3 BAR ASSOCIATION FOR THE THIRD FEDERAL CIRCUIT

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REMEMBERING JUDGE JOHN J. GIBBONS

Dear Third Circuit Bar Association members:

I'm sad to pass on the news that former Third Circuit Judge John J. Gibbons died on Sunday, December 9th (the day after his 94th birthday). Judge Gibbons served in the U.S. Navy during World War II, where he was stationed at Guantanamo Bay Naval Base. He then attended Harvard Law School and entered private practice in Newark at Crummy & Considine. President Nixon appointed him to the Third Circuit in 1970 and he served on the Third Circuit for 20 years, the last three of which as Chief Judge. He authored over 800 opinions during his tenure on the Third Circuit. In 1990, he left the bench and became a professor at Seton Hall. He eventually returned to private practice and the firm where he previously practiced law. At that time, the law firm was named Crummy, Del Deo, Dolan, Griffinger & Vecchione. It would become known as Gibbons, Del Deo, Dolan, Griffinger & Vecchione in 1997, and then Gibbons P.C. in 2007.

Judge Gibbons worked throughout his career on issues concerning the rule of law and access to justice. When President of the New Jersey Bar Association in the 1960s, Judge Gibbons enlisted lawyers to help those unable to pay for legal representation during the Newark Riots. In 2004, Judge Gibbons successfully argued in the U.S. Supreme Court against detention without judicial review for the 660 people then detained at Guantanamo Bay Naval Base (where he was stationed during WWII). *See Rasul v. Bush*, 542 U.S. 466 (2004). He had a monumental career as a lawyer, judge, mentor, and friend to many in New Jersey. In every way, he was a pillar of the New Jersey legal community.

The Gibbons Firm will hold a memorial ceremony to celebrate his career in January.

Very truly yours,

Chip Becker
President, Third Circuit Bar Association

THIRD CIRCUIT PERMITS IN-STATE DEFENDANTS TO USE "SNAP REMOVAL" TO REMOVE A CASE TO FEDERAL COURT

Encompass Insurance Co. v. Stone Mansion Restaurant Inc., 902 F.3d 147 (3d Cir. 2018)

Colin E. Wrabley
Reed Smith LLP, Pittsburgh, PA

Joshua T. Newborn
Reed Smith LLP, Pittsburgh, PA

The Third Circuit recently became the first federal appellate court to directly address and approve "snap removals"—a procedural quirk that allows in-state defendants to remove a state-court case to federal court if the defendants file for removal before they are "properly joined and served" by the plaintiffs. *See Encompass Insurance Co. v. Stone Mansion Restaurant Inc.*, 902 F.3d 147 (3d Cir. 2018).

Background

Section 1441(a) of Title 28 authorizes the removal of civil actions from state court to federal court. Section 1441(b)(2) contains an exception to this broad removal authorization—known as the "forum defendant rule"— "if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." Thus, state-court plaintiffs can prevent removal simply by naming a defendant who was a citizen of the state in which the suit was filed.

Prior to the advent of electronically accessible court dockets, state-court defendants had little recourse where at least one named defendant was a "forum defendant." But in the early 2000s, as state courts began to adopt the use of electronic dockets, parties could check the status of a complaint online before they were formally served with it. Armed with early knowledge of having been named as defendants, they could quickly file their removal papers before being "properly joined and served" by the plaintiffs. And since the forum-defendant rule precludes removal only where a home-state defendant has been both "joined and served," pre-service defendants argued that the forum defendant rule did not apply to them and that they were free to remove the case to federal court.

The argument has received a mixed reception. Some courts have permitted the practice because, in their view, it is a straightforward application of the text of § 1441(b)(2). *See, e.g., Cheung v. Bristol-Myers Squibb Co.*, 282 F. Supp. 3d 638, 642-43 (S.D.N.Y. 2017). Other courts, however, have found that "snap removals" amount to gamesmanship that was never intended by the rules. *See, e.g., Little v. Wyndham Worldwide Operations, Inc.*, 251 F. Supp. 3d 1215, 1221-22 (M.D. Tenn. 2017). For various reasons, the propriety of snap removals rarely comes before appellate courts, and until the Third Circuit's *Encompass* ruling, no federal court of appeals had squarely analyzed the issue.

Analysis

In March 2011, after leaving the Stone Mansion in Pittsburgh, an intoxicated driver crashed and flipped his vehicle, killing him and seriously injuring his passenger. Encompass Insurance, the liability carrier for the vehicle, settled the passenger's claims related to the accident and then filed a lawsuit in Pennsylvania state court against Stone Mansion seeking contribution under Pennsylvania law. Stone Mansion is a Pennsylvania company, and under the forum defendant rule, it would not be able to remove the case to federal court. But after declining to receive electronic service of the complaint, Stone Mansion noticed removal to federal court. The federal district court permitted the "snap removal" and then dismissed the case. Encompass Insurance appealed.

The Third Circuit affirmed the "snap removal" ruling. It found that the plain language of 28 U.S.C. § 1441(b)(2) "precludes removal on the basis of in-state citizenship only when the defendant has been properly joined and served." The court would only reject this plain language interpretation if there had been a "most extraordinary showing of contrary intentions" or the literal interpretation would lead to "absurd and bizarre results"—it found neither.

First, although the court found no applicable legislative history, it observed that courts and commentators had determined that the forum defendant rule was enacted "to prevent a plaintiff from blocking removal by joining as a defendant a resident party against whom it does not intend to proceed, and whom it does not even serve." Based on this understanding of the statute, the Third Circuit found that the phrase "properly joined and served" was intended to address fraudulent joinder, and that intent did not run contrary to "snap removals."

Second, the Third Circuit determined that the plain meaning of the statute was not "nonsensical or superfluous." It justified this ruling with three reasons: "(1) it abides by the plain meaning of the text; (2) it envisions a broader right of removal only in the narrow circumstances where a defendant is aware of an action prior to service of process with sufficient time to initiate removal; and (3) it protects the statute's goal without rendering any of the language unnecessary."

As a result, the Third Circuit found that Stone Mansion properly removed the case to federal court. It acknowledged that the issue was one on which "[r]easonable minds might conclude that the procedural result demonstrates a need for a change in the law." But, the court added, if such a change were appropriate, "it is Congress—not the Judiciary—that must act."

Conclusion

The future of "snap removals" is still in flux as courts continue to weigh in on their validity and, in many instances, join the chorus calling for Congress to act. Nonetheless, the Third Circuit's decision in *Encompass Insurance* is a landmark case for recognizing the validity of "snap removals" and is sure to be influential as the issue continues to be litigated in courts across the country.

THIRD CIRCUIT EXPLAINS WHAT CONSTITUTES A "FINAL DECISION" AND REVERSES AN ORDER TO COMPEL ARBITRATION

Cup v. Ampco Pittsburgh Corporation, 903 F.3d 58 (3d Cir. 2018)

Anthony M. Fassano
Archer & Greiner P.C., Haddonfield, NJ

In *Cup v. Ampco Pittsburgh Corp.*, 903 F.3d 58 (3d Cir. 2018), the Third Circuit was presented with the question of whether an arbitration clause in a collective bargaining agreement (CBA) covered retirees who had retired before the CBA went into effect. Before answering the question, however, the Court addressed a threshold procedural issue of whether the district court's order compelling arbitration amounted to a "final decision" over which the Court could exercise appellate jurisdiction. In a unanimous precedential opinion authored by Judge Hardiman and joined by Chief Judge Smith and Judge Restrepo, the Court ruled that the district court's order was a final decision and that the retirees were not covered by the CBA.

Background

Cup involved a dispute over healthcare benefits for retirees at a manufacturing facility in Avonmore, Pennsylvania. In 2016, Ampco acquired the facility. Later that year, Ampco announced a change to its healthcare plan for retirees who had retired before March 1, 2015. Instead of charging the retirees $195 per month, as had been the case, retirees would have to purchase health insurance on the private marketplace and receive a stipend as reimbursement from the company. The retirees opposed the new plan and the union filed a grievance on their behalf under the CBA. Ampco rejected the grievance, taking the position that the union did not represent the retirees.

The union and a retiree who had retired in 2014 sued Ampco on behalf of retirees who would be affected by the change. The complaint sought an order to compel arbitration and enforce the CBA or, in the alternative, relief under ERISA. Ampco moved to dismiss, and the plaintiffs moved to compel arbitration.

Relying on the strong federal policy in favor or arbitration, as well as the CBA's broadly worded arbitration provision, the district court granted the plaintiffs' motion to compel arbitration. The district court went on to dismiss the plaintiffs' remaining two counts without reaching the merits, denied Ampco's motion to dismiss as moot, ordered the parties to attend mediation before arbitration, and administratively closed the case.

The District Court's Order Constituted a "Final Decision"

Under 28 U.S.C. § 1291 (and the Federal Arbitration Act with regard to decisions involving arbitration), the courts of appeals have jurisdiction over "final decisions." The question that the Court faced in *Cup* was whether the district court's order compelling arbitration constituted a "final decision."

As an initial matter, the Court determined that the district court's administratively closing of the case was not, in itself, sufficient to make the decision "final." However, the Court recognized that the district court did not merely administratively close the case; it went on to order arbitration and dismiss all of the other claims in the case. The Court found that the dismissal of all the other counts was "about as strong a 'signal' as [the Court could] envision" that the district court's decision was "final." Having taken that action, the district court had "nothing more to do but to execute the judgment." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 86 (2000) (quotation and citation omitted). Such a decision is "final" for the purposes of appellate jurisdiction.

The Plaintiff Retirees Were Not Covered by the CBA

The CBA governed disputes "between the Company and the Union or its members." The question that the Court addressed was whether retirees fell within those categories. To answer this question, the Court simply looked to the CBA and found that it covered "employees," which were defined as those working at the facility "as of the date of [the] Agreement or thereafter." Thus, by its terms, the CBA did not apply to the plaintiff retirees, who had retired before the CBA went into effect.

The plaintiffs raised two additional arguments, both of which the Court rejected. First, the plaintiffs argued that the CBA implicitly incorporated a memorandum of agreement (MOA) that applied to retiree benefits because the CBA made reference to medical insurance. The Court found that this reference was insufficient to demonstrate the parties' intent to incorporate the MOA. Without that intent, the Court declined to hold that the MOA was incorporated into the CBA.

Second, the plaintiffs argued that the parties had arbitrated disputes in the past, including disputes about retiree benefits. The Court rejected this argument because the CBA was unambiguous, and thus extrinsic evidence of the parties' past conduct was not needed.

Having reached this conclusion, the Court reversed the district court's order compelling arbitration and remanded for further proceedings.

Conclusion

In the wake of *Cup*, Third Circuit practitioners would do well to keep a couple of things in mind. First, whether a district court's decision is "final" for purposes of a circuit court's appellate jurisdiction is not always clear. In attempting to answer the question, attorneys should ask what more, absent any actions by the parties, the district court has to do with the case. If the answer is nothing, the decision may be "final" and the clock for filing an appeal may be ticking. In that case, it is essential to file a notice of appeal and preserve appellate rights. Second, the federal policy in favor of enforcing arbitration agreements can only go so far. Without a showing that the parties intended to include a class of disputes within the ambit of an arbitration clause, attorneys may have difficulty prevailing on motions to compel arbitration.

DIVIDED THIRD CIRCUIT PANEL HOLDS THAT CONFLICT PREEMPTION DOES NOT BAR STATE TORT CLAIMS ARISING FROM FATAL PLANE CRASH

Sikkelee v. Precision Airmotive Corporation et al., 907 F.3d 701 (3d Cir. 2018)

Steven G. Sanders
U.S. Attorney's Office, D.N.J.

Sikkelee v. Precision Airmotive Corp. et al., 907 F.3d 701 (3d Cir. 2018), holds, over a dissent, that a manufacturer's ability to seek and obtain approval from the Federal Aviation Administration for changes to the design of airplane parts precludes a claim of "impossibility preemption."

Background

In July 2005, a Cessna 172N crashed shortly after taking off from Transylvania County Airport in Brevard, North Carolina, killing David Sikkelee and seriously injuring his brother. The Cessna was equipped with an engine that had been manufactured by AVCO Corporation and its Textron Lycoming Reciprocating Engine Division ("Lycoming") in Pennsylvania in 1969. In the early 1960s, Lycoming received permission to modify the method of joining the two halves of the engine's carburetor, which mixes fuel and air prior to combustion. So instead of using safety wire to reinforce the bolts holding the carburetor, Lycoming was permitted to use screws and lock tabs instead.

Over time, Lycoming received several complaints that the screws were less effective in holding together the carburetor, leading to fuel leakage and poor engine performance. Lycoming recommended checking the screws for tightness during inspection and, if necessary, replacing the carburetor and retightening the screws. Nonetheless, a Lycoming supplier in 2004 told Lycoming that a significant percentage of loose carburetors occurred on Cessna 172 aircrafts.

In 2007, Jill Sikkelee, David Sikkelee's widow, filed a wrongful-death action against Lycoming in the Middle District of Pennsylvania, alleging strict liability claims for design defect. She claimed the carburetor design was defective and allowed fuel to flow into the engine, causing the Cessna to crash. Lycoming argued Sikkelee's claims were preempted because the company would not have been able to implement any design change requirements alleged under Pennsylvania law, such as reinforced wiring, without the FAA's approval.

The district court held that Sikkelee's claims were field preempted, but the Third Circuit reversed that determination and remanded for consideration of conflict preemption. *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680 (3d Cir.), *cert. denied sub nom., AVCO Corp. v. Sikkelee*, 137 S. Ct. 495 (2016).

On remand, the district court granted summary judgment for Lycoming, holding that because the FAA had approved the method Lycoming used to secure the two halves of the carburetor, and because the FAA would need to approve any changes to that method, Jill Sikkelee's state-law tort claims were barred under "impossibility preemption," a species of conflict preemption.

The Panel Majority Rejects Impossibility Preemption

In a majority opinion authored by Judge Shwartz and joined by Judge Rendell, the Third Circuit reversed the district court's order granting summary judgment on Sikkelee's state law claim and rejected Lycoming's claim of impossibility preemption.

Under the impossibility preemption doctrine, the Supremacy Clause forbids imposition of liability where "compliance with both federal and state duties is impossible." As the panel majority explained, the question "'is whether the private party could independently do under federal law what state law requires of it.'" (quoting *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 620 (2011)).

Lycoming principally claimed that, because the FAA had issued a certificate approving the method of using screws and lock tabs to secure the carburetor, and because only the FAA could approve a change to that method, it would have been impossible for Lycoming unilaterally to implement a safer and more effective method, even if Pennsylvania tort law imposed on it a duty to do so.

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PRESIDENT'S NOTE

Charles "Chip" Becker
Kline & Specter PC, Philadelphia, PA

As the year comes to a close, thank you for your continued engagement with the Third Circuit Bar Association. The last year has been a productive one for the Association. The Association generated regular issues of its outstanding newsletter, which I hope provide you with valuable guidance on practice before the Third Circuit. It sponsored some terrific social events and CLE programs on federal appellate practice. These CLE programs are proving to be a model that can be replicated in programs throughout the Circuit and have been well received and attended. I am excited for those programs to continue. In 2019, we look forward to continuing to serve your needs—most immediately with a revised website that also will facilitate a social media presence so the Association can better keep its members informed about developments in the Third Circuit. We will be working on more social and CLE events as well. We are also working on a revised Third Circuit practice manual. We are moving ahead on several fronts.

With these projects in mind, I hope once again that you will renew your membership. You already have received the renewal form and I hope will return it soon. If you know other attorneys who practice before the Third Circuit, please call the 3CBA to their attention and encourage them to join. Your support helps the Association foster our Third Circuit community. It helps promote excellence in appellate advocacy. I appreciate your engagement and look forward to your continued involvement. Thank you in advance for your renewed membership.

As you know, the Senate recently confirmed David Porter as the Third Circuit's newest judge. Judge Porter, congratulations and welcome to the Court! We hope that you will find your work and life as a judge to be satisfying in every respect.

As a final matter, my term as president concludes at the end of this year. It has been a pleasure and privilege to serve in this role. Thank you for your support and energy! I'm also happy to pass the presidential baton to Andy Simpson from the Virgin Islands. Andy's office is a short walk from the Caribbean Sea, which sounds pretty great. More importantly, he is a tremendous person with a vibrant practice before the Third Circuit. I look forward to his leadership.

I wish you all a happy and healthy year in 2019!

DIVIDED THIRD CIRCUIT PANEL HOLDS THAT CONFLICT PREEMPTION DOES NOT BAR STATE TORT CLAIMS ARISING FROM FATAL PLANE CRASH — continued from page 4

The panel majority disagreed. It turned to *Wyeth v. Levine*, 555 U.S. 555, 565 (2009), a case involving recovery in tort for defective warning labels that had been approved by the Food & Drug Administration ("FDA"). *Wyeth* pertained to an FDA regulation allowing a manufacturer to strengthen a warning label upon filing a supplemental application with the FDA and without awaiting FDA approval. The Supreme Court held that Wyeth's impossibility preemption defense failed absent clear evidence that the FDA would have rejected the stronger warning label that the plaintiffs contend was required under state tort law.

Applying *Wyeth*, the panel majority held that the record was devoid of clear evidence that the FAA would have rejected proposed improvements to the screws or attachment system. To the contrary, the record showed that the FAA was aware of the problems with the carburetor and was encouraging Lycoming to remedy them. Beyond that, "the FAA had previously required the use of safety wire, the very design change Sikkelee alleges would have cured the defect." "Based on this record," the panel majority concluded, the FAA likely would have approved a proposed change to the attachment system."

Judge Roth's Dissent

Dissenting, Judge Roth concluded that the post-*Wyeth* decisions in *PLIVA*, 564 U.S. 604, and *Mutual Pharmaceutical v. Bartlett*, 570 U.S. 472 (2013), controlled and that impossibility preemption applied. Unlike the FDA process cited in *Wyeth*, which created an exception to the pre-approval process safety-enhancing label changes, Judge Roth concluded that FAA regulations do not allow unilateral changes to the design of the component in question. The absence of a process similar to the FDA's, according to Judge Roth, meant that there was no legal basis to ask the question that had been posed in *Wyeth, i.e.*, whether there was clear evidence that the FAA would have rejected a modification to the screw-and-fastener process for the carburetor.

As Judge Roth explained, "the key initial question for impossibility is not whether a manufacturer has engaged in dialogue with a federal agency regarding possible design changes or even whether the agency might ultimately approve a proposed change at the conclusion of such dialogue. Rather, as previously stated, we must start with the question whether the manufacturer could have implemented the change independently, *i.e.*, without prior agency approval." Because Lycoming could have implemented the change only ***after*** securing FAA approval, it was impossible for it to comply with both state and federal law.

Conclusion

Sikkelee marks a notable restriction on the reach of impossibility preemption. The sharp dispute between the panel majority and the dissent, however, makes this issue one to watch going forward.

THIRD CIRCUIT RELINQUISHES JURISDICTION OVER VIRGIN ISLANDS SUPREME COURT

Vooys v. Bentley, 901 F.3d 172 (3d Cir. 2018) (*en banc*)

Dwyer Arce[1]
Kutak Rock LLP, Omaha, NE

In *Vooys v. Bentley*, 901 F.3d 172 (3d Cir. 2018), the *en banc* Third Circuit held that it lacks jurisdiction to review decisions of the Supreme Court of the Virgin Islands by writ of certiorari, expressly overruling an earlier panel decision in *UIW-SIU ex rel. Bason v. Gov't of the V.I.*, 767 F.3d 193 (3d Cir. 2014).

Background

In 2005, plaintiffs Joseph Gerace and Victoria Vooys sued multiple defendants in the Superior Court of the Virgin Islands, the court of general jurisdiction for the U.S. territory of the Virgin Islands. During the course of the litigation, the plaintiffs moved to the mainland United States, prompting the Superior Court to order the plaintiffs to post a cost bond under a Virgin Islands statute. When the plaintiffs failed to post bond, the Superior Court dismissed the case. On appeal, the Virgin Islands Supreme Court reversed and ordered the Superior Court to reinstate the case, holding that the cost bond statute was unconstitutional. The defendants then sought review of that decision by the Third Circuit.

To understand why the defendants sought review in the Third Circuit at all requires an explanation of the role the Third Circuit has played in the Virgin Islands judiciary. Between the time the plaintiffs filed the complaint in 2005 and the time the Virgin Islands Supreme Court issued its opinion in 2016, the nature of the Virgin Islands judiciary had fundamentally changed. In 2005, the Superior Court of the Virgin Islands was reviewed on appeal by three-judge panels of the United States District Court of the Virgin Islands. In turn, the District Court was reviewed on appeal by the Third Circuit. That changed when the Virgin Islands Legislature created the Virgin Islands Supreme Court pursuant to authority granted by Congress in the 1984 Revised Organic Act of the Virgin Islands. The Supreme Court began operations in 2007, reviewing the Superior Court on appeal instead of the federal District Court. Under the Revised Organic Act, Congress provided that for the first 15 years of the Virgin Islands Supreme Court's operation, the Third Circuit would review its decisions on writ of certiorari and issue reports to Congress every five years on "whether it has developed sufficient institutional traditions to justify direct review by the Supreme Court of the United States." 48 U.S.C. § 1613 (2012).

In 2012, after the Virgin Islands Supreme Court had been in operation for five years, the Third Circuit issued a report concluding that the Supreme Court had "passed that test with flying colors" and "recommended that Congress eliminate our certiorari jurisdiction in favor of direct review by the U.S. Supreme Court." *Vooys*, 901 F.3d at 184. Congress followed this recommendation, enacting legislation ending the Third Circuit's 15-year review period with all "cases commenced" after the effective date of the legislation on December 28, 2012. In 2014, the Third Circuit decided *Bason*, interpreting the "cases commenced" effective date to mean that the Third Circuit would continue to have certiorari jurisdiction in any case where the complaint was filed in the Virgin Islands Superior Court before December 28, 2012, while any case where the complaint was filed after that date could be reviewed only by the U.S. Supreme Court.

Relying on the holding in *Bason*, the defendants petitioned the Third Circuit for a writ of certiorari seeking review of the Virgin Islands Supreme Court's decision. The plaintiffs opposed the petition, arguing in part that the court did not have jurisdiction because *Bason* was wrongly decided.

The *En Banc* Decision

In December 2017—just two months after the territory was devastated by two successive Category 5 hurricanes—the merits panel heard oral argument on the island of St. Croix regarding the court's jurisdiction and the merits of the petition. After oral argument, but before the panel had issued an opinion, the Third Circuit *sua sponte* ordered rehearing *en banc*.

In an opinion authored by Judge McKee and joined by 11 judges, the court comprehensively outlined the unique history between the Third Circuit and the Virgin Islands. The court of appeals noted that when the Virgin Islands became a U.S. territory in 1917, Congress immediately assigned it to the Third Circuit along with Pennsylvania, New Jersey, and Delaware—a move "that has baffled historians for years." *Vooys*, 901 F.3d at 177 n.12. With the first Organic Act in 1936, the territorial trial court had jurisdiction only "over civil actions where the amount in controversy was less than $500, and over criminal actions where the maximum punishment was a fine of $100, imprisonment for six months, or both," and the federal District Court had jurisdiction over everything else. *Vooys*, 901 F.3d at 181. Since 1936, the court continued, the territorial court system evolved to acquire greater jurisdiction over territorial matters, and with the 1984 Revised Organic Act, Congress granted the Virgin Islands Legislature the authority to transfer jurisdiction over local matters to territorial courts and to create an appellate court for the territory. In 1994, the Legislature completed the process of transferring general jurisdiction over all territorial crimes and local civil actions to the Superior Court of the Virgin Islands, subject to the federal court's diversity and federal-question jurisdiction, much like the relationship between state and federal courts. In 2004, the Legislature took the final step of creating an appellate court—the Supreme Court of the Virgin Islands—which began operations in 2007.

[1]Dwyer Arce presented argument on behalf of amicus curiae Virgin Islands Bar Association before the panel and the *en banc* Third Circuit opposing jurisdiction in this case.

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THIRD CIRCUIT RELINQUISHES JURISDICTION OVER VIRGIN ISLANDS SUPREME COURT — continued from page 6

With this history in mind, the court concluded that when interpreting "cases commenced," the *Bason* decision did not give proper consideration to *Slack v. McDaniel*, 529 U.S. 473 (2000), or the legislative history of the statute ending the Third Circuit's certiorari review. In *Slack*, the U.S. Supreme Court explained that "[w]hen Congress instructs . . . that application of a statute is triggered by the commencement of a case, the relevant case for a statute directed to appeals is the one initiated in the appellate court." *Vooys*, 901 F.3d at 187 (quoting *Slack*, 529 U.S. at 481–82). This reading, Judge McKee explained, was also in accordance with legislative intent because "[i]nterpreting 'cases commenced' . . . as the filing of a petition for certiorari review, as opposed to the filing of a complaint, is consistent with Congress's termination of the certiorari jurisdiction other circuit courts of appeals temporarily had over the supreme courts of other U.S. territories." *Vooys*, 901 F.3d at 188. The court concluded that under the effective date of the statute, only the U.S. Supreme Court had jurisdiction to review the Virgin Islands Supreme Court after December 28, 2012. The court accordingly dismissed the petition for a writ of certiorari. As a result of this decision, the Third Circuit also dismissed two other cases seeking review of the Virgin Islands Supreme Court.

In dissent, Judge Bibas emphasized that *stare decisis* should counsel against overturning *Bason*. He also expressed concern "for litigants in the pipeline"—like the defendants—"who relied on *Bason*" in seeking certiorari review in the Third Circuit.

On November 19, 2018, the defendants filed a petition for a writ of certiorari in the U.S. Supreme Court. But the petition did not challenge the Third Circuit's decision on its certiorari jurisdiction—instead, the petition only challenged the merits of the Virgin Islands Supreme Court's decision finding the Virgin Islands cost bond statute unconstitutional.

Conclusion

With the *Vooys* decision, the Virgin Islands court system now operates almost identically to that of all 50 states and the other U.S. territories, with the Virgin Islands Supreme Court having the final word on the meaning of territorial law, and the U.S. Supreme Court—but not a federal appeals court—having jurisdiction to review its decisions on issues of federal law only.

VICE PRESIDENT JOE BIDEN RECOGNIZED WITH AWARD FOR EXEMPLARY SERVICE TO THE THIRD CIRCUIT

Chief Judge D. Brooks Smith of the United States Court of Appeals for the Third Circuit has announced that former Vice President of the United States Joseph R. Biden, Jr. is the first-ever recipient of an award named in his honor – the Joseph R. Biden, Jr. Award for Exemplary Service to the Third Circuit. Chief Judge Smith presented the award at a luncheon meeting attended by the judges of all federal courts within the Third Circuit on October 18, 2018, at the Hotel DuPont in Wilmington, Delaware.

In announcing the award presentation, Chief Judge Smith made the following statement: "I am extremely pleased that Vice President Biden has agreed to accept the inaugural award which will bear his name. As a veteran U.S. Senator and as a former Senate Judiciary Committee chairman, Vice President Biden has for decades been a friend, supporter, and defender of an independent federal judiciary. Over those years, his commitment to the courts and judges within the Third Circuit has been unflinching. This is a small way for the Third Circuit family to say 'thank you.'"

Biden served as the 47th Vice President of the United States from 2009 to 2017, and his connections to the Third Circuit are broad and deep. He is a native of Scranton, Pennsylvania, and a long-time Delawarean. First elected as a senator from Delaware in 1972, he served in that body for thirty-six years, next becoming its presiding officer when he assumed the office of Vice President. During that long Senate tenure, he had a role in the confirmation of 1,896 Article III judges, 166 of whom went on to serve the district courts and the court of appeals of the Third Circuit. As a U.S. Senator, Biden was a force in a wealth of legislative measures affecting the courts, including the Civil Justice Reform Act.

The Biden Award recognizes outstanding service in promoting the cause of justice and the work of the courts within the Third Judicial Circuit. Future awardees will be honored every few years at Third Circuit Judicial Conference meetings. The Circuit is made up of the U.S. Court of Appeals for the Third Circuit and the District and Bankruptcy Courts of Pennsylvania, New Jersey, Delaware, and the U.S. Virgin Islands. It is headquartered in Philadelphia.

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