BAR ASSOCIATION FOR THE THIRD FEDERAL CIRCUIT

On Appeal

March 2016
Volume X, Number 1

THIRD CIRCUIT BAR ASSOCIATION WELCOMES JUDGE LUIS FELIPE RESTREPO TO THE COURT

M. Patrick Yingling
Reed Smith LLP, Pittsburgh, PA

On January 11, 2016, the U.S. Senate confirmed Judge L. Felipe Restrepo to the U.S. Court of Appeals for the Third Circuit. Judge Restrepo fills the vacancy created when Judge Anthony J. Scirica took senior status.

Judge Restrepo comes to the Third Circuit with ten years of experience as a judge, having served in the Eastern District of Pennsylvania as a District Court Judge from 2013 to 2016 and as a Magistrate Judge from 2006 to 2013.

Judge Restrepo was born in Medellín, Colombia and raised in northern Virginia. He received his B.A. from the University of Pennsylvania in 1981 and his J.D. from Tulane Law School in 1986. Judge Restrepo began his legal career as a law clerk at the National Prison Project before spending seven years as a public defender, first for the Defender Association of Philadelphia from 1987 to 1990, and then as an Assistant Federal Defender in the Eastern District of Pennsylvania from 1990 to 1993. Judge Restrepo then worked in private practice for 13 years as a partner at Krasner & Restrepo until becoming a U.S. Magistrate Judge.

Over the course of his career, Judge Restrepo has taught a number of law school classes. Since 1993, he has served as an Adjunct Professor of Trial Advocacy at Temple University Beasley School of Law. From 1997 to 2009, he served as an Adjunct Professor of Trial Advocacy at the University of Pennsylvania Law School. And, in the summer of 1992, he served as an Adjunct Professor teaching a course in Criminal Justice at Peirce College.

On his transition to the Court of Appeals, Judge Restrepo stated: "I am humbled to have the opportunity to serve on the Court and grateful for the support of President Obama and Senators Casey and Toomey during the confirmation process." Judge Restrepo's chambers are located in the James A. Byrne United States Courthouse in Philadelphia. The Third Circuit Bar Association congratulates Judge Restrepo and welcomes him to the Court.

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

THIRD CIRCUIT EN BANC PROCEDURE—THE BASICS AND BEYOND

Matthew Stiegler
Law Office of Matthew Stiegler, Philadelphia, PA

After deciding just two en banc cases in 2014 and one in 2015, the Third Circuit is likely to be more active in 2016 with four en banc cases currently argued and pending decision. Despite this uptick, en banc rehearing remains infrequent enough that even experienced Third Circuit practitioners may benefit from a refresher on how it works.

Let's start with the basics.

What is en banc rehearing? Federal appeals courts almost always decide cases using three-judge panels. But in very rare instances, the court decides cases en banc. In recent years the Third Circuit has done so in roughly 1 out of every 1000 cases it decides. En banc means the entire court decides the case, but figuring out exactly what "the entire court" means can get tricky.

Which judges participate in an en banc rehearing? ("Participate" means to vote on which side wins the case (affirm or reverse), *not* on whether to grant rehearing in the first place.)

- All of the active Third Circuit judges (right now there are 13; senior judges are not "active judges" in this sense);
- Minus active judges who recuse; and
- Plus any senior Third Circuit judges who (a) sat on the original panel *and* (b) elected to participate in the en banc hearing.

Senior Third Circuit judges who did not sit on the panel are not eligible to participate in the en banc, period. (Several other circuits allow this.) Visiting judges (judges who are not Third Circuit judges) are not eligible to participate in en banc rehearing, period, even if they *did* sit on the panel, per 3d Cir. IOP 9.5.3.

If rehearing en banc has been granted, how can you tell which judges are participating? You can tell if active judges recused, or if senior judges on the panel opted in, by examining the order granting rehearing en banc. It gives a list of judges, and that identifies the judges who are participating in the en banc rehearing of that case as of that date. (After this, subtractions would occur only if a judge leaves the court or belatedly recuses; additions would occur only if a newly confirmed judge joins the court before en banc oral argument.)

Which judges get a vote on whether to grant en banc rehearing in the first place? It's the same as who gets to participate—except that no senior judges get to vote, even if they sat on the panel.

So much for the basics, now for some more-obscure en banc issues. First, some issues about the vote on whether to grant rehearing:

What if there is a tie about whether to grant rehearing en banc? It takes a majority to grant rehearing, so a tie means rehearing en banc is denied. That in turn means a three-judge panel decides the appeal, so, if there already is a panel opinion, it remains in force.

Is en banc rehearing ever granted *before* there is a panel ruling? Yes. The court can grant rehearing en banc any time it wants, and it doesn't have to wait for a party to ask. In cases where en banc rehearing is granted, it is not unusual in recent years for the Third Circuit to do so before the panel issues any opinion.

Which majority is required to grant rehearing en banc—all active judges, or only *participating* active judges? If judges recuse, does that reduce the number of votes needed to grant rehearing? In some circuits it does not, but in the Third Circuit it does. 3d Cir. LAR 35.3 says, "For purposes of determining the majority number necessary to grant a petition for rehearing [*see* 28 USC 46(d)], all circuit judges currently in regular active service *who are not disqualified* will be counted." (IOP 9.5.3 is to the same effect.) That means you only need a majority of non-disqualified judges. (But be aware that a very authoritative secondary source cites Rule 35.3 to mean that the Third Circuit will not grant rehearing en banc unless a majority of active judges are not disqualified, so if this situation arises, confusion is possible.)

And here are some issues for cases where rehearing en banc has been granted:

If en banc rehearing is granted, what happens to the panel decision? If there was a panel opinion issued before rehearing is granted, it is vacated in the order granting rehearing en banc. It's like the panel opinion never existed. En banc opinions often do not discuss the prior panel opinion in the case.

What if there is a tie by the en banc court about whether to affirm or reverse? An en banc tie affirms the district court's judgment and leaves the district court's ruling in place. It does not reinstate the panel opinion. It is similar to a non-precedential affirmance by judgment order.

If a judge takes senior status while the en banc case is pending, does s/he still get a vote? Yes. If a judge voted on whether to grant rehearing en banc, that judge gets to participate in the entire rehearing even if s/he goes senior.

If a new judge joins the court while en banc rehearing is pending, does the judge get a vote? It depends. The court's consistent practice is that new judges always participate in en banc cases if they are commissioned before the en banc oral argument, but not if they are commissioned after oral argument. Thus, Judge L. Felipe Restrepo participated in the two en banc cases argued in February because he was commissioned in January.

In the end, en banc rehearing will always be rare, so memorizing all of its procedural wrinkles is less important than knowing they exist and remembering where to go for answers.

THIRD CIRCUIT ADHERES TO FUNDAMENTALS OF CONSTITUTIONAL STANDING IN SUPER BOWL TICKET APPEAL

Finkelman et al. v. National Football League et al., 810 F.3d 187 (3d Cir. 2016)

Richard G. Freeman
Law Office of Richard G. Freeman, Philadelphia, PA

The U.S. Court of Appeals for the Third Circuit, in *Finkelman et al. v. National Football League et al.*, convincingly closed the door on two putative class action plaintiffs who had sued the NFL on the grounds that its ticketing policies wrongly denied them an opportunity to buy a ticket to the Super Bowl. In concluding that the litigants lacked standing, the Court composed a primer on constitutional standing that probably should be reduced to an app available on every first-year law student's iPhone.

The two named plaintiffs in this case, Josh Finkelman and Ben Hoch-Parker, wanted to attend Super Bowl XLVIII, which was held in New Jersey in 2014. Finkelman bought two tickets on the resale market, allegedly for much more than face price. Hoch-Parker—confronted with the high prices in that market—opted not to purchase any. The plaintiffs then brought a class action against the NFL and various affiliated entities in the District of New Jersey, alleging that the NFL's practice of distributing 99% of Super Bowl tickets to NFL teams and League insiders, while designating only 1% of tickets for purchase by the general public, violated New Jersey's rarely litigated "Ticket Law," N.J. Stat. Ann. § 56:8-35.1, which appears in New Jersey's Consumer Fraud Act and provides that "[i]t shall be an unlawful practice for a person, who has access to tickets to an event prior to the tickets' release for sale to the general public, to withhold those tickets from sale to the general public in an amount exceeding 5% of all available seating for the event."

The District Court dismissed the plaintiffs' suit for failure to state a claim, specifically concluding that (1) the NFL did not "withhold" any tickets to the Super Bowl; (2) Finkelman failed to plead causation under the Ticket Law; and (3) "unjust enrichment" did not apply because there was no contractual relationship between the NFL and the parties. The District Court only addressed standing with respect to Hoch-Parker. It concluded that since Hoch-Parker decided not to buy a ticket, he suffered no harm or loss sufficient to invoke the intervention of an Article III court.

On appeal, in an opinion authored by Judge Fuentes and joined by Judges Smith and Barry, the Third Circuit found standing to be lacking for both Finkelman and Hoch-Parker. After asking the parties to submit supplemental briefing on the question of standing, the Third Circuit set aside all state-law and causation questions and proceeded first to the standing issue, recognizing that a "federal court's obligation to assure itself that it has subject matter jurisdiction over a claim is antecedent to its power to reach the merits of that claim." After inferentially taking the NFL to task for not focusing its attack on the question of standing, the Court itemized the three prerequisites of standing: "(1) an injury-in-fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision." In further detailing the prerequisites, the Court emphasized that to allege an injury-in-fact, "a plaintiff must claim the invasion of a concrete and particularized legally protected interest resulting in harm that is actual or imminent, not conjectural or hypothetical." The Court also explained that the causation criterion "requires the alleged injury to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court."

Applying the well-settled law on standing to Hoch-Parker, the Court concluded that "[b]ecause Hoch-Parker never purchased a ticket on the secondary market, he suffered no more injury than any of the possibly tens of thousands of people who thought about purchasing a ticket to the Super Bowl and chose not to." "Article III is simply not that expansive," is the epitaph the Court applied to Hoch-Parker's lawsuit after stating that under Hoch-Parker's concept of injury, "*everyone* who contemplated buying a Super Bowl ticket but decided against it would have standing to bring a claim under the Ticket Law." (Reading the opinion, one wonders whether one or several of the judges aired the word "floodgates" among their clerks in deciding the appeal).

With regard to Finkelman, the Court also found standing to be lacking. In response to Finkelman's argument that the NFL's misconduct prevented him from purchasing a face-price ticket, the Court held that because Finkelman failed to enter the NFL's ticket lottery, "there was always a *zero* percent chance that he could procure a face-price ticket." On Finkelman's second theory—that the NFL's conduct caused price inflation, thus entitling Finkelman and others who bought tickets on the secondary market to a refund of the amount they paid over the face price—the Court reasoned that because Super Bowl ticketholders have a great incentive to resell their tickets for a price higher than face value regardless of whether the NFL illegally withholds tickets, the Court had "no way of knowing whether the NFL's withholding of tickets would have had the effect of increasing or decreasing prices on the secondary market" and emphasized that speculation was insufficient to sustain Article III standing.

Finally, because the NFL did not raise the issue of Finkelman's Article III standing before the District Court, the Third Circuit remanded for the District Court to determine whether leave to amend the complaint should be granted.

When it is all said and done, one passage from the opinion appears to sum up the essence of the case: "Just as the realities of supply and demand mean that not everyone who wants to attend a popular event will be able to do so, federal courts, too, are not open to everyone who might want to litigate in them."

THIRD CIRCUIT FINDS NO JURISDICTION OVER PATENT-RELATED PETITION FOR WRIT OF MANDAMUS

In re Dr. Lakshmi Arunachalam, 812 F.3d 290 (3d Cir. 2016)

Brian Willett
Reed Smith LLP, Pittsburgh, PA

When it comes to interpreting statutes, every word matters. Recently, in *In re Dr. Lakshmi Arunachalam*, the United States Court of Appeals for the Third Circuit emphasized that point in holding that three words in 28 U.S.C. § 1651 were dispositive of significant jurisdictional issues in patent actions. Specifically, the Third Circuit held that a close reading of § 1651(a) definitively established that the proper court to rule on a petition for writ of mandamus arising out of a patent action in the United States District Court for the District of Delaware was not, as petitioner argued, the Third Circuit. Instead, it was the United States Court of Appeals for the Federal Circuit that properly had jurisdiction over a petition for writ of mandamus for an order requiring the disqualification of a district judge. While the Third Circuit ordinarily would have appellate jurisdiction over an action arising out of the District of Delaware, the court found that the patent-related nature of the case mandated transfer to the Federal Circuit, which has exclusive jurisdiction over appeals in patent infringement actions.

The matter reached the Third Circuit after Arunachalam, plaintiff in a number of patent suits filed in the District of Delaware, sought to disqualify the District Judge because he owned mutual funds with holdings in some of the corporate defendants in Arunachalam's actions. The District Judge denied Arunachalam's motions to disqualify, and Arunachalam subsequently sought a writ of mandamus from the Third Circuit.

Operation of the All Writs Act

Although it is 28 U.S.C. § 1295(a)(1) that provides for the Federal Circuit's exclusive jurisdiction over appeals in patent infringement cases, the Third Circuit's decision that the Federal Circuit had exclusive jurisdiction hinged primarily on the phrase "in aid of" found in § 1651(a). The latter statute, more familiarly known as the All Writs Act, was crucial to the Third Circuit's determination that it lacked jurisdiction over Arunachalam's petition.

The per curiam opinion noted that because Arunachalam's actions were "premised solely on alleged patent infringement," § 1295(a)(1) provided the Federal Circuit with exclusive jurisdiction over any final decisions in the actions. Then, acknowledging that "identify[ing] a jurisdiction that the issuance of the writ might assist" is a prerequisite for considering an application for mandamus, the Third Circuit found that in light of the Federal Circuit's exclusive jurisdiction, "it does not appear that the actions may at some future time come within th[is] court's appellate jurisdiction." Accordingly, acting on the writ would not be "in aid of" the Third Circuit's jurisdiction, as the court lacked appellate jurisdiction over the actions.

Supporting Case Law

In addition to the statutory interpretation, the Third Circuit drew support for its ruling from decisions in other Circuits, noting that "the only Courts of Appeals to have addressed this issue have concluded that they lack jurisdiction to issue writs of mandamus in patent infringement actions over which the Federal Circuit has exclusive appellate jurisdiction." Specifically, the Third Circuit pointed to *Lights of America, Inc. v. United States District Court for the Central District of California*, 130 F.3d 1369, 1370 (9th Cir. 1997), in which the Ninth Circuit held it lacked jurisdiction over an emergency petition for writ of mandamus due to the Federal Circuit's exclusive jurisdiction over appeals in patent actions and observed that the "All Writs Act is not itself a source of jurisdiction." Similarly, in *In re BBC International, Ltd.*, 99 F.3d 881 (7th Cir. 1996), the Seventh Circuit found it lacked authority to rule on a writ of mandamus to transfer litigation because, due to § 1295(a)(1), the Federal Circuit would have exclusive jurisdiction over any appeal from a lower court decision.

Petitioner's Arguments Unpersuasive

The Court of Appeals also explained its rationale for rejecting Arunachalam's other authorities. First, contrary to Arunachalam's arguments, jurisdiction

(continued on page 5)

PRESIDENT'S NOTE

Peter Goldberger
President, Third Circuit Bar Association

This issue of the Third Circuit Bar Association newsletter once again brings us a variety of interesting and informative articles to enhance our knowledge and understanding of appellate practice. Brian Willett, from Pittsburgh, and Rick Freeman, from Philadelphia, draw our attention to two recent decisions that highlight the sort of issues that cannot be overlooked, despite the natural tendency we all share to focus immediately on the merits of a legal dispute—appellate jurisdiction and Article III standing. Each of these decisions teaches a lesson with value far beyond the particular facts of the case at hand.

Our stalwart newsletter co-editor, Patrick Yingling, introduces us to the Third Circuit's newest judge, L. Felipe Restrepo. Readers who have not had the pleasure of knowing Judge Restrepo as a practitioner, as a U.S. Magistrate or as a District Judge in E.D.Pa., will enjoy learning about his unique background as we all welcome him to the Court of Appeals. His wait for confirmation was too prolonged, and still leaves the Court with vacancies. I hope all members of the Association will encourage their Senators to keep judicial nominations on the agenda, even during an election year.

Matt Stiegler, whose "CA3 Blog" is a must-read for those of who practice in the Circuit, offers a succinct and informative guide to the en banc process. Beginners and experienced practitioners alike will find something in this piece that they didn't know before but wish they had.

The latest revision of the Association's indispensable Practice Guide will be out soon, and made available to all members. As always, the Board thanks you for your continued membership and your support for the Court and for our Bar Association.

THIRD CIRCUIT FINDS NO JURISDICTION OVER PATENT-RELATED PETITION FOR WRIT OF MANDAMUS

— continued from page 4

could not be based on 28 U.S.C. § 1294(1), the residual jurisdictional statute, because that statute applies only to appeals, not writs of mandamus.

Second, the Third Circuit found Arunachalam's reliance on *Medtronic AVE, Inc. v. Advanced Cardiovascular Systems, Inc.*, 247 F.3d 44 (3d Cir. 2001) to be of no moment. There, the Court held that it had jurisdiction, not over a writ of mandamus petition, but to review an interlocutory but immediately appealable order in a patent action.

While the Third Circuit acknowledged the mandate of § 1295(a)(1) in *Medtronic*, it reasoned that the statute applied only to final decisions, and an interlocutory order denying a stay pending arbitration would thus not fall within its purview. Additionally, the court noted that in *Medtronic*, it was considering jurisdiction in the appellate context (as opposed to the mandamus context), so its decision was based upon which court properly had jurisdiction in the present, not the future. Accordingly, § 1651's constraint on issuing writs "in aid of" its jurisdiction would be inapplicable.

SAVE THE DATE

The Federal Court Section of the Allegheny County Bar Association is pleased to invite members of the Third Circuit Bar Association to save the date for a continuing legal education opportunity:

2016 Third Circuit Review of Cases

Join a panel of distinguished moderators who will engage Third Circuit Judges in a lively and informative discussion of the past year's most notable cases.

Thursday, May 19
2:00 to 4:00 p.m.

Joseph F. Weis Jr. United States Courthouse
Pittsburgh, Pennsylvania

Reception to follow.

Watch your inbox! Details and a registration link will be emailed to Third Circuit Bar Association members.

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 & Azzarello
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

Membership/Dues: Donna M. Doblick
Rules: Deena Jo Schneider and David Fine
Programs: Lisa J. Rodriguez and Robert A. Vort
Publicity/Newsletter: Colin E. Wrabley and Paige H. Forster
Website: Deena Jo Schneider (interim)

OFFICERS

President: Peter Goldberger
Ardmore, PA

President-Elect: Charles L. Becker
Philadelphia, PA

Secretary and Acting Treasurer: Andrew C. Simpson
St. Croix, U.S. Virgin Islands

Immediate Past President: Lisa Freeland
Pittsburgh, PA

DIRECTORS

Howard Bashman
Willow Grove, PA

Edson Bostic
Wilmington, DE

Donna M. Doblick
Pittsburgh, PA

David Fine
Harrisburg, PA

Dolace McLean
St. Thomas, U.S. Virgin Islands

Lisa J. Rodriguez
Haddonfield, NJ

Deena Jo Schneider
Philadelphia, PA

Robert A. Vort
Hackensack, NJ

Witold (Vic) J. Walczak
Pittsburgh, PA

At Large (vacant)

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