3 BAR ASSOCIATION FOR THE THIRD FEDERAL CIRCUIT

On Appeal

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ADMINISTERING JUSTICE IN THE MIDST OF COVID-19

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Chief Judge, U.S. Court of Appeals for the Third Circuit

When the brunt of COVID-19 hit last March, few of us anticipated that we would still be coping almost a year later with its virulence and the complications the virus brings to both daily life and the workplace. But that is the reality we face for the time being, and the courts of the Third Judicial Circuit have been more than coping with the many obstacles the pandemic has placed in our respective paths. Judges and court staff have not lost sight of their collective duty to see that justice is administered, day by day. In short, federal courts within the Third Circuit have remained open and operational.

In a public statement I issued not long after the World Health Organization declared the spread of COVID-19 a pandemic, I made it clear that despite the seriousness of what had become a national emergency, the Third Circuit was "not in the midst of a *judicial emergency*." And just as I noted back then, the efforts of our judges and employees have assured "the uninterrupted application of the rule of law."

None of my words should be read as an attempt to "sugar coat" either the seriousness of the pandemic or the challenges it has presented to all court operations. These are not normal times. Members of the extended Third Circuit "family" have themselves contracted COVID-19, with varying degrees of severity. Those afflicted have run the gamut, from those who provide security for court operations—deputy marshals, court security officers and members of the Federal Protective Service—to judges, their families and members of their staff.

But there have been bright spots along the way. As Chief Judge of the Court of Appeals, I'm pleased to report that our transition to working remotely has been remarkably smooth. Throughout the pandemic, our disposition rate has actually improved from what it was during the same period last year. And the percentage of appeals which receive oral argument has gone up as well. We began conducting arguments by audio conference last March 16, and transitioned to video arguments through Zoom Government on June 16. Those electronic substitutes for appearing "live" are hardly the optimum—but they have allowed court and counsel to engage in real time, and to participate in the kind of "conversations" that oral arguments are really about.

Our Court's Legal Division has experienced an increase in appeals from orders adjudicating federal prisoners' motions for compassionate release, mostly because of COVID-19. And they've seen an uptick in appeals from orders entered in habeas proceedings brought on behalf of immigration detainees. But the lawyers in the Legal Division have kept pace.

Third Circuit libraries are mostly teleworking, but they too continue their all-too-often unheralded mission. As usual, they have assisted in research and reference requests, offered webinars and orientations, pushed out current awareness newsletters and publications, and circulated to over 1600 inboxes the *Friday Flash*, keeping all within the Third Circuit informed of milestone events in the ongoing work, and the history, of the courts of the Third Circuit.

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ADMINISTERING JUSTICE IN THE MIDST OF COVID-19 — continued from page 1

Recently, Circuit Executive Margaret Wiegand and I participated in a podcast presented by the Federal Judicial Center which was themed "Leading the Judiciary through Uncertainty." I was pleased that our Circuit was recognized for its approach to engaging all courts and judicial officers within the Circuit in ongoing conversations about the common issues we face. Through weekly teleconferences I have conducted since last March with all six Chief District Judges, along with similar sessions Ms. Wiegand has convened with court unit executives, we have looked for and usually found uniform approaches to the obstacles all courts are facing during COVID times.

And those challenges have not all been pandemic-related. In 2020, the federal judiciary faced threats to the safety and security of both judges and facilities at a rate I have never witnessed in my 36 years as a judge. Last summer, we were horrified by the fatal shooting of the 21-year old son of New Jersey District Judge Esther Salas at the family's home. Judge Salas's husband was seriously wounded and continues a long recovery process. The shooter was a disappointed litigant.

I am grateful beyond words to our U.S. Marshals who have been on constant alert, protecting judicial officers and monitoring online threats.

And as if a pandemic, along with violence and threats of violence were not enough, we learned this past December that federal judiciary computer systems, along with the systems of numerous government agencies, had been hacked—almost certainly by foreign intelligence operatives. An assessment of just how extensive the incursion was is ongoing. It was a stark reminder of the many dangers we face in these times.

As a colleague recently deadpanned to me: "I guess the next thing we can expect are swarms of locusts."

Hopefully not.

But we have kept on. District and bankruptcy courts have had the greatest challenges. Case inventories are growing with limited opportunities to dispose of cases. Yet the Chief Judges of those courts have been examples of strength and resolve. Indeed, so has the entire extended "Third Circuit family."

Among the groups which have joined me on several conference calls include the officers of the Third Circuit Bar Association and our Court's Lawyers Advisory Committee. I will continue to seek their views and support.

Cancelling the Third Circuit Bench Bar which was scheduled for last May was one of the hardest decisions I have ever had to make. The central theme of that conference was to be Judicial Independence. If, as I suspect, it continues as a subject of interest, future conferees may have an opportunity to participate in discussions of that subject. Events of recent months have amply demonstrated that the federal judiciary has lived up to the Founders' expectations for Article III of the Constitution.

All of us who do the work of the courts of the Third Circuit look forward to a day when we will again meet face to face. Until that time, on behalf of that very special group of judges and staff, I wish all members of the Third Circuit Bar—as well as every person who comes to our courts seeking justice—health, safety, and the resolve to stay the course.

THIRD CIRCUIT RULES THAT COURTS DECIDE WHETHER AN AGREEMENT TO ARBITRATE EXISTS WHEN THE VALIDITY OF THE "CONTAINER" CONTRACT IS IN DOUBT—EVEN IF THE AGREEMENT DELEGATES THAT THRESHOLD QUESTION TO THE ARBITRATOR

MXM Constr. Co. v. N.J. Bldg. Laborers Statewide Benefit Funds, 974 F.3d 386 (3d Cir. 2020)

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The Third Circuit recently confronted a "mind bending" legal question in the esoteric area of federal arbitration law that implicates larger concerns about the allocation of power between the judges and arbitrators under the Federal Arbitration Act (FAA). In *MZM Construction Co. v. New Jersey Building Laborers Statewide Benefit Funds*, 974 F.3d 386, the Third Circuit held that questions about "the making of the agreement to arbitrate" are for the courts to decide unless the parties clearly and unmistakably referred those questions to arbitration in an agreement whose formation is not in dispute. In so holding, the court joined several circuits in finding that parties can delegate to arbitrators the power to decide so-called "gateway" issues in arbitration by including a delegation provision in the parties' arbitration agreement, provided consent to the underlying contract containing that provision is not in question.

The Underlying Contract Dispute and District Court Proceedings

The underlying contract dispute concerned whether MZM Construction was liable for additional contributions to a union benefits fund (the "Funds") based on a one-page Short Form Agreement (the "SFA"), which incorporated by reference a 2002 collective bargaining agreement (the "2002 CBA"). According to the Funds, the 2002 CBA (1) required MZM to make certain payments; and (2) contained an arbitration clause. The arbitration clause contained a delegation provision (also referred to in arbitration parlance as a "competency-competency" provision), granting the arbitrator the authority to address threshold questions concerning whether an agreement to arbitrate existed.

MZM filed suit in the U.S. District Court for the District of New Jersey to enjoin arbitration. The gravamen of MZM's complaint was that no valid agreement to arbitrate had been formed because there had been fraud in the execution of the SFA and the purported agreement to arbitrate in the 2002 CBA. The Funds moved to dismiss on the grounds that the arbitration agreement delegated to the arbitrator the authority to decide the fraud in the execution defense and the underlying payment dispute.

The District Court denied the Fund's motion to dismiss and concluded that the court had the power to decide the threshold question of whether an agreement to arbitrate existed, despite the delegation provision. The Third Circuit then affirmed in a unanimous panel opinion.

The Court's Legal Analysis

The panel first focused on the relationship between the severability doctrine announced in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.,* 388 U.S. 395 (1967), and the Third Circuit's later application of the doctrine in *Sandvik AB v. Advent International*, 220 F.3d 99 (3d Cir. 2000). In *Prima Paint*, the Supreme Court established that a party cannot avoid arbitration by challenging the validity of the parties' contract without specifically challenging the validity of the arbitration agreement *within* the contract. Under the severability rule, absent a specific challenge to the validity of the arbitration agreement, the court must treat the arbitration agreement as valid and refer any challenges to the container contract to the arbitrator.

Thereafter, the Third Circuit in *Sandvik* held that Section 4 of the FAA requires a court to decide questions about the formation or existence of an arbitration agreement, even if that means the court must pass judgment on the validity of the container contract. This ruling was consistent with *Prima Paint*, according to the panel, because the severability doctrine "presumes an underlying, existent agreement" to arbitrate. Assessing whether an agreement to arbitrate exists frequently requires a court to address the validity of the container contract because an analysis of the former often implicates the latter, and vice versa.

The panel then considered the impact of the Supreme Court's decision in *Rent-A-Center v. Jackson*, 561 U.S. 63 (2010), which involved an arbitration agreement with a provision that delegated to the arbitrator, not the court, the power to decide questions about the formation or existence of an agreement to arbitrate. The Supreme Court in *Rent-A-Center* held that despite Section 4's language bestowing courts with the power to decide whether an agreement to arbitrate exists, contracting parties may delegate to the arbitrator the exclusive authority to decide gateway questions of arbitrability. And in doing so, a court must honor the parties' intent to arbitrate threshold issues of arbitrability, in the absence of a specific challenge to the validity of the delegation provision itself.

*The views expressed here are the personal views of the author, made solely in her personal capacity, and do not necessarily represent the views of the Department of Justice or the United States.

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THIRD CIRCUIT RULES THAT COURTS DECIDE WHETHER AN AGREEMENT TO ARBITRATE EXISTS WHEN THE VALIDITY OF THE "CONTAINER" CONTRACT IS IN DOUBT—EVEN IF THE AGREEMENT DELEGATES THAT THRESHOLD QUESTION TO THE ARBITRATOR — continued from page 3

As applied to this case, the panel noted that the MZM's challenge related specifically to the 2002 CBA (the "container contract") and the arbitration agreement in the CBA, but not the delegation provision found *within* the arbitration agreement. Nonetheless, applying the logic from *Sandvik*, the plaintiff's claim of a lack of assent to the container contract and arbitration agreement implicated the delegation provision within the arbitration agreement, as the validity of each is factually intertwined. *See MZM*, 974 F.3d at 400 ("It is inevitable that a court will need to decide questions about the parties' mutual assent to the container contract to satisfy itself that an arbitration agreement exists and vice versa. That is no less true when the container contract includes or incorporates a delegation provision.").

In other words, if the facts establish fraud in the execution of the container contract, those same facts vitiate the arbitration agreement and the delegation provision contained within it. In this case, the allegations relating to the plaintiff's claim of fraud in the execution of the contract, if true, would vitiate the 2002 CBA, the arbitration agreement within the CBA, and the delegation provision within the arbitration agreement. Thus, the court is the proper forum in which to resolve these questions.

The panel then turned to the second question—whether the plaintiff put the formation of the arbitration agreement at issue by stating a claim of fraud in the execution. After reviewing the relevant New Jersey contract principles and the plaintiff's allegations and proofs, the panel was satisfied that the plaintiff stated a claim of fraud in the execution of the 2002 CBA and arbitration agreement sufficient to trigger the district court's power to adjudicate that claim.

THIRD CIRCUIT EXAMINES APPELLATE JURISDICTION FOR CLAIMS INVOLVING PATENT LAW

FTC v. AbbVie Inc., 976 F.3d 327 (3d Cir. 2020)

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In *FTC v. AbbVie Inc.*, 976 F.3d 327 (3d Cir. 2020), the Third Circuit held that an antitrust case brought by the Federal Trade Commission (FTC) involving issues of patent law was reviewable under its appellate jurisdiction, rather than the jurisdiction of the Court of Appeals for the Federal Circuit.

The Federal Circuit was created in part to provide uniformity to appellate decisions relating to patent law. Under 28 U.S.C. § 1295, the Federal Circuit has exclusive jurisdiction over any civil action "arising under … any Act of Congress relating to patents." A civil action "aris[es] under" federal patent law if "a well-pleaded complaint" shows either that (1) "federal patent law creates the cause of action," or (2) "the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law, in that patent law is a necessary element of one of the well-pleaded claims." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 809 (1988). Through this appellate jurisdiction, the Federal Circuit has developed its own body of patent law jurisprudence that is binding on district courts nationwide. The Federal Circuit applies its own legal precedent for substantive matters unique to patent law and the legal precedent of the relevant regional Circuit Court of Appeals for other questions of law.

The use (or alleged "misuse") of patent rights is often relevant in antitrust actions due to the fact that the monopoly a patent provides can significantly impact the market and competitive landscape. In this particular case, the FTC alleged that Defendants AbbVie, Inc., Abbott Laboratories, Unimed Pharmaceuticals LLC, and Besins Healthcare, Inc. violated Section 13(b) of the Federal Trade Commission Act by (1) maintaining a monopoly through a course of anticompetitive conduct, including filing sham patent litigation and entering into reverse-payment agreements with Teva Pharmaceuticals; and (2) restraining trade by entering into anticompetitive reverse-payment agreements. The district court dismissed the FTC's claims that were based on the reverse-payment theory. The FTC, however, prevailed on its sham litigation claims after a bench trial, and the district court ordered Defendants to disgorge $448 million in profits. The FTC and Defendants both appealed.

Third Circuit Review

Among other relief, the Third Circuit reinstated the FTC's dismissed claims that were based on the reverse-payment theory, but reversed the judgment for the FTC on a sham litigation claim and held the FTC overstepped its authority in seeking disgorgement. Before doing so, however, the court examined its own appellate jurisdiction in relation to 28 U.S.C. § 1295. Specifically with regard to the monopolization claim, the court held that patent law is not a "necessary element" because the alleged "course of anticompetitive conduct" involved *both* the alleged sham litigation and the reverse-payment agreement. Acknowledging that the "sham litigation theory does present patent-law questions because it requires … review [of] the objective reasonableness of … [the] patent infringement litigation," the court nevertheless held that it—and not the Federal Circuit—had jurisdiction because the reverse-payment theory was also part of the anticompetitive conduct giving rise to the claim and did not itself present questions of patent law.

The Third Circuit also held that its appellate jurisdiction extended to the claim against the defendant (Besins) that did not enter into a reverse-payment agreement with Teva because "the FTC's complaint may be read to allege that Besins participated in AbbVie's settlement with Teva." The court reasoned that the patent law question was not "necessary" to the monopolization claim against Besins because the complaint averred that "[t]he sham lawsuits did not eliminate the threat of" competition and that "AbbVie ... and Besins ... turned to other ways to preserve their monopoly."

The Third Circuit's decision goes a step further to hold that, even if the patent-law question was "necessary" to the claim, it would still maintain appellate jurisdiction because the patent law questions are not important to the federal system as a whole and are therefore not "substantial." This aspect of the court's ruling is largely premised on *Gunn v. Minton*, 133 S. Ct. 1059 (2013), a Supreme Court decision examining whether federal courts have jurisdiction under 28 U.S.C. § 1338(a), a statute providing federal courts with original jurisdiction over any civil action arising under a law relating to patents. In *Gunn*, the Court held that the particulars of the patent law question were not "significant" enough to the legal malpractice claim at issue because the patent law question being asked—whether timely raising the experimental use defense would have changed the result of a prior patent litigation—was hypothetical and did not change the result of that prior litigation. The particular "significance" examined in *Gunn* was with respect to "the federal system as a whole" and balanced against the interests of the state. Balancing these interests, the *Gunn* Court held that state courts have an interest in legal malpractice claims to maintain standards for licensed professions.

Implications

The Third Circuit's decision applies the *Gunn* standard on jurisdiction between state and federal courts under 28 U.S.C. § 1338(a) to a question of appellate jurisdiction between two different federal appellate courts under 28 U.S.C. § 1295. This reasoning provides grounds for litigants to argue that other state v. federal jurisdiction cases are relevant to an analysis under 28 U.S.C. § 1295. The decision also holds that a patent law issue is "necessary" under 28 U.S.C. § 1295 based on the relief sought in the trial court and not the questions being resolved on appeal. In turn, plaintiffs looking to maintain appellate jurisdiction in a regional Circuit Court of Appeals for cases involving questions of patent law may wish to consider—at the outset—non-patent theories or averments giving rise to such claims.

THE COLLATERAL ORDER DOCTRINE'S NARROW RANGE: THIRD CIRCUIT DISMISSES APPEAL OF ORDER DECLINING TO DISMISS INDICTMENT

United States v. Alexander, 985 F.3d 291 (3d Cir. 2021)

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In *United States v. Alexander*, a case with a "disturbing" grand jury history, the Third Circuit held that it lacked appellate jurisdiction to review a pretrial order denying the defendant's motion to dismiss an indictment. The decision confirms the truly "narrow range of situations" in which a non-final order can be reviewed on appeal under the collateral order doctrine.

District Court Proceedings

In *Alexander*, a grand jury returned an initial indictment against the defendants based on an alleged identity-theft and tax-fraud scheme. One of the grand jurors, however, was a victim of the alleged scheme. The original indictment expressly listed this juror as a victim. The government also presented an exhibit during the grand jury proceedings that contained this juror's full name. Additionally, an IRS agent investigating the scheme had interviewed the alleged victim approximately eight months before the grand jury convened. Still, when the government asked whether the jurors knew any of the defendants, there were no positive responses. The alleged victim went on to vote along with the other jurors to return a true bill.

When the government learned of the victim's grand jury involvement, it obtained a superseding indictment from a new grand jury. Nonetheless, two of the defendants moved to dismiss, arguing that the indictment violated Federal Rule of Criminal Procedure 6(d), which provides that only government attorneys, the witness, interpreters, and a court reporter may be present while the grand jury is in session. The defendants also contended that the indictment violated the Fifth Amendment's Grand Jury Clause, which states that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury."

The district court denied the motion, ruling that the superseding indictment cured any prejudice caused by the tainted original grand jury. One defendant, Alexander, appealed to the Third Circuit.

Third Circuit Analysis

In a unanimous panel opinion, the Third Circuit dismissed Alexander's appeal for lack of jurisdiction. The panel began with the north star of appellate jurisdiction—the final judgment rule stemming from 28 U.S.C. § 1291, which limits appellate jurisdiction to "final decisions" of district courts. As the panel recognized, Alexander had not been convicted or sentenced, and thus the order denying her motion to dismiss the indictment was not a final judgment.

But that wasn't the end of the matter. Alexander contended that her appeal was proper under the collateral judgment doctrine, an exception to the final judgment rule that permits interlocutory review when the district court order (1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) would be effectively unreviewable on appeal from a final judgment.

The panel ruled that Alexander's Rule 6(d) argument did not satisfy the collateral order doctrine's conditions. While acknowledging "Alexander may well be correct that … the pre-trial denial of a Rule 6(d) motion is effectively unreviewable after trial," the panel nonetheless held that Alexander's motion failed to satisfy the second condition of the collateral order doctrine—*i.e.*, that the disputed order resolve an important issue completely separate from the merits. According to the panel, Rule 6(d) is designed to protect defendants from being charged without probable cause, which means that Rule 6(d) pertains to the sufficiency of the evidence, an issue "enmeshed in the merits."

The panel also ruled that Alexander's Grand Jury Clause argument did not satisfy the collateral order doctrine's conditions. An order that denies a right to avoid trial is effectively unreviewable in an appeal after a final judgment. But not every error in grand jury proceedings implicates this right. As recognized by the panel, the error must be "so fundamental that it causes the grand jury no longer to be a grand jury, or the indictment no longer to be an indictment." The Third Circuit has limited these circumstances to "technical challenges to the *existence* of an indictment" in contrast to a "substantive challenge to an indictment's legal propriety." With respect to Alexander, the panel ruled that the challenge was substantive rather than technical. The argument thus failed to implicate Alexander's right to avoid trial and, in turn, failed to satisfy the third collateral-order condition.

Conclusion

The collateral order doctrine is an established part of federal practice that all practitioners should know. The doctrine exists to allow for appellate review of an order that would be effectively unreviewable on appeal from a final judgment. But the collateral order doctrine is only an exception to the more fundamental rule that appellate jurisdiction is limited to review of final decisions. And, as the *Alexander* decision confirms, the exception applies only in a "narrow range of situations."

PRESIDENT'S NOTE

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I am honored to be the new president of the Third Circuit Bar Association, following many distinguished lawyers who previously held this position. I thank them and our Board of Governors for their service and look forward to their continued support.

Our association serves both the Third Circuit and the lawyers who appear before it by seeking to improve appellate advocacy and practice within the Circuit and by facilitating relations between the local appellate bar and the Circuit, especially the Court of Appeals. We generally do this through programming, publications, commenting on proposed rules and suggesting others, interacting with the Court and organizing gatherings of lawyers and judges, and supporting Court-organized initiatives such as the Third Circuit Judicial Conference. Unfortunately, some of these initiatives have been limited or curtailed this past year as we have been battling challenges ranging from the pandemic and natural disasters to civil and political unrest to attacks on the justice system and the judiciary.

Most of us now work remotely, interacting only virtually with colleagues, opposing counsel, and the courts—and multitasking even more than before. While figuring out how to function in our new abnormal, we have been reminded that some individuals and groups in our society are not managing nearly as well, and that the peace, prosperity, and democratic form of government we took for granted are more fragile than we thought. Many of us are wondering what the future will bring and how we can help make that future brighter, especially as lawyers committed to promoting the rule of law.

The Third Circuit Bar Association has been modifying its activities to support our members, the broader appellate bar, and the Circuit during these difficult times. We have been publishing tips on practicing remotely and will continue to do that. We have consulted with the Court and hope to do so more going forward. We are planning to offer remote programming until we can resume live gatherings. (We may continue some virtual offerings even afterwards, as they are easy to attend and may remain available after the fact.) We are considering ways to bring lawyers and judges together virtually to exchange ideas and enhance our connections. And we continue to work on updating our Third Circuit Practice Guide and our website.

The extent of our accomplishments naturally depends on the number of people willing to contribute to them. Please watch out for our dues notice and renew your membership for 2021; your modest dues help fund our activities. Encourage your colleagues and friends to renew or join as well. And please join our active Board of Governors and others in planning programming and other events and working on publications, including this newsletter. Reach out to me or any of our other Board members to put your talents to work. I look forward to working with you and seeing the fruits of our combined efforts.

THIRD CIRCUIT COURT OF APPEALS

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