewise would have no certiorari jurisdiction (because the V.I. Supreme Court decision was decided based upon local law).

The Court's August decision was on panel rehearing (granted with respect to an unrelated issue) and followed a similar holding (on the certiorari jurisdiction issue) that the panel made in the case in March. 746 F.3d 115. On rehearing, the Virgin Islands Supreme Court was granted leave to file an amicus brief in which it argued that the Third Circuit did not retain certiorari jurisdiction over it (presenting the unusual situation of the court whose ruling was subject to review appearing as an amicus). While the decision appears to be based upon solid underpinnings, it will raise practical questions for Virgin Islands attorneys in coming years.

One such question is, "What if the U.S. Supreme Court decides in a future case that the Circuit was wrong?" Consider the following scenario: A criminal defendant in a case filed in the Superior Court before December 28, 2012 appeals, asserting that a search violated the 4th Amendment of the U.S. Constitution. The V.I. Supreme Court upholds the legality of the search but observes that there is a conflict among state supreme courts on the identical issue. Does the defendant file a petition for certiorari in the Third Circuit or the U.S. Supreme Court? According to *United Industrial*, the writ should be filed in the Third Circuit. But what if the defendant seeks certiorari in the Third Circuit and prevails on certiorari – and then the government seeks further certiorari to the U.S. Supreme Court (or en banc review by the Circuit), which grants it and holds that *United Industrial* was decided incorrectly and the Third Circuit had no certiorari jurisdiction? Absent some sort of relaxation of the U.S. Supreme Court's certiorari rules to allow a delayed petition for certiorari to be filed with that Court, the defendant may have lost the opportunity to have the split among the state supreme courts decided in his favor. Does this make it necessary to file protective petitions for certiorari in both courts? Or perhaps to seek a prudential extension of the deadline for seeking certiorari in the U.S. Supreme Court until such time as the process in the Third Circuit is final?

A second issue arises with respect to certified questions from the Third Circuit to the Supreme Court of the Virgin Islands. These could arise in any case on appeal from the District Court of the Virgin Islands – no matter when such a case was filed. Does it make sense for the Circuit to certify questions of local law to the V.I. Supreme Court during the period that it maintains certiorari jurisdiction over final decisions from the V.I. Supreme Court (*i.e.*, until there are no longer *any* cases pending within the Virgin Islands judicial system that were filed before December 28, 2012)? What if the Third Circuit panel receiving an answer to a certified question concludes that the answer is manifestly erroneous – the standard of review it applies review of V.I. Supreme Court decisions on local law on certiorari?[3] Must it adhere to the answer even though if the same issue came before it in the form of a decision reviewed through the certiorari process it would overturn it?

A third issue – similar to the second issue but more likely to occur – can arise in cases where the Circuit is reviewing a decision of the District Court of the Virgin Islands that was based upon a V.I. Supreme Court decision. On appeal, is the Circuit bound by the decision of the V.I. Supreme Court (as it would be bound by the decision of a state's highest court on an issue of state law) even if it concludes that if the same question came before it under its certiorari jurisdiction, it would overturn that decision on the grounds that it was manifestly erroneous? To avoid conflicting results depending upon the manner in which a case arrives in the Third Circuit, it would seem that in a direct appeal from the district court, the Circuit should have the authority to overrule a "binding" V.I. Supreme Court decision if it concludes that it was manifestly erroneous.[4]

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“WHO DECIDES?” – THE THIRD CIRCUIT HOLDS THAT COURT, NOT ARBITRATORS, PRESUMPTIVELY DECIDE WHETHER AN ARBITRATION CAN PROCEED ON A CLASS BASIS

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Having determined that class arbitrability was a “question of arbitrability” *presumptively* for the courts to decide, the panel then turned to the second part of the analysis: whether that presumption was overcome in the case before it. As the panel explained, the presumption applies “unless the parties clearly and unmistakably provide otherwise.” *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). The panel had no difficulty finding that the presumption was not overcome in *Opalinski* because the employment agreements were silent as to the availability of class arbitration and as to who should decide such questions.

Ultimately, the panel concluded by reiterating a foundational principle from prior Third Circuit decisions: “Arbitration is fundamentally a creature of contract, and an arbitrator’s authority is derived from an agreement to arbitrate.” *Puleo*, 605 F.3d at 194. That paramount principle underlies the *Opalinski* decision. And it highlights the major takeaway from the case: the parties’ intent is controlling when deciding arbitrability questions, and the text of the arbitration agreement is the determinative factor when assessing the parties’ intent. Courts will need to rely on presumptions only when the governing arbitration agreement is silent on an issue. Therefore, when drafting arbitration agreements, parties should consider including not only a provision regarding class arbitration, but also a provision designating who decides questions of arbitrability. Even if an arbitration agreement explicitly allows or bars classwide arbitration, that provision could be subject to challenge, and who decides the issue could be crucial.

THIRD CIRCUIT RETAINS CERTIORARI JURISDICTION OVER SOME V.I. APPEALS BUT UNANSWERED QUESTIONS ABOUND

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A final issue could arise from cases that are pending in an administrative proceeding in the Virgin Islands as of December 28, 2012. Those decisions are reviewable by filing a writ of review in the Superior Court of the Virgin Islands. While the *United Industrial* decision would seem to hold that the date of filing the writ of review is the governing date, an argument can be made that the issue of pending administrative cases was not before the panel and that perhaps had it considered such cases, it would have concluded that it has certiorari jurisdiction over any administrative cases that were pending before that date as well as cases pending in the Superior Court before that date.

As often happens with appellate decisions, *United Industrial* answered an important question while creating new questions that will be sorted out in coming years.

1. For those unfamiliar with the historical underpinnings of the Third Circuit’s certiorari jurisdiction, a brief history is provided in the opinion. 2014 WL 4179481 at *7.
2. 2012 Annual Report, United States Virgin Islands Courts and Judicial System at 71
3. *Pichardo v. V.I. Com’r of Labor*, 613 F.3d 87 (3d Cir. 2010).
4. Adopting such a practice for appeals from district court cases could raise additional issues in later years because it is not clear how the Circuit will know when its certiorari jurisdiction has conclusively ended (*i.e.*, when there are no longer any cases pending in either the Superior Court or V.I. Supreme Court that were filed in the Superior Court before December 28, 2012).

PUBLIC NOTICE - U.S. BANKRUPTCY JUDGESHIP VACANCY - DISTRICT OF NEW JERSEY

Chief Judge Theodore A. McKee of the United States Court of Appeals for the Third Circuit announces the application process for a bankruptcy judgeship in the District of New Jersey, seated in Newark. A bankruptcy judge is appointed to a 14-year term pursuant to 28 U.S.C. § 152. The application process is entirely automated. No paper applications will be accepted. Applications must be submitted electronically by October 22, 2014. Applications must be submitted only by the potential nominee personally. To apply, go to www.ca3.uscourts.gov for more information or call the Circuit Executive’s Office at 215-597-0718.

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Robert A. Vort
Hackensack, NJ

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Pittsburgh, PA

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Harrisburg, PA

Virgin Islands delegate (vacant)

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