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On Appeal

3CBA BOARD MEMBER LISA FREELAND REFLECTS ON RECENT SUPREME COURT PRACTICE

By Lisa B. Freeland, Federal Public Defender, Western District of Pennsylvania, and Paige H. Forster, Reed Smith LLP

Lisa B. Freeland, Federal Public Defender (FPD) for the Western District of Pennsylvania and Secretary of the 3CBA Board of Governors, has had two cases heard by the U.S. Supreme Court in the past two years: *United States v. Stevens*, No. 08-769 (130 S. Ct. 1577) and *Dillon v. United States*, No. 09-6338 (130 S. Ct. 2683).

United States v. Stevens. The FPD's client, Robert Stevens, had made and sold videos of pit bull fights. He was convicted and sentenced to 37 months' imprisonment under a federal statute aimed at criminalizing "crush videos," which show the torture and killing of small animals and are intended to be sexually arousing. The en banc Third Circuit overturned Stevens' conviction, holding that the statute was an unconstitutional content-based restriction of protected speech. The government petitioned for certiorari, and the FPD enlisted outside counsel to oppose certiorari (Patricia Millett of Akin Gump Strauss Hauer & Feld and Jeffrey Fisher of the Stanford Law School Supreme Court Litigation Clinic). After certiorari was granted, the same outside counsel spearheaded the merits brief and argued the case. Stevens and the FPD won when the Supreme Court affirmed, concluding that the statute "create[d] a criminal prohibition of alarming breadth" and violated the First Amendment.

Dillon v. United States. The FPD's client, Percy Dillon, was convicted in 1993 of possession of crack cocaine with intent to distribute. Under the pre-Booker mandatory Sentencing Guidelines, the District Court reluctantly sentenced Dillon to nearly twenty-seven years' imprisonment, concluding that it was not permitted to sentence him below the Guidelines range. The length of Dillon's sentence was partly due to the 100-to-1 disparity in the treatment of crack versus powder cocaine. In 2007, the Sentencing Commission partly remedied the crack-powder disparity. Dillon subsequently filed a motion for a sentence reduction, citing not only the severity of his sentence but also his extraordinary rehabilitation in prison, which included his leadership role in establishing educational programs both behind bars and in the community. The District Court reduced Dillon's sentence to twenty-three years, the bottom of the new Guidelines range. It concluded that it could not go further because a policy statement in the Sentencing Guidelines says that courts should not reduce a sentence below the Guidelines range unless the original sentence was also below the Guidelines range. The Third Circuit affirmed. The FPD filed a certiorari petition on Dillon's behalf, which was granted. Lisa led the drafting of the merits brief and argued the case. Dillon and the FPD lost when the Supreme Court affirmed, concluding—over a strong dissent by Justice Stevens—that the Sentencing Guidelines policy statement remained mandatory because resentencing proceedings were not affected by Booker's holding that made the Sentencing Guidelines advisory rather than mandatory.

Lisa Freeland recently discussed her Supreme Court practice with *On Appeal*.

How often does your office file petitions for certiorari, and how do you choose cases in which to file petitions?

We don't routinely file petitions for certiorari, and when we do, the reasons vary. We strive to follow the Court's rules—focusing on cases where there is a circuit split, an issue of national importance, or a need for clarification in the law.

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WILKES BARRE LABOR PRECEDENT IN QUESTION FOLLOWING SUPREME COURT RULING

By David J. Bird, Reed Smith LLP

Last summer, many expected that the U.S. Supreme Court would use *Granite Rock Co. v. Int'l Brotherhood of Teamsters & Teamsters Local 287*, No. 08-1214, 130 S.Ct. 2847 (June 24, 2010), to resolve a long-standing circuit split over whether a party could bring a claim under section 301 of the federal Labor Management Relations Act (LMRA) for tortious interference with a collective bargaining agreement between an employer and a union. The Third Circuit is the only circuit that unequivocally has held that a party may bring a claim for tortious interference under section 301. See *Wilkes-Barre Publ'g Co. v. Newspaper Guild of Wilkes-Barre*, 647 F.2d 372 (3d Cir. 1981).

The Supreme Court ultimately ruled that the Granite Rock Company could not bring a section 301 claim against the International Brotherhood of Teamsters for allegedly causing a violation of Granite Rock's collective bargaining agreement with a local union. However, the Court did so on very narrow and case-specific grounds and did not definitively rule that a party could not bring such a claim as a matter of law.

Thus, it is unclear what impact, if any, *Granite Rock* will have on the Third Circuit's decision in *Wilkes-Barre* allowing tortious interference claims under section 301. Arguably, *Granite Rock* does not overrule that precedent. But the Supreme Court's skepticism about such claims and its narrow reasons for rejecting the Granite Rock Company's particular claim may provide grounds for a future panel of the Third Circuit to reconsider the issues.

Section 301 Of The LMRA

Section 301 of the LMRA creates a federal cause of action for a "violation of [a] contract[] between an employer and a labor organization." A long line of Supreme Court cases has construed section 301 as authorizing the federal courts to develop a body of federal common law to remedy disputes arising out of labor contracts. Many of these Supreme Court cases recognize that section 301 has a powerful preemptive effect on state law causes of action that would require a court to construe and enforce a labor contract. And following the Supreme Court's jurisprudence, federal and state courts typically have held that section 301 preempts state law claims for tortious interference with a contract

where the contract at issue is a labor contract arising under the LMRA.

The Circuit Split Over Tortious Interference Claims Under Section 301

In *Wilkes-Barre Publishing*, 647 F.2d 372, the Third Circuit held that a newspaper publisher could bring a section 301 claim against an international union and the publisher's competitors, alleging that the defendants caused the local union to violate the agreement. The court's decision began with the plain language of section 301(a), which broadly authorizes "suits" for violations of labor contracts. The court also took note of Supreme Court precedent giving section 301 a broad preemptive effect on state law claims.

With these general principles in mind, the *Wilkes-Barre Publishing* court held that section 301 provides federal jurisdiction over any suit that seeks remedies for a violation of an agreement between an employer and a union, even if the defendants are not parties to the agreement. Nothing in either the Supreme Court's jurisprudence or the text of section 301 suggested that section 301 actions should be limited to contract claims between parties. And because a "violation" of the collective bargaining agreement would be an "essential element" of any tortious interference action, the Third Circuit reasoned that the claim could not arise under state law and had to arise under the federal common law authorized by section 301.

Other circuits also recognized that section 301 preempts state law actions for tortious interference, but they generally held that a party could not bring such an action under section 301. These circuits held that common law remedies under section 301 are limited to suits against a defendant who either is a party to a labor agreement or has assumed specific rights or obligations under it.

Granite Rock: The Supreme Court Fails To Resolve The Split

Granite Rock appeared to be a good opportunity for the Supreme Court to resolve the split concerning the scope of federal remedies under section 301. The Granite Rock Company sued the International Brotherhood of Teamsters (IBT) (which was not a party to the collective bargaining agreement), alleging that the IBT tortiously induced a local union to violate the agreement. The Ninth Circuit held that

the Granite Rock Company could not bring its tort claim against the IBT, following the reasoning of a number of other circuits on this issue.

The Supreme Court wound up deciding *Granite Rock* on exceedingly narrow and case-specific grounds, holding only that Granite Rock's attempt to assert a common law tort remedy against the IBT was "premature." The Court found that *Granite Rock* had failed to demonstrate the inadequacy of other "potential avenues" for deterring and redressing the damage caused by the IBT's alleged misconduct.

The Future of Wilkes-Barre In The Third Circuit

The Third Circuit has not addressed tortious interference claims under section 301 since *Granite Rock* was decided last June. And it is unclear what will happen when the next claim for tortious interference under section 301 is appealed. *Granite Rock* did not overrule *Wilkes-Barre* or adopt a construction of section 301 that is clearly inconsistent with it. A strong argument could be made that *Wilkes-Barre* remains binding on future Third Circuit panels.

But, by the same token, *Granite Rock* is openly skeptical about the use of section 301 to remedy tortious interference with a labor contract. The decision suggests that federal common law under section 301 should not be invoked until a plaintiff has demonstrated that there are no other "avenues" for deterring and redressing the damage caused by the alleged interference. These other avenues could include administrative proceedings with the National Labor Relations Board, breach of contract claims under the LMRA based on alter ego and agency theories of liability, and claims under state law. Pursuing (or demonstrating the futility of) all these avenues would likely be both costly and time-consuming.

Accordingly, *Granite Rock* leaves the law in the Third Circuit unsettled. And it may remain that way for a long time, because tortious interference claims under section 301 were extremely unusual even in the Third Circuit under *Wilkes-Barre*. Labor law practitioners in the Third Circuit must wait for guidance on this issue. Meanwhile, they will continue grappling with *Wilkes-Barre* and numerous other issues that were addressed by the parties in *Granite Rock* but not fully explored in the Supreme Court's opinion.

BOARD MEMBER REFLECTS ON SUPREME COURT PRACTICE—continued from page 1

Dillon, though, could impact our future decision-making. That case did not meet any of the traditional cert requirements. All of the circuits that had considered the question had decided against us. But the Assistant Federal Defender on the case was so dissatisfied with the Third Circuit's decision that she drafted a cert petition anyway. We think that cert was granted because of Percy Dillon himself—his personal story, including his incredible rehabilitation and his sentence that was so excessive. Other cert petitions on the same issue had been denied, and the legal distinctions between those cases and Dillon's were minimal.

Once cert was granted, how long was the briefing process, and what did it consist of? What team did you work with during this process?

In *Stevens*, the Supreme Court granted cert in April 2009. The parties agreed on a briefing schedule that was longer than the rules provide for, and we argued the case on the second day of the subsequent term—October 6, 2009. *Dillon* was much quicker. Cert was granted in early December 2009, and we argued the case on March 30, 2010. I don't remember last Christmas!

Stevens, the First Amendment case, was unusual from the start. First Assistant Federal Public Defender Michael Novara tried the case, and he developed the arguments that ultimately prevailed together with one of our research and writing specialists. Assistant Federal Public Defender Karen Sirianni Gerlach handled the Third Circuit appeal, again pressing the arguments that the trial team had teed up for appeal. We knew Mr. Stevens would be hotly pursued as a Supreme Court client. Even before the Third Circuit ruled, lawyers and law professors started calling. In the end, Mr. Stevens decided to stick with the team we put together to oppose cert—Akin Gump and the Stanford Law School Supreme Court clinic—because he knew and trusted us.

In *Dillon*, I drafted the merits brief. The editing team was five or six people including fellow 3CBA Board member Peter Goldberger and Jeffrey Fisher of the Stanford clinic. Throughout the process, I also relied heavily on federal public defenders from around the country who are part of a group known by the

awful acronym of DSCRAP: the Defender Supreme Court Research and Assistance Panel.

The most important lesson I learned is that no one handles a Supreme Court case on her own. The process is short in terms of months, but it requires an enormous amount of work, including from people whose names never appear on the briefs. I had a ton of input, including edits and suggestions that were emailed to me at one o'clock in the morning. The process of assessing and incorporating everyone's thoughts and ideas was so taxing that there were times when I wanted to shut everyone down. But all of the contributions were extremely helpful—both in drafting the brief and in preparing for oral argument—because by the time I stood up in court, there was almost nothing I hadn't heard and considered.

How did *Stevens*, which you handled with outside counsel, differ from *Dillon*?

In *Dillon*, I was at the center of the process: I was the drafter who received everyone's edits. In *Stevens*, I could sit back and watch the process more, because I was one of many people providing edits to the drafter. So the two experiences were quite different.

In *Stevens*, First Assistant Michael Novara and I were primarily responsible for protecting Mr. Stevens and his family from the media as oral argument drew near. There were things that we didn't want bandied about in the public arena, but there were also facts that we wanted to publicize—primarily that even though Mr. Stevens' conviction stemmed from his production of pit bull fighting videos, he was an animal lover. He raised animals, and those animals were members of his family, just like your pets or mine. People wanted to write about his case, so we had the opportunity to carefully answer questions and help disseminate information about Mr. Stevens.

Stevens was a First Amendment case that got lots of mainstream press, whereas *Dillon* involved the intricacies of the federal Sentencing Guidelines. Did these substantive differences make the cases feel different?

Yes. *Dillon* did not get a lot of press coverage, but the issue—the mandatory versus advisory nature of the policy statement regarding resentencing—is critically important to criminal defendants. In fact, I was one of the witnesses who testified before the Sentencing Commission in November 2007 about whether the partial remedy of the crack-powder disparity should be made retroactive. I testified that it should be, because in reopening a sentence, the traditional retroactivity concerns do not apply—finality is not at issue where the decision has already been made to reopen a prior sentence to correct it.

Federal Defenders in other, more populated districts saw hundreds of cases where the Guidelines sentences were thirty years to life, but that was and is not commonplace in the Western District of Pennsylvania. Judges routinely say that criminal sentencing is the hardest, most stressful thing they do; the crack-powder disparity was one of the issues they frequently complained about. The judge who sentenced Mr. Dillon spoke publicly about his distress over the sentence. For a judge to speak out in that fashion was highly unusual.

For two decades we all had to accept the crack-powder sentencing disparity, even though we knew it was wrong. Then the Sentencing Commission recognized the wrong and implemented a partial fix, but the policy statement limited our ability to redress this longstanding injustice. So, *Dillon* was of great interest to many people, even though it was not a "mainstream" case.

In August, Congress passed the Fair Sentencing Act of 2010, which changed the crack-powder disparity in the federal drug statute from 100:1 to 18:1. The statute directed the Sentencing Commission to promulgate a corresponding emergency amendment to the Sentencing Guidelines, which took effect November 1, 2010, changing the Guidelines ratio to 18:1.

What was oral argument like for you? Is it true, as you so often hear, that oral argument is a terrific experience?

It's true! Supreme Court oral argument is great.

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CASE OF INTEREST: *HARRIS V. KELLOGG BROWN & ROOT SERVICES, INC.*, NO. 09-2325 (AUGUST 17, 2010)

Third Circuit continues to illuminate contours of collateral order doctrine

By Paige H. Forster, Reed Smith LLP

In *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599 (2009), the Supreme Court concluded that the collateral order doctrine should be applied more narrowly than some Courts of Appeals (including the Third Circuit) had been applying it. The collateral order doctrine allows review of a non-final order if the order (1) conclusively determines (2) “an important issue completely separate from the merits of the action” and (3) “would be effectively unreviewable on appeal from a final judgment.” *Will v. Hallock*, 546 U.S. 345, 349 (2006). The Supreme Court ruled in *Mohawk* that orders requiring production of arguably privileged documents are not “effectively unreviewable” because they can be remedied on appeal through a remand for retrial with the privileged information excluded from evidence.

In the last edition of *On Appeal*, we reported on *New Jersey v. Fuld*, 604 F.3d 816 (3d Cir. 2010), which followed the Supreme Court’s narrow reading of the collateral order doctrine (see our analysis [here](#)). The Third Circuit concluded that denial of a remand motion was not “effectively unreviewable” because the case could be remanded to state court on appeal from the final judgment.

Recently, in *Harris v. Kellogg Brown & Root Services, Inc.*, 618 F.3d 398 (3d Cir. 2010), the Third Circuit maintained its strict view of the collateral order doctrine. *Harris* does not center on the “effectively unreviewable” prong of the collateral order test, but instead considers whether a district court’s denial of a Rule 12 motion to dismiss “conclusively determined” a key question in the litigation.

The tragic facts of the *Harris* case may be familiar from news reports. The plaintiffs’ son, an Army Ranger stationed in Iraq, died from electric shock while showering in his quarters because the building’s electrical system was not properly grounded. Plaintiffs brought negligence claims against Kellogg Brown & Root Services, Inc. (“KBR”), the contractor responsible for electrical maintenance.

KBR moved to dismiss on two grounds: that the case presented a non-justiciable political question, and that KBR was entitled to “combatant activities” immunity. *Id.* at 400. The District Court denied the motion without prejudice, noting that very little discovery had taken place and stating that KBR could renew its motion later if the facts warranted it.

KBR sought certification of an interlocutory appeal under 28 U.S.C. § 1292(b), which the District Court

denied. KBR appealed anyway, arguing that the denial of its motion to dismiss was reviewable under the collateral order doctrine. Judge Smith, writing for a unanimous panel that included Judges Fisher and Cowen, disagreed. The Court relied on its own case law and Supreme Court case law holding that an order cannot be a “conclusive determination” under the first prong of the collateral order test if it is tentative, conditional, provisional, or subject to further review. *Id.* at 401-02. The District Court had twice “made clear that her rejection of [KBR’s] . . . defenses was not necessarily her ‘final disposition’ of those issues.” *Id.* at 402. Thus, the Third Circuit concluded that the order “was nothing resembling a complete, formal, and final rejection of [KBR’s] position.” *Id.* (internal quotes, alterations, and citation omitted).

The Court concluded that taking jurisdiction of the appeal would lead to “piecemeal” litigation. *Id.* at 403. It stated that “[t]here could be no clearer example of the very redundancy, delay, and waste of judicial resources that the final decision rule is intended to prevent.” *Id.* *Harris*, read together with the Supreme Court’s *Mohawk* decision and the Third Circuit’s earlier *Fuld* decision, seems to indicate that the Third Circuit will continue to narrowly construe all prongs of the collateral order doctrine.

PITTSBURGH’S THIRD CIRCUIT LIBRARY DEDICATED IN HONOR OF JUDGE WEIS

The Third Circuit Library in the federal courthouse in Pittsburgh was dedicated on October 20 as the Joseph F. Weis, Jr. Library. The dedication ceremony was a fitting tribute to Judge Weis, who has served with distinction on the Third Circuit bench since 1973. In his thirty-seven (and counting) years of service, Judge Weis has made contributions not only to the Third Circuit, but to the federal judiciary as a whole. In March 1989, Chief Justice Rehnquist named him chairman of the congressionally-created Federal Courts Study Committee, which was charged with reviewing problems created by the explosion in federal court caseloads and developing a long-range plan for the future of the courts. No entity had been given such broad authority in nearly a century. Judge Weis’s committee took a little over a year to produce a report containing one hundred specific recommendations for federal court reform. Several of them were immediately enacted and others have continued to shape the courts since. Aside from his jurisprudential accomplishments, which include significant opinions on judicial ethics, Judge Weis has also chaired Third Circuit and ABA committees on court technology.

Judge Aldisert, joining the library dedication by videoconference, painted a vivid picture of legal practice on Pittsburgh’s Grant Street when Judge Weis began his career and practice in 1950. Judge Garth gave an insider’s perspective on Judge Weis’s contribution to the Third Circuit family. David Strassburger, who clerked for Judge Weis from 1996 to 1998, also spoke, and Judge Smith concluded with a moving portrayal of Judge Weis as a caring individual and family man.

No tribute to Judge Weis would be complete without highlighting his service in the Army during World War II. He fought under General Patton, was severely wounded in action and was decorated multiple times. One of Judge Weis’s comrades in arms, who drove a jeep under fire to rescue him after he was wounded, was present at the dedication. He received a rousing ovation in recognition of his bravery—and his indirect, but vital, contribution to the Third Circuit!

Judge Weis’s remarks were, as might be expected, understated and modest. But the Joseph F. Weis, Jr. Library now stands as a fitting acknowledgment of his personal, professional, and jurisprudential contributions to the Third Circuit.

FROM THE PRESIDENT'S DESK

It has been an eventful summer and fall for the 3CBA. At the end of the summer, we co-sponsored an informative CLE in Pittsburgh, "Watch out for the Waives: How Good Lawyers Waive Good Arguments On Appeal." Judge D. Michael Fisher and Judge Thomas Hardiman lent their expertise as panelists, along with Western District Judge Donetta Ambrose and 3CBA members Donna Doblack and Robert Byer. After Donna Doblack's presentation on waiver pitfalls, Vic Walczak, a member of the 3CBA's Board of Governors, moderated a lively question-and-answer session. The panelists, including the judges, provided candid and helpful insights. Reed Smith LLP hosted a rooftop reception afterward, where participants could continue the discussion. Look for announcements about further high-quality 3CBA-sponsored CLEs in your e-mail, this newsletter, and our [website](#).

Two judges of the Third Circuit have recently received much-deserved honors. Judge Anthony

Scirica received the 28th Annual Edward J. Devitt Distinguished Service to Justice Award, often referred to as the "Nobel Prize of Judging." And the Third Circuit Library in Pittsburgh was dedicated in honor of Senior Judge Joseph Weis (who, incidentally, received the Devitt Award in 1992). I had the honor of attending the dedication, which was a moving tribute to an outstanding jurist and person. For more on that event, see [here](#). Both Judge Weis and Judge Scirica are integral parts of the fabric of what Judge Garth fondly referred to at the dedication as "the mighty Third."

The time has come for the changing of the guard in the 3CBA leadership. I am pleased to be turning over the reins to Steve Orlofsky. Steve is an outstanding lawyer and bar leader who will bring a wealth of experience to the 3CBA. We are looking forward to his stewardship in the coming year.

As my term draws to a close, I am grateful for the support and participation of many people, including the Board of Governors, our liaison judges, and the staff of the Third Circuit, particularly Marcia Waldron and Toby Slawsky. Peter Goldberger and George Leone, for all their work on the Rules Committee, and Colin Wrabley and Paige Forster, for their work on the newsletter, deserve special mention. So does Nev Heimall for keeping us all connected. Finally, this note would be incomplete without a thank you to our first president, Nancy Winkelman, for all the thoughtful advice she has provided.

To the members of the 3CBA, a particular thank you as well for your support of the association and its mission. Find a colleague or two to join and become an active participant!

James C. Martin
President, Third Circuit Bar Association

BOARD MEMBER REFLECTS ON SUPREME COURT PRACTICE—continued from page 3

I had very little time to prepare, because our reply brief in *Dillon* was filed less than two weeks before argument. I had two moots, one with the DSCRAP defenders' group and one at Georgetown University Law Center. I have a colleague from Oregon who was arguing the other case on the same day as *Dillon*. He did the same moots that I did, and he prepped by the book. He wore the suit he was going to wear to court and he had his binder put together. I had no outline and no binder at that point—just my thoughts on scraps of paper!

I spent a great deal of time on my three- or four-sentence opening statement. I'd heard that I would probably get two or three minutes to speak before the Justices interrupted, and I worked hard to take advantage of that two or three minutes. I had to think carefully about every word so that my statement would be persuasive but not controversial; no pauses or "therefores" that would provide an opportunity for the Court to cut me off.

Another important part of my prep, which I initially prioritized above preparing my outline, was reading oral argument transcripts from other cases

involving *Blakely* and *Booker*. I wanted to see what the Justices had to say in other cases related to my issue. I put together my outline the weekend before argument, and I put together my binder at the hotel the night before argument.

By the time you begin prepping for argument, you have confidence and knowledge, but there's a lot of conventional wisdom that comes at you. The big question is whether to do what you know works for you, or whether to take advice from people who've done what you have never done before. I think I successfully married the two. For instance, preparing my binder the night before was my style—but I followed conventional wisdom in that I *had* a binder! Some people don't do anything the night before argument, but it was a good strategy for me to go over things that night and create my system for finding documents I might need at the podium.

After everything was over, I saw pictures of myself at the Court before argument, and I couldn't have looked more tense. But when they called my case, all of the myths about the Supreme Court slipped away, we were off and running, and it was just

eight people talking to me about my case. It was over before I knew it.

I was hugely relieved, because I knew we had done everything we could. It was a satisfying feeling. Also, I had every opportunity to speak; the Justices vigorously questioned me, but were very polite and didn't excessively interrupt me. Some attorneys get cut off at every turn, and my argument was not like that.

My parents, my brother, friends, and people from my office all came to the argument. A retired Third Circuit judge helped my parents to get seats in the Justices' guest section so they were able to hear me and see my face. It was truly a special moment. Another thing that made the argument very special was something that Peter Goldberger later confirmed. So far as we can tell, *Dillon* was the first Supreme Court case that was argued by two African American women.

Leondra Reid Kruger, Assistant to the Solicitor General, argued on behalf of the government.

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BOARD MEMBER REFLECTS ON SUPREME COURT PRACTICE—continued from page 5

Lisa argued before eight Justices rather than nine because Justice Alito recused himself, as Lisa found out via a phone call the evening before argument. Justice Alito had been involved in the panel that remanded Dillon's case on direct appeal, as well as the panel that denied Dillon a Certificate of Appealability in a § 2255 habeas corpus proceeding.

You lost the *Dillon* appeal, but Justice Stevens wrote a strong dissent. Did the dissenting opinion make a difference to you?

I am so thankful for the dissent. Justice Stevens spoke the truth—which was gratifying, but bittersweet. I believe the opinion may have been Justice Stevens' last dissent, and it makes me sad to know that we are losing not only Justice Stevens' vote, but his voice.

It was unsatisfying to us that the Court granted cert in *Dillon* only to write the opinion they did. They wrote basically the same opinion that the Circuits had written, and it was neither more thorough nor more analytical. In that sense, the outcome in *Dillon* was confusing.

What have other lawyers asked you most often about your Supreme Court experiences?

Lawyers frequently ask whether Supreme Court argument is different than arguing before any other court, and the answer is yes. I've frequently argued before the Third Circuit, and I've also argued before the New York state appellate courts. In my experience, those courts are much more focused on the facts of the case and the governing law.

Supreme Court Justices tend to say to you: "I've looked at everything and this is what I think; what do you think about that?"

One thing I don't get asked, but always say when I can, is that it would be fool's play to try to handle a Supreme Court case on your own—even the brief. A Supreme Court appeal ranges from extreme intellectualism to the most tedious minutiae. I spent hours on the phone with the printer making sure that every hyphen and dot was correct. We pondered questions like, "Should we capitalize 'Guidelines' here? What about here?" There is so much to do, that to do it right, a Supreme Court case has to be a team effort.

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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).