3 BAR ASSOCIATION FOR THE THIRD FEDERAL CIRCUIT

November 2022 – Volume XVI, Number 2

On Appeal

- Remembering Judge Dolores K. Sloviter – Page 1
- Judge D. Michael Fisher's Portrait Unveiled During Special Sitting of The Third Circuit – Page 3
- Third Circuit to Distribute Pens with Court's Seal at Oral Argument – Page 4
- Bank Secrecy Act and IRS Civil Penalties: The Third Circuit Addresses FBAR Willfulness – Page 5
- Third Circuit Holds that Order Compelling Arbitration Does Not Merge into Order Dismissing Case for Failure to Prosecute for Purposes of Appellate Jurisdiction – Page 7
- Third Circuit Holds that the Shareholder Standing Rule is Prudential and Non-Jurisdictional – Page 8
- Third Circuit Vacates Arbitration Award Procured by Fraud – Page 9
- President's Note – Page 10
- Third Circuit Judges and Practitioners Provide Practice Tips – Page 11
- Call for Volunteers – Page 12
- Save the Date: 2023 Third Circuit Bench and Bar Conference – Page 12

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

REMEMBERING JUDGE DOLORES K. SLOVITER

By now many of the readers of this newsletter know that Dolores K. Sloviter, former Chief Judge of the Court of Appeals for the Third Circuit and the first woman to serve on the Court and as Chief Judge, has passed away after a long illness. Some of you may not be aware that she was also one of the Court's first liaison judges to our Association, together with Judges Ambro and Fisher. Many tributes to Judge Sloviter have already been published, including an excellent one by the Court summarizing her career and innumerable accomplishments on and off the bench. We considered writing another such article, but concluded that we could not improve upon the moving one written by our founding President, one of Judge Sloviter's clerks, as the Judge took inactive senior status. We are therefore reproducing Nancy Winkelman's tribute, which appeared in our August 2016 newsletter: …

Thirty years ago, I met a judge. A judge who would come to be my life-long mentor, and, today may I even say – my friend.

As Judge Dolores Korman Sloviter now takes inactive senior status, I am most touched and honored to write this brief tribute.

In 1986, I was a part-time law student at Western New England College School of Law in Springfield, Massachusetts. I was also the mother of a two-month old. Through a constellation of various factors, I was lucky enough to land an interview with Judge Sloviter – an interview that I had to cut short so I could get back on a plane to Springfield to nurse my baby. Hardly federal appellate clerk material. Yet Judge Sloviter must have seen something in me. She gave me a chance.

In the ensuing thirty years, I have been so grateful to work with and come to know this most extraordinary jurist: a brilliant intellect, with an extraordinary work ethic; a courage, strength, and independence born of upbringing, character, and necessity; a drive always for the best in herself and everyone around her; a deep commitment to justice and to the judicial system; and that unique and most precious combination of grit and heart.

(continued on page 2)

REMEMBERING JUDGE DOLORES K. SLOVITER — continued from page 1

And, just as Judge Sloviter saw something in me that others may not have seen thirty years ago, so she has given me the opportunity to see something in her. Like many brilliant women of her generation who would come to succeed in a male profession, circumstances required Judge Sloviter to develop a tough exterior. She is of the small cadre of women who were the first in their fields; who were the only women in the room for far too long; who were always surrounded by men who, even when they had good intentions (and many did not), could not possibly have left their prejudices and stereotypes at the door.

We have all heard the stories of this generation of women. I fully appreciate the tough exteriors that necessarily developed. Without that, most of these women would not have managed to stay in the room for very long at all. And without them, we – this next generation of professional women – would have had to struggle and fight even harder than we have, and ourselves develop tougher exteriors than perhaps our natures countenanced.

Yet, I am so fortunate to know Judge Sloviter beyond that. She is a caring, supportive, loving mother and grandmother. To this day, what brings the biggest smile to her face and joy to her eyes are mention of her beloved Vikki and Vikki's four children, her grandchildren. She is so very proud of them. To this day, her first questions to me are always about my own children. The coalescence of Judge Sloviter's toughness and softness is perhaps well illustrated by her one inviolate chambers rule: no matter how much work we had on our desks, and no matter how much she wanted to get that opinion out – chambers lights out at 6:30 p.m., and no working at night or on weekends. She wanted to be sure that we, like she, always had dinner with our families.

And this is all before we even get to "the facts."

A life-long Philadelphian, Judge Sloviter is the only child of Jewish immigrants from Poland. Her parents spoke Yiddish in her home, and she herself spoke Yiddish before she spoke English. Judge Sloviter worked throughout high school, at such jobs as a summer camp counselor, a typist, and a secretary. She paid much of her own freight for college and law school, the rest covered by scholarships. She attended Philadelphia's public schools, including Girls' High, before proceeding to Temple University for her undergraduate degree and then to the University of Pennsylvania for law school. Judge Sloviter decided to go to law school after reading a biography on Clarence Darrow, and, in her own words: "[O]nce it entered my mind, there was nothing else there." (Such quintessential Judge Sloviter!)

Although Judge Sloviter graduated at the top of her class at Penn, she was initially offered jobs only as a law librarian. Yet she persevered. Ultimately, she joined the firm then known as Dilworth, Paxson, Kalish, Kohn & Levy and became its first woman partner, practicing primarily antitrust litigation. She then moved on to teach at Temple Law School, focusing on antitrust and civil procedure. At Temple, Judge Sloviter came to see that law firms were still not accepting women or granting them jobs to the extent the firms were hiring male students. So she took matters in her own hands, and worked to draft a proposal that Temple Law School would not allow any law firm that discriminated against women to conduct interviews on Temple's campus.

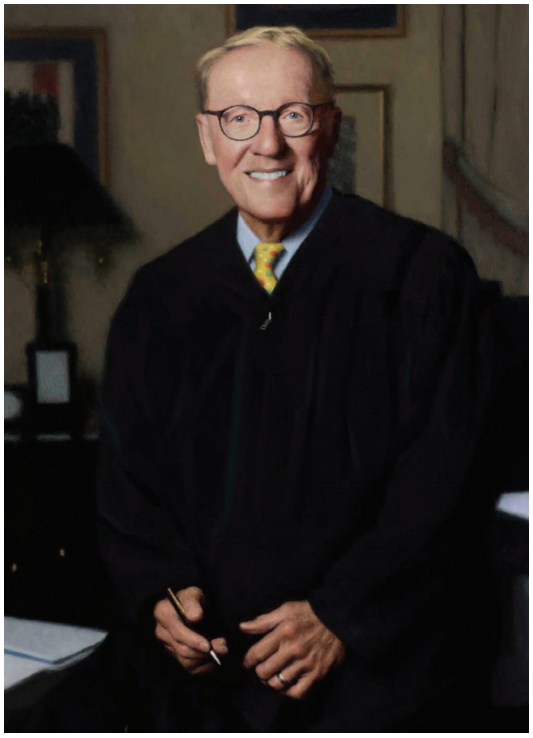
Appointed to the Third Circuit Court of Appeals by President Carter in 1979, Judge Sloviter was the first woman ever to serve as a judge on that Court. She was the first (and so far only) female Chief Judge of the Third Circuit. In fact, she is only the fourth woman in the entire country ever to serve as a Circuit Chief Judge at all. Judge Sloviter authored an astounding 808 precedential opinions in her almost 40-year tenure on the Court of Appeals, shaping the law in numerous areas, including antitrust and the First Amendment.

A fierce advocate for diversity and inclusiveness, as Chief Judge (a position she held from 1991 to 1998), Judge Sloviter created the ground-breaking Task Force on Equal Treatment in the Courts to examine racial and gender bias for the Third Circuit. She opened the Third Circuit Conference to all lawyers for the first time ever (a tradition that continues to this day). And she supported women and work-life balance in numerous ways, including offering part-time law clerk positions to working mothers.

Judge Sloviter is active in civic affairs, and is an ardent supporter of the Philadelphia arts. She also is a lifelong passionate Philadelphia sports fan – in particular her beloved Temple Owls. Anyone who has had the chance to accompany Judge Sloviter to a Temple Owls game can attest to that!

Thirty years ago, I met a judge. A judge who would change my life and the lives of so many around her; who would shape the jurisprudence of the Third Circuit for centuries to come; whose grit and heart would inspire so many. A remarkable woman.

JUDGE D. MICHAEL FISHER'S PORTRAIT UNVEILED DURING SPECIAL SITTING OF THE THIRD CIRCUIT



Devin Misour
Reed Smith LLP, Pittsburgh, PA

On September 22, 2022, Chief Judge Michael Chagares presided over a special sitting of the U.S. Court of Appeals for the Third Circuit for the presentation of the portrait of Senior Judge D. Michael Fisher. In attendance were many dignitaries, including judges from both the state and federal judiciaries, numerous elected officials, Judge Fisher's family, and many of Judge Fisher's current and former law clerks. The program took place in a fit-for-the-occasion ceremonial courtroom in the Joseph H. Weis, Jr. United States Courthouse in Pittsburgh.

Several long-time friends and colleagues paid tribute to Judge Fisher by sharing fond memories and humorous anecdotes about the Judge, and Chief Judge Chagares read aloud letters of congratulations from U.S. Supreme Court Justice Samuel Alito and Third Circuit Judge Maryanne Trump Barry, who unfortunately were unable to attend the proceedings.

Numerous speakers, including Judge Gerald Pappert of the U.S. District Court for the Eastern District of Pennsylvania, Third Circuit Judge Thomas Hardiman, President of the Pennsylvania Bar Association Barry Simpson, and Dean Amy Wildermuth of the University of Pittsburgh School of Law, each highlighted a different time period in Judge Fisher's distinguished career in public service.

Judge Pappert recalled his early days as a young lawyer serving as then-Attorney General Fisher's first deputy, as well as the unique circumstances that led to him succeeding his former boss as Pennsylvania's Attorney General. Judge Hardiman then picked up the thread and praised Judge Fisher's contributions to all three branches of government. Judge Hardiman also recounted his own long-time friendship with Judge Fisher during their service together on the Third Circuit. Referencing the well-known tradition of collegiality on the Court, Judge Hardiman discussed how his friendship with Judge Fisher deepened through countless sittings and court events, occasional differences of opinion, and hard-fought battles on the golf course. Mr. Simpson added his perspective as another long-time friend of Judge Fisher's, and praised the Judge's 52-year commitment to and involvement with the Pennsylvania Bar Association. Finally, Dean Wildermuth rounded out the overview of Judge Fisher's career by discussing the Judge's many contributions to both the University of Pittsburgh and the Pitt Law School, including his role as the Law School's first Distinguished Jurist in Residence.

In addition to Judge Fisher's professional accomplishments, two of the Judge's law clerks offered their own perspectives on the Judge as both a boss and as a person. Paige Forster, Judge Fisher's career law clerk, recounted the Judge's grace and pragmatic approach to problem solving that she has seen firsthand, both during her time as a law clerk and when she, as a litigant, presented oral argument in front of the Judge. Finally, former law clerk Geoff Neri offered a dramatic retelling of Judge Fisher's grace in an entirely different context—that of a bitterly cold Pittsburgh Steelers game against Mr. Neri's hometown football team, the Cleveland Browns.

Also in attendance was Judge Fisher's extended family, including his wife, Carol Fisher, and their children. Finally, the Judge's grandchildren all played critical roles during the proceedings, by singing the National Anthem, leading the Pledge of Allegiance, and ultimately unveiling the portrait itself. The portrait, which was painted by renowned artist David Larned, is stunningly accurate, as it perfectly captures the smile and energy that anyone who knows Judge Fisher will instantly recognize.

In his remarks, Judge Fisher reflected on the past two decades, thanking his family, his "court family," and all of the speakers for their kind words and friendship during that time. Judge Fisher also thanked all of his other professional colleagues in attendance. As for his 75 former and current law clerks, Judge Fisher complimented their contributions, and celebrated how there was "not one wasted draft pick" amongst the bunch. In an emotional conclusion, Judge Fisher offered his heartfelt thanks for a wonderful day.

Judge Fisher was nominated to the Third Circuit by President George W. Bush on May 1, 2003, and has served on the Court since December 15, 2003. He took senior status on February 1, 2017.

THIRD CIRCUIT TO DISTRIBUTE PENS WITH COURT'S SEAL AT ORAL ARGUMENT

David R. Fine
K&L Gates LLP, Harrisburg, PA

No matter how many times you've stepped to the lectern, an oral argument in the Third Circuit is an important occasion. Important for your client, of course, but also important for you, the advocate. And, if you've argued a case in the last six months or so, you've likely received as a memento a pen with the court's seal on it.

The Third Circuit Bar Association is pleased to have assisted in making those pens available. The association's officers noted that there are courts that provide such mementos—the Supreme Court's quill pens being the best known—and they suggested to Chief Judge Michael Chagares and Circuit Executive Margaret Wiegand that the Third Circuit do something to commemorate the important occasions when the judges and advocates gather in court to discuss the issues the court will resolve. The Chief Judge and Ms. Wiegand embraced the idea, and the bar association worked with a vendor to choose the type of pen to offer and the design (all with the court's approval). The bar association bought 1,000 pens and the court began distributing them in May 2022.

If you've received a pen already, the Third Circuit Bar Association hopes it has been a good reminder of an important occasion. And, if you've not yet received one, we hope you will soon.

BANK SECRECY ACT AND IRS CIVIL PENALTIES: THE THIRD CIRCUIT ADDRESSES FBAR WILLFULNESS

United States v. Collins, 36 F.4th 487 (3d Cir. 2022);
Bedrosian v. United States, 42 F.4th 174 (3d Cir. 2022)

Alison Donahue Kehner
DTO Law, New York, NY

The Bank Secrecy Act requires United States citizens to report interests in foreign bank accounts that exceed $10,000 by filing what is known as a Report of Foreign Bank and Financial Accounts ("FBAR") with the U.S. Treasury Department. When taxpayers fail to disclose those interests by filing an FBAR, the Internal Revenue Service has the authority to investigate violations, assess penalties, and file suit to collect civil penalties and interest on amounts due. The penalty amount turns on whether the IRS finds the failure to report was "willful" or not – an important distinction to the taxpayer because the penalty assessed for an honest mistake is capped at $10,000, whereas the penalty for willful failure to report is *the greater of* $100,000 or 50 percent of the foreign account balance at the time of violation.

Two recent Third Circuit decisions examined taxpayer conduct against this legal backdrop and affirmed the district court's penalty assessments for willful FBAR violations. In both cases, the court reaffirmed and applied the willfulness test first articulated in *Bedrosian v. United States*, 912 F.3d 144 (3d Cir. 2018) (*Bedrosian I*). There the court adopted a more expansive view of willfulness in this context and held that a willful FBAR violation encompasses knowing as well as reckless violations of the reporting requirement.

First, in *United States v. Collins*, the court affirmed a district court's award of $308,064 in penalties, plus interest, to the IRS for the taxpayer's willful failure to report several foreign bank accounts he held for several years. 36 F.th 487 (3d Cir. June 6, 2022), *petition for cert filed*, No. 22-335 (U.S. Oct. 11, 2022). The accounts came to light after Collins, a professor, submitted amended income tax returns for tax years 2002-2009 as part of his participation in the IRS' then-existent Offshore Voluntary Disclosure Program (OVDP). Collins ultimately withdrew from OVDP, prompting an IRS audit that revealed he owed money unrelated to his foreign bank accounts, which he ultimately paid. Then, in 2015, the IRS assessed a civil penalty for Collins' willful failure to report his foreign accounts in 2007 and 2008. The district court ruled in favor of the IRS, concluding the taxpayer had engaged in a "decades-long course of conduct, omission and scienter" in failing to disclose his foreign accounts.

The Court of Appeals unanimously affirmed. Quoting *Bedrosian I*, the court stated that the concept of willfulness encompasses the broader concept of recklessness, "'which is conduct that violates an objective standard: action entailing an unjustifiably high risk of harm that is either known or so obvious that it should be known.'" According to the court, the dispositive question was whether Collins "knew or (1) clearly ought to have known that (2) there was a grave risk that he was not complying with the FBAR reporting requirement, and if (3) he was in a position to find out for certain very easily."

The court pointed to the following facts in support of the district court's conclusion that the taxpayer's failure to file was willful: (1) The defendant was a sophisticated taxpayer who knew about his foreign accounts; (2) The defendant intentionally managed the accounts so as to avoid detection (Collins purposely avoided receiving mail from his Swiss bank in the United States and at one point asked the bank to "discreetly" transfer funds to the United States for a mortgage transaction); and (3) Even though Schedule B of IRS income tax Form 1040 directs taxpayers to check "yes" if they have an interest in foreign bank accounts, Collins repeatedly checked "no" when answering, despite the significant account balance sitting in a foreign bank for years. The court also rejected Collins' argument that his cooperation with the government established his honest belief that he had met all of his IRS obligations, explaining that voluntarily amending one's tax returns and making payments after the fact do not necessarily preclude a finding of willful failure to report if the other evidence in the record supports that conclusion.

Approximately six weeks later, a second panel decided *Bedrosian v. United States*, 42 F.4th 174 (3d Cir. July 22, 2022) (*Bedrosian II*), in which the court addressed, for the second time, whether the IRS proved the defendant committed a willful FBAR violation. *Bedrosian II* involved the taxpayer's filing of an incomplete FBAR disclosure form. The taxpayer, a pharmaceutical executive, held two Swiss bank accounts for many years without disclosing their existence to the IRS, even though his accountant had advised him that he was breaking the law by not acknowledging their existence on Schedule B of his personal tax returns. Eventually in 2008, after seeking additional tax advice, Bedrosian filed an FBAR form, but he listed just one Swiss bank account with a balance of less than $1 million. The FBAR filing was inaccurate because at the time, Bedrosian held a second account (which was the larger of the two foreign accounts he held) and his foreign holdings well exceeded $1 million. The IRS eventually discovered the inaccuracies, concluded Bedrosian's omissions were willful, and assessed the maximum penalty. Bedrosian refused to pay, and the IRS filed suit to recover the penalties and interest.

(continued on page 6)

BANK SECRECY ACT AND IRS CIVIL PENALTIES: THE THIRD CIRCUIT ADDRESSES FBAR WILLFULNESS

continued from page 5

The district court originally sided with Bedrosian, and the IRS appealed. The Third Circuit first addressed the legal standard to be applied and then remanded the case for further proceedings in light of the broader standard for willfulness the court articulated. On remand, the district court concluded the inaccurate FBAR filing was willful and assessed a maximum penalty of $975,789.17, which was 50 percent of the taxpayer's undisclosed Swiss account balance. This time, Bedrosian appealed.

The Third Circuit concluded the court's willfulness finding was supported by evidence in the record proving Bedrosian's knowledge that his bank accounts existed and his conduct in managing those accounts during the relevant time. Shortly after filing the FBAR, Bedrosian directed the Swiss bank to close both accounts even though only one of them was listed on the FBAR. Also, the Swiss accounts were subject to a "mail hold" which Bedrosian secured by signing a form and paying a fee to the bank. As in *Collins*, the court was not moved by the taxpayer's cooperation with the government, which occurred "only after he was exposed as having hidden foreign accounts."

Summary and Takeaways

Collins and *Bedrosian* provide important reminders that although the IRS can meet its burden of proof in the FBAR civil penalty context only by showing the taxpayer's knowledge of the FBAR filing requirement and intentional conduct, it is also true that the IRS does not have to go that far. Willful blindness is sufficient. Willful blindness equates with recklessness, which is far easier to prove than the taxpayer's intent or knowledge. Thus, the taxpayer's course of conduct during the relevant time period is critically important in evaluating the facts and potential risks when providing legal advice in this highly regulated area.

THIRD CIRCUIT HOLDS THAT ORDER COMPELLING ARBITRATION DOES NOT MERGE INTO ORDER DISMISSING CASE FOR FAILURE TO PROSECUTE FOR PURPOSES OF APPELLATE JURISDICTION

R & C Oilfield Servs. LLC v. Am. Wind Transp. Grp. LLC, 45 F.4th 655 (3d Cir. 2022)

Brandy S. Ringer
Schnader Harrison Segal & Lewis LLP, Pittsburgh, PA

In *R & C Oilfield Services LLC v. American Wind Transport Group LLC*, 45 F.4th 655 (3d Cir. 2022), the Third Circuit upheld the dismissal of a complaint with prejudice for failure to prosecute based on the plaintiff's inaction and representation that it had no plans to commence arbitration. The Court also refused to review the interlocutory order that compelled arbitration, concluding that the failure-to-prosecute dismissal prevented the interlocutory order from merging into the final judgment, and thus, the Court lacked jurisdiction to review it.

Background

Plaintiff R & C Oilfield Services, LLC ("R&C") filed suit in federal court against American Wind Transport Group, LLC ("American Wind"), alleging that American Wind failed to make agreed-upon payments in their commercial agreement to haul equipment (the "Agreement"). American Wind moved to dismiss the case, or in the alternative, stay the case because the Agreement contained a mandatory arbitration clause. The district court denied American Wind's motion to dismiss, but over R&C's objection to the enforceability of the arbitration clause, entered an order that compelled arbitration and stayed the case.

More than a year later, the district court ordered the parties to submit a joint status report. The parties reported that R&C did not commence arbitration and did not plan to do so. American Wind subsequently moved to dismiss the complaint with prejudice pursuant to Rule 41(b) because of R&C's failure to prosecute its claim. The district court granted that motion and R&C appealed.

Third Circuit's Decision

On appeal, R&C asked the court to review both the dismissal pursuant to Rule 41(b) and the propriety of the interlocutory order compelling arbitration.

The Third Circuit concluded that the district court "soundly exercised its discretion" and affirmed the district court's dismissal of the complaint. In so holding, the Court noted that "[c]ourts possess inherent power to 'manage their own affairs so as to achieve the orderly and expeditious disposition of cases,'" which includes "the authority to dismiss a case for lack of prosecution." The Third Circuit held that it was not an abuse of discretion to dismiss the case with prejudice pursuant to Rule 41(b) because R&C willfully refused to pursue arbitration for more than a year and made a "clear statement that it had no plans to pursue arbitration."

With respect to R&C's request to review the interlocutory order, the Court found that R&C's notice of appeal only identified the district court's order dismissing the complaint under 41(b) as the order from which the appeal was taken. The Third Circuit acknowledged that "[i]nterlocutory orders generally 'merge' into the final judgment or order and usually can be reviewed on appeal from the final order," but found that where, as here, "the final order is one dismissing the case under Rule 41(b) … interlocutory orders typically do not merge." The Court explained that this exception to merger is "consistent with the finality interests inherent in § 1291" and to prevent parties from intentionally "'refus[ing] to proceed whenever a trial judge ruled against him, wait for the court to enter a dismissal for failure to prosecute, and then obtain review' of an otherwise unappealable order."

The Court noted that in this case "R&C had multiple avenues to seek appeal of [the interlocutory order] … [but] [i]nstead, [] sat on its rights for a year and a half and told the District Court that it did not intend to comply with the order, leaving the Court no choice but to involuntarily dismiss the complaint." Under these circumstances, the Third Circuit concluded that the interlocutory order did not "merge in to the final order, [and was] outside the notice of appeal." Accordingly, the Court concluded that it lacked jurisdiction to review the order.

Conclusion

R & C demonstrates that litigants who are disappointed by an order compelling arbitration cannot sit on their rights. If they desire an appeal, they must seek it. If things get to the point of a failure-to-prosecute dismissal, it will be too late to seek an appeal of the order compelling arbitration.

THIRD CIRCUIT HOLDS THAT THE SHAREHOLDER STANDING RULE IS PRUDENTIAL AND NON-JURISDICTIONAL

Potter v. Cozen & O'Connor, 46 F.4th 148 (3d Cir. 2022)

Howard Chang
K&L Gates LLP, Pittsburgh, PA

In a case of first impression involving the shareholder standing rule—an equitable restriction that generally prohibits shareholders from bringing actions on behalf of corporations—the Third Circuit determined it is a prudential rule,[1] not a constitutional or jurisdictional one.

In *Potter v. Cozen & O'Connor*, a battle ensued between the sole shareholders of certain companies ("Shareholders"), and the legal team ("Lawyers") involved in a 2018 sale of the Shareholders' companies. The Lawyers were involved on both sides of the sale, but they denied any conflict and continued to provide advice. Eventually, the Shareholders took the Lawyers' advice in selling their LLCs for $20 million, but later determined that those LLCs were sold much below their fair market value. The Shareholders also determined that the Lawyers secured this outcome for the buyer by using the Shareholders' confidential information.

The Shareholders sued the Lawyers *in the Shareholders' names*, even though the harm identified (the difference in purchase price and fair market value) was to be paid to the LLCs. The Lawyers saw this discord and moved to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim, arguing that under the shareholder standing rule, the Shareholders could not bring the LLCs' claims under their own names. In response, the Shareholders characterized the Lawyers' motion as a challenge to their Article III standing under Rule 12(b)(1)—lack of subject matter jurisdiction. The District Court split the difference: ruling for the Lawyers but adopting the Shareholder's portrayal of the argument. The Shareholders moved for reconsideration or leave to amend, but the Court denied their motion by reasoning that they lacked Article III standing to pursue their claims.

On appeal, the Third Circuit panel emphasized that it had a duty to determine whether the shareholder standing rule did, in fact, deprive the District Court of Article III jurisdiction, even though both parties on appeal accepted that premise.

First, the panel discussed the requirements of Article III standing: (i) an injury in fact which is (a) concrete and particularized and (b) actual or imminent; (ii) an injury that is fairly traceable to the challenged action of the defendant; and (iii) a likelihood that the injury will be redressed by a favorable legal decision. The panel distinguished these requirements from prudential standing requirements, which do not derive from the Constitution but are instead judge-made rules meant to help judicial efficiency. It then discussed the importance of this distinction, as the mere labeling of a claim could change whether a challenge is properly brought under 12(b)(6) or 12(b)(1). Such a difference could mean the difference between a defendant's burden to show that the plaintiff did not state a claim or a plaintiff's responsibility to show there is subject matter jurisdiction.

Second, the panel discussed whether third-party standing in general implicates Article III standing. It discussed the Supreme Court's treatment of the doctrine as prudential and distinct from constitutional standing as well as the Third Circuit's conclusion that antitrust standing—typically characterized as prudential standing—does not implicate a court's subject matter jurisdiction.

Applying these principles, the Court found that the Shareholders had Article III standing based on: (i) a loss of value in their investments that was actual, concrete, and particularized; (ii) an injury allegedly caused by the Lawyers' involvement on both sides of the sale; and (iii) an injury redressable through damages. In doing so, the panel emphasized that a prudential doctrine does not bar consideration of Article III standing. Thus, a 12(b)(1) dismissal was improper because there was subject matter jurisdiction under Article III.

The panel then ruled that the District Court erred in refusing to grant leave to amend based on lack of Article III standing. It distinguished the District Court's denial for reconsideration on the merits versus its denial of a motion to amend based on a lack of Article III standing. Again, such a denial is incorrect because prudential standing does not bar or alter the Shareholders' constitutional standing. And when a court incorrectly concludes it lacks the power to consider a motion to amend, that is an abuse of discretion requiring that the related order be vacated and remanded for consideration on the merits.

That's exactly what ended up happening. The panel vacated the 12(b)(1) dismissal and the order denying leave to amend and remanded, signaling to the District Court that shareholder standing rule—as a prudential rule—was improperly considered to pertain to Article III standing and subject matter jurisdiction. Future litigants should look to *Potter* for guidance and recognize the important distinction between prudential and constitutional standing.

1 Prudential standing is a misleading term because the doctrine is unrelated to jurisdiction and instead concerns the merits of a plaintiff's claim. So, a challenge to Article III standing based on prudential standing is a contradiction.

THIRD CIRCUIT VACATES ARBITRATION AWARD PROCURED BY FRAUD

France v. Bernstein, 43 F.4th 367 (3d Cir. Aug. 9, 2022)

Douglas Baker
Reed Smith LLP, Pittsburgh, PA

When should a court disturb an arbitration award? Only in limited circumstances, such as when a party wins an arbitration by lying under oath and hiding damning information requested in discovery. Under those circumstances, the award is procured by fraud, and a district court should vacate the award.

Background

France v. Bernstein involved two sports agents, Jason Bernstein and Todd France, who are registered with the National Football League Players Association (NFLPA). Bernstein previously represented Kenny Golladay, an NFL wide receiver. Bernstein represented Golladay in his playing contracts and in endorsement and marketing deals. But in January 2019, Golladay terminated his contracts with Bernstein and signed a new agreement with Todd France. Three days before terminating his contract with Bernstein, Golladay had participated in an autograph-signing event in Chicago that Bernstein only learned about through a Facebook post.

Bernstein suspected that France had orchestrated the event and had done so to induce Golladay into firing Bernstein and hiring him (France). Five months later, Bernstein filed a grievance against France for violating two NFLPA Regulations. The Regulations prohibit an agent from "[p]roviding or offering money or any other thing of value to any player or prospective player to induce or encourage that player to utilize his/her services." They also prohibit an agent from "[i]nitiating" communication with a player who is already represented, if the communication concerns a player's current agent, his representation agreement, his contract status, or services to be provided by a prospective agent. Under the NFLPA's Regulations, the dispute was referred to arbitration.

Throughout the arbitration, France denied all involvement in the autograph-signing event. In response to written discovery, he claimed he had no documents relating to the event, and at the arbitration hearing, France repeatedly denied that he'd had anything to do with it. He testified that Golladay had approached *him* about switching agents, several months before the signing event. According to France, Golladay intended to fire Bernstein in December but was advised to wait until January, the end of the NFL season. France maintained that the timing of the autograph-signing was purely coincidental and not related to Golladay's decision to switch agents. The arbitrator believed France's story and denied Bernstein's grievance in an arbitration award.

But the story didn't end there. In a parallel federal court action, Bernstein later discovered that France was in fact involved in the autograph-signing event. The evidence included text messages and emails showing that France and Golladay had a written contract for the event. The problem was that the arbitration award had been issued several months before the new evidence came to light.

After the arbitrator's award was issued, France filed a petition to confirm it in district court. Bernstein then cross-moved to vacate the award based on the newly discovered evidence. The district court granted France's motion to confirm the award and denied Bernstein's motion to vacate, holding that Bernstein hadn't offered a satisfactory reason for why the new evidence wasn't discoverable before or during the arbitration. Bernstein ultimately appealed.

Third Circuit's Discussion

The Third Circuit disagreed. It acknowledged that "[i]t's a steep climb to vacate an arbitration award," requiring a three-part showing: (i) that there was fraud, proven by clear and convincing evidence; (ii) the fraud was not discoverable through reasonable diligence before or during the arbitration; and (iii) the fraud was material to an issue in the arbitration. All three elements were satisfied.

The court held that France committed fraud under the clear-and-convincing-evidence standard. Perjured testimony constitutes fraud, and, under § 10(a)(1) of the FAA, knowingly concealing evidence is analogous to perjured testimony. The new evidence clearly showed that France had both lied under oath and withheld important information demanded in discovery.

(continued on page 10)

THIRD CIRCUIT VACATES ARBITRATION AWARD PROCURED BY FRAUD

continued from page 9

The court also held that the fraud was not discoverable through reasonable diligence. During the arbitration, France had promised to produce documents responsive to Bernstein's request and had then represented that no such documents existed. The court explained, "A reasonably diligent litigant in Bernstein's position was entitled to rely upon those representations without launching a separate fact-finding investigation." France argued successfully before the district court that Bernstein was not reasonably diligent because he did not sufficiently pursue several non-party subpoenas. The Third Circuit claimed this was legal error: "Reasonable diligence does not require parties to assume the other side is lying." Bernstein's efforts were reasonable under the circumstances, because "'[r]easonable' does not mean 'perfect.'"

Finally, the court held that the fraud was material to the case. The center of Bernstein's case in arbitration was that France was behind Golladay's autograph-signing event. Bernstein lost because the arbitrator held that Bernstein had presented no evidence to support this theory. But Bernstein obviously could have done so but for France's lies. The fraud was therefore material.

The court acknowledged that additional factual findings would be needed to determine whether France had indeed violated NFLPA Regulations. "While it is not for us to make those factual findings, it is clear that the arbitrator's fact-finding task would have looked much different had Bernstein possessed the concealed evidence to support the core allegation in his grievance."

Conclusion

When an arbitration award is procured by fraud, a district court is justified in vacating it, since parties to arbitration "have a right to expect" an "honest process."

PRESIDENT'S NOTE

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

The mission of the Third Circuit Bar Association is to serve the Circuit and the lawyers who appear before it by working with the Court of Appeals to improve appellate advocacy and practice and to facilitate the administration of justice and local bench-bar relations. One way we do this is by publishing this newsletter, which includes news from the Court, descriptions of recent decisions of interest, and reports on our activities. You may have noted that this issue came to you from a different email address than before (3CBA@thirdcircuitbar.org). Most communications from us will now be sent from this email, so please add it to your address book. This is part of a general technology upgrade. We will soon be rolling out a new website with a more contemporary look and improved functionality that we hope you will find useful.

As lawyers, judges, and staff spend more time in their offices, chambers, and courtrooms, we look forward to connecting more frequently in person with our members and the larger Circuit community while continuing to build our virtual presence. One of our major current initiatives is supporting the **Third Circuit Bench and Bar Conference** that is scheduled to be held on May 10-12, 2023 at the Hilton at Penn's Landing in Philadelphia. Please mark those dates on your calendar and plan to attend. This will be the first Circuit bench-bar in six years due to the pandemic and is sure to be very worthwhile. We are planning one of the CLE programs and will host a reception as well as a breakfast meeting. We will also have a meet-and-greet table in the lobby and will organize a dine-around to facilitate informal socializing at local restaurants.

As described elsewhere in this newsletter, we are supporting the Court by providing the pens being distributed to advocates appearing before it. We also arranged for our members to obtain a promotional rate to attend the program on Third Circuit practice offered by the ABA's Council of Appellate Lawyers that featured judges from the Court and lawyers from our association. We are now planning new programming as well as an updated format for this newsletter and would like to add more content to our website, help create a young appellate lawyers group, and facilitate more communication among the local federal appellate community. We welcome your help in these efforts and hope you will share ideas of other initiatives to consider.

I close with a reminder that we are holding elections at the end of this year. If you have any interest in serving on our Board or working on an activity or Committee, reach out to me or one of our other Board members or Committee Chairs listed at the end of this newsletter. Please consider getting involved, and encourage your colleagues and friends to join you. A strong bar association supports the courts and the administration of justice. Let's all do our part!

THIRD CIRCUIT JUDGES AND PRACTITIONERS PROVIDE PRACTICE TIPS

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

Chief Judge Michael A. Chagares and Judge L. Felipe Restrepo of our Court of Appeals and Third Circuit Bar Association Board member Ilana H. Eisenstein recently presented an interesting program about best practices to follow in litigating before the Court. Karl S. Myers, a member of our Association, moderated and also spoke during the program, which was the second installment in the Riding the Circuits series organized by the American Bar Association's Council of Appellate Lawyers. The program is still available on the ABA's website. Here are a few highlights from the very interesting discussion:

On the state of the Circuit:

Chief Judge Chagares noted that the Court remains sensitive to the challenges created by COVID. He is meeting with different groups of affected people about how to transition to more normal operations and to memorialize lessons learned. The Court's caseload and disposition times are lower than before the pandemic, and its judges are assisting the district courts in handling their backlog.

On briefing:

Advocates should pay attention to every section of the brief, including the headings and table of contents, since different judges vary as to what they read first. Both Chief Judge Chagares and Judge Restrepo start with the appellant's summary of argument and defer reading the opinion below because it typically deals with numerous issues not before them on appeal. Briefs should be succinct and professional in tone, and should focus on Supreme Court and Court of Appeals precedent rather than other courts' decisions or non-precedential opinions. It is best to limit the number of issues presented and provide an overview of the law, remembering that the judges are not expert in every area. Never misrepresent the record, and provide specific citations to both the record and case law. File reply briefs and Rule 28(j) letters, but use them for their stated purpose and not to reiterate points or authorities previously presented.

On oral argument:

The most important things to do at argument are to listen to and answer the questions (which hopefully were anticipated as part of your preparation), and also to state what you want the Court to do and why you should win. The judges will know the record and are focused on the standard of review as well as the law. Treat hypotheticals seriously; the judges ask them to understand how the rule announced in your case will apply to others. Argument will be granted when at least one of the judges on the panel requests it, and in most pro bono cases as a thank you to the attorneys who undertake those representations. The Court values hearing from lawyers and is now giving pens to those who present argument (courtesy of the Third Circuit Bar Association). Live arguments are preferred, but virtual arguments remain an option, especially where there is a financial issue or counsel has limited travel ability.

On Court procedures:

The Clerk's Office assembles the Court's panels randomly. Active judges generally sit on five different merits panels a year; motions panels sit for an entire year. In a change from past practice, judges now do sometimes exchange views about the substance of cases before argument. At conference following argument, the panel discusses the merits of the cases assigned to it, starting with the judge with the least seniority, and which opinions should be precedential. While there are exceptions, argued cases generally result in precedential opinions and cases decided on the briefs do not. The presiding judge assigns each case to a panel member to write the opinion, and the draft is circulated to the other panel members for comment and approval. Non-precedential opinions are sent to the parties once the panel is in agreement. Precedential opinions are circulated to the entire Court to review before they are published. Occasionally a panel may grant a party's motion that a particular opinion be published.

CALL FOR VOLUNTEERS

The Third Circuit Bar Association will be holding elections at the end of this year. Any members interested in serving on our Board or working on one of our Committees are invited to contact our President Deena Jo Schneider or any other Board member or Committee Chair listed at the end of this newsletter. We welcome Third Circuit practitioners of all backgrounds and points of view. Please consider joining our leadership!

SAVE THE DATE

2023 Third Circuit Bench and Bar Conference

Up to 12 CLE, including 2 Ethics, pending approval

May 10-12, 2023

Hilton at Penn's Landing, Philadelphia, PA

Registration information to follow

FOUNDING MEMBERS

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

FOUNDING FIRMS

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

COMMITTEE CHAIRS

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

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