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On Appeal

3CBA ASSISTS ALLEGHENY COUNTY BAR ASSOCIATION TO PROVIDE GREAT CLE OPPORTUNITY: THIRD CIRCUIT JUDGES SPEAKING ABOUT RECENT NOTABLE CASES

By Kyle Bahr, Reed Smith, LLP

Members of the Third Circuit Bar Association are invited to attend "A View From the Bench: The Third Circuit Judges Present Notable Cases of the Past Year," the 2012 version of the Allegheny County Bar Association's annual Third Circuit Review of Cases. With this program, held from 2:30 p.m. to 4:30 p.m. in Courtroom 6A of the Federal Courthouse in Pittsburgh, PA, on April 17, 2012, the ACBA Federal Court Section presents a rare opportunity to hear Third Circuit Judges speak on the Third Circuit's most influential recent cases.

In addition to being a valuable opportunity to obtain insights directly from Third Circuit judges, this year's program represents a partnership between the ACBA Federal Court Section and the 3CBA. Members of the 3CBA have contributed to the packet of case summaries that will be provided to attendees at the event.

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PERMISSION TO EXCEED THE PAGE OR WORD LIMITATIONS FOR BRIEFS IS NOW THE EXCEPTION, NOT THE RULE

By Hon. Theodore A. McKee, Chief Judge

In the wake of the Court's January 9, 2012 Standing Order, I thought that it might be helpful to offer some background and additional explanation for why the Court abandoned its past practice and moved to severely limit the number of over-length briefs that are filed. We all know that the best and most persuasive appellate briefs are those that capture the reader's attention and present an argument with precision. Yet, anyone who has had to draft an appellate brief knows how difficult it is to do that.

The Federal Rules of Appellate Procedure permit opening briefs of 30 pages or 14,000 words and reply briefs of 15 pages or 7,000 words. Slightly larger limitations govern certain briefs in cross-appeals. Over the past few years, requests to exceed those limits grew to the point that it began to appear that a significant number of briefs were being filed in this Court that exceeded FRAP's limitations. Judges became so used to seeing (and perhaps even expecting) motions to exceed the page or word limitations of briefs that it began to appear that such motions were being granted routinely and at a rate that was hardly justified by the merits of the appeals involved.

To determine whether this was true, the Clerk's office conducted a random study of approximately 500 cases. We were dismayed by the result. Motions to exceed the page or word limitations were being filed in approximately 25% of all cases. Of the 268 motions reviewed, 71% sought an increase greater than 20%. And, we granted 90% of all motions to exceed the page or word limitations. "Brief bloat" had become a reality in the Third Circuit.

In order to put our situation in perspective, the Clerk's office informally surveyed the Clerks of other Circuit Courts. Of the 12 Circuits surveyed, 9 Circuits reported that they "rarely" or "almost never" grant motions to exceed the page or word limitations. The Second Circuit, not included in this group, receives fewer than 10 motions a month. The remaining Circuits did not indicate any particular problem

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3CBA ASSISTS ALLEGHENY COUNTY BAR ASSOCIATION...

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A panel of Third Circuit Judges will discuss and answer questions regarding the Circuit's leading decisions published between April 1, 2011 and February 29, 2012. The program's distinguished moderators include Magistrate Judge Cynthia R. Eddy of the United States District Court for the Western District of Pennsylvania, Dean Mary Crossley of the University of Pittsburgh School of Law, and Dean Ken Gormley of Duquesne University School of Law. Following the program, attendees and panelists are invited to a reception in the Courthouse.

The program is available for 2 Pennsylvania CLE credits. To attend, register for the program at the [ACBA website](#) or by emailing hbooth@acba.org. Registration fees are \$75 for ACBA Federal Court Section members, \$90 for all other ACBA members, and \$105 for non-ACBA members.

Any questions about the event can be directed to co-chairs [Tom May](#) and [Holly Whalen](#).

PERMISSION TO EXCEED THE PAGE OR WORD LIMITATIONS...

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or concern with over-length briefs. The more we looked into what was happening in the Third Circuit, the more it became apparent that a culture had evolved that undermined the importance of keeping briefs within prescribed page/word limits.

Accordingly, we issued the Standing Order Regarding Motions to Exceed the Page Limitations of the Federal Rules of Appellate Procedure on January 9, 2012, effective immediately. Pursuant to that Order, I appointed a three-judge Standing Motions Panel to rule on all motions to exceed the page or word limitations with a few very well defined exceptions. The panel currently consists of myself, Judge Dolores K. Sloviter and Judge D. Brooks Smith. The Standing Order notes that motions to exceed the page or word limitations are strongly disfavored and will be granted only upon demonstration of extraordinary circumstances. The Order describes examples of extraordinary circumstances, including multi-appellant consolidated appeals in which the appellee seeks to file a single responsive brief, or complex/consolidated proceedings in which the parties are seeking to file jointly or the subject matter clearly requires expansion of the page or word limitations.

As emphasized by the Order, Counsel is strongly advised to seek advance approval of requests to exceed the page or word limitations whenever possible or run the risk of rewriting and refile a compliant brief. Any request to exceed not submitted in advance must include an explanation of why counsel could not have foreseen any difficulty in complying with the limitations in time to seek advance approval from the Panel.

To obtain the widest distribution, the Standing Order was posted on the Court's website and the Third Circuit Bar Association e-mailed the Standing Order to its members. The Standing Order now accompanies electronic transmission of case opening materials and briefing schedules.

The Court greatly appreciates the Third Circuit Bar Association's assistance in this matter and its commitment to work with the Court in improving the standards of federal practice. Although compliance with the Order may sometimes be difficult and will almost always take more time than submitting a longer brief, the end product of compliance should be a more finely crafted and precise document that better serves clients and is of far more assistance to the Court.

FROM THE PRESIDENT'S DESK

One of the 3CBA's main goals is to improve the standards of practice in the Third Circuit. Within the next several weeks, our members are involved in two terrific CLE opportunities that will help to do just that. On the evening of April 3, Lisa Rodriguez and I will be two of the presenters at the Federal Appellate Practice program put on by the New Jersey Institute for Continuing Legal Education. We are honored that Judge Julio Fuentes and the Third Circuit's Clerk, Marcia Waldron, will also be presenters. Get the details and register on the [NJICLE website](#).

Then, on April 17, the Allegheny County Bar Association continues a great tradition with a new twist. The tradition is the Third Circuit Review, a CLE offered in conjunction with the Third Circuit's traditional spring sitting in Pittsburgh. Several Third Circuit judges will discuss the most important developments in the Circuit's case law over the past year. The new twist is that for the first time, the 3CBA is helping the ACBA Federal Court Section to put on this program by pitching in with publicity and preparations. Read more [here](#), and then register on the [ACBA website](#) or by emailing the [ACBA](#).

As a final reminder, if you haven't gotten around to renewing your membership for 2012, please do so—and invite a fellow Third Circuit practitioner to join us. Our dues are a bargain at \$40, and they enable you to be a part of important efforts to improve Third Circuit practice, aid the Court in the administration of justice, and facilitate bench-bar relations.

As always, don't hesitate to get in touch with [me](#) if you'd like to share your questions or ideas.

Stephen M. Orlofsky
President, Third Circuit Bar Association

CASE OF INTEREST

KHAN V. DELL, INC., NO. 10-3655 (3D CIR. JAN. 20, 2012)

By Jonathan D. Klein, Gibbons P.C.

The Third Circuit recently considered whether the unavailability of the parties' designated arbitrator vitiates their agreement to arbitrate, or whether it merely calls for the appointment of a replacement arbitrator. *Khan v. Dell Inc.*, No. 10-3655, 2012 U.S. App. LEXIS 1167 (3d Cir. Jan. 20, 2012). Not surprisingly, the answer depends on the wording of the arbitration agreement. But the Court will indulge a strong presumption in favor of arbitrability and will, therefore, direct appointment of a substitute arbitrator unless the agreement "indicate[s] the parties' unambiguous intent not to arbitrate their disputes if [the designated arbitrator] is unavailable." *Id.* at *19. Finding a standard consumer contract to be "ambiguous" on the point, the Third Circuit, in a 2-1 decision, directed the appointment of a replacement arbitrator pursuant to Section 5 of the Federal Arbitration Act (FAA).

Raheel Ahmad Khan, having purchased a computer that he regarded as defective, filed a class action complaint against the seller, Dell, Inc. Dell moved to compel arbitration, citing the arbitration clause in the standard Terms and Conditions of Sale. The clause provided, in part, that claims "SHALL BE RESOLVED EXCLUSIVELY AND FINALLY BY BINDING ARBITRATION AND ADMINISTERED BY THE NATIONAL ARBITRATION FORUM ("NAF") under its Code of Procedure then in effect." *Id.* at *3-4. By the time Khan filed his action, however, the NAF had entered into a consent judgment with the Attorney General of Minnesota that barred it from conducting consumer arbitrations.

Khan argued that, because the NAF was not available, the arbitration clause was void, and his action could proceed in court. The District Court agreed. It denied Dell's motion to compel arbitration, holding that the clause demonstrated the "'parties' intent to arbitrate exclusively before a particular arbitrator, not simply an intent to arbitrate generally." *Id.* at *8 (quoting *Khan v. Dell, Inc.*, No. 09-3703 (JAP), 2010 U.S. Dist. LEXIS 85042 (D.N.J. Aug. 18, 2010)). Dell appealed.

The majority opinion of the Third Circuit, written by the Hon. Jane R. Roth and joined by the Hon. Joseph A. Greenaway, Jr., staked out two competing principles: on one hand, "questions of arbitrability must be addressed with a healthy

regard for the federal policy favoring arbitration"; on the other, arbitration is a creature of contract, "a matter of consent, not coercion." *Id.* at *10 (citations omitted).

Section 5 of the FAA "provides a mechanism for substituting an arbitrator when the designated arbitrator is unavailable." *Id.* at *11. Indeed, where there is "a breakdown in the mechanics of the appointment process" or "a lapse" in the naming of an arbitrator, a court "shall" appoint a substitute arbitrator. *Id.* at *16. The majority held that those preconditions had been met. *Id.* at *17.

The majority acknowledged, however, that Section 5 may be overridden by the parties' agreement. A court considering that issue should focus on two interrelated concerns: (a) whether the agreement "unambiguously" provided that arbitration could proceed only before the designated arbitrator; and (b) whether "the designation of the arbitrator was 'integral' to the arbitration provision or was merely an ancillary consideration." *Id.* at *11. This arbitration clause, in the majority's view, was not "unambiguous." "'EXCLUSIVELY' could be read to modify 'BINDING ARBITRATION,' 'THE NATIONAL ARBITRATION FORUM,' or both." *Id.* at *13-14. Thus the parties had not unambiguously agreed to have their disputes arbitrated exclusively by the NAF. *Id.* at *17. Absent unambiguous contractual intent to the contrary, Section 5 of the FAA requires "a court to address such unavailability by appointing a substitute arbitrator." *Id.* at *19.

The Hon. Dolores K. Sloviter, dissenting, cautioned that despite the FAA's pro-arbitration policy, parties must nevertheless be free to "structure[] arbitration agreements as they see fit." *Id.* at *22-23 (citations omitted). The parties' unambiguous contractual intent to arbitrate only before the NAF, in Judge Sloviter's view, meant that "Section 5 of the FAA is inapplicable and the unavailability of the NAF precludes arbitration." *Id.* at *23.

The majority and dissent reflect a broader split in authority found in the Section 5 case law. Compare *In re Salomon Inc. Shareholders' Derivative Litig.*, 68 F.3d 554, 560 (2d Cir. 1995) (NYSE's refusal to arbitrate the dispute was not a "lapse" requiring appointment of substitute within the meaning of

Section 5); *Ranzy v. Extra Cash of Tex., Inc.*, No. H-09-3334, 2010 U.S. Dist. LEXIS 22551 at *14-15 (S.D. Tex. March 1, 2010) (denying motion to compel arbitration "because the NAF was clearly an integral part of the arbitration provision"), *aff'd*, 393 F.App'x 174 (5th Cir. Aug. 25, 2010); and *Carideo v. Dell, Inc.*, No. C06-1772JLR, 2009 U.S. Dist. LEXIS 104600 at *15-16 (W.D. Wash. Oct. 26, 2009) (arbitration clause unambiguous, and selection of the NAF as arbitrator is integral to the agreement), with *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1222 (11th Cir. 2000) (unavailability of the NAF does not subvert the arbitration clause because choice of forum not "integral" to the agreement); *Adler v. Dell, Inc.*, No. 08-cv-13170, 2009 U.S. Dist. LEXIS 112204 at *10-11 (E.D. Mich. Dec. 3, 2009) (Section 5 mandates designation of a substitute arbitrator if the named arbitrator is not available).

As *Khan* illustrates, the Third Circuit views agreements to arbitrate with an expansive view towards enforceability unless the parties have unambiguously agreed to the contrary. Although the Court did not reach the issue, more than a choice of forum may be at stake in these cases; the clause upheld in *Khan*, for example, also provided, *inter alia*, that the buyer could not "ARBITRATE ANY CLAIM AS A REPRESENTATIVE OR CLASS ACTION" – precisely what Khan sought to do. Because the stakes are high, and the results will turn on the particular wording of agreements, this issue will doubtless continue to generate case law.

TO BE A PART OF THE 3CBA'S ACTIVITIES AND ACCOMPLISHMENTS, BECOME A MEMBER OR RENEW YOUR MEMBERSHIP!

Dues for 2012 membership in the 3CBA are, well, due! The 3CBA had an exciting and extremely productive year in 2011, and there's plenty more in store for 3CBA members in 2012. Among other recent accomplishments:

- Members of the Board of Governors designed and participated in two panel discussions at the Third Circuit Judicial Conference in May. Both CLE's ("Preserving and Forfeiting Appellate Issues" and "Interlocutory Appeals") were extremely well-received by practitioners and judges alike. (Did you know that, as a 3CBA member, you'd be entitled to receive copies of the outlines and PowerPoints the panelists used during those programs? Contact [Donna Doblick](#) for details.
- Members of the Board of Governors designed and participated in two panel discussions at the Third Circuit Judicial Conference in May. Both CLE's ("*Preserving and Forfeiting Appellate Issues*" and "*Interlocutory Appeals*") were extremely well-received by practitioners and judges alike. (Did you know that, as a 3CBA member, you'd be entitled to receive copies of the outlines and PowerPoints the panelists used during those programs? Contact [Donna Doblick](#) for details.
- The 3CBA published three editions of *On Appeal* in 2011, covering a wide variety of substantive and practical information. (Did you know that back issues are available on our [website](#)?)
- The 3CBA filed an amicus brief on behalf of its membership, encouraging the Third Circuit to revisit its narrow view of what constitutes "good cause" for an extension of time.
- The 3CBA Rules Committee proposed reforms to the Third Circuit's proposed new rules for the filing of appendices to appellate briefs, the taxation of costs, and the practice of law by law students. The comments were well-received and largely adopted by the Court.
- Members of the Board of Governors updated chapters in the second edition of the *Pennsylvania Bar Institute's Third Circuit Appellate Practice Manual* – a comprehensive desk reference no appellate advocate should be without. (What? You don't have a Manual yet? Contact Lydia Hack at PBI, 800.247.4724, and she'll send you an order form.)
- The Board of Governors is particularly gratified to be working with the Third Circuit to develop a concise, user-friendly *Third Circuit Practitioners' Guide* that should hit the presses in the summer of 2012.

And, best of all: Dues remain at their 2009 levels: \$40 for an Individual Membership; \$25 for a Student/Law Professor/Dean Membership. (Federal judges, law clerks, and court staff, as well as attorneys who have been admitted to practice 50 years or more enjoy complimentary memberships.) Given the significant benefits of 3CBA membership, we hope you'll agree that this is the best deal in town!

So, join (or re-join!) all of the privileges of membership! Simply mail the [Application Form](#) (available on page 5) and your check to: The Bar Association of the Third Federal Circuit, P.O. Box 4041, Brick, NJ 08723 today!

Sincerely,

Stephen M. Orlofsky
Partner, Blank Rome LLP
Princeton, NJ
President

Donna M. Doblick
Partner, Reed Smith LLP
Pittsburgh, PA
Membership Chair

MEMBERSHIP APPLICATION FORM: 2012 CALENDAR YEAR

Name: _____ Firm/Agency/Court: _____

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I am admitted to practice before the U.S. Court of Appeals for the Third Circuit. _____ **YES** (year admitted: _____) _____ **NO**

I am a member in good standing of the bar(s) of:

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I enclose the following dues for 2012:

_____ \$40 (Individual Member)

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Please mail this form and a check to:

The Bar Association of the Third Federal Circuit
P.O. Box 4041
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Questions? Contact Nev Heimal (nheimal@thirdcircuitbar.org) or Donna Doblack (3CBA Membership Chair, ddoblack@reedsmith.com).
Also be sure to add nheimal@thirdcircuitbar.org to your address book so 3CBA communications aren't intercepted by your firm's spam filter!

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