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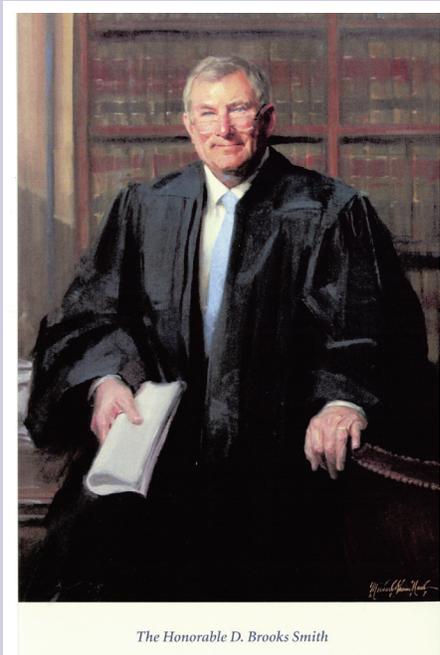
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On Appeal

CHIEF JUDGE D. BROOKS SMITH'S PORTRAIT UNVEILED DURING SPECIAL SITTING OF THE THIRD CIRCUIT

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On October 12, 2017, Judge Theodore A. McKee presided over a special sitting of the U.S. Court of Appeals for the Third Circuit for the presentation of the portrait of Chief Judge D. Brooks Smith. In attendance were nearly all senior and active members of the Third Circuit, as well as the Honorable Samuel A. Alito, Jr., Associate Justice of the U.S. Supreme Court. Many of Chief Judge Smith's current and former law clerks were also in the standing-room-only crowd.



The Honorable D. Brooks Smith

Justice Alito, as well as Third Circuit Judges Anthony J. Scirica and Patty Shwartz, regaled those in attendance with stories about Chief Judge Smith's tenure in the federal judiciary. Many of the anecdotes harkened back to Chief Judge Smith's role as chair of the Committee on Space and Facilities of the Judicial Conference of the United States, which is responsible for making decisions about courtroom needs throughout the country, often in the face of tough budgetary constraints. Justice Alito recalled how Chief Judge Smith was instrumental in persuading Congress to dedicate \$50 million annually for new court facilities.

Justice Alito also noted that Chief Judge Smith "logged thousands of miles and spent many a dreary night" in places like Kosovo, Albania, Afghanistan and Bosnia as part of his effort to introduce American ideals of justice to emerging countries in Eastern Europe and elsewhere. On

a more personal level, Justice Alito recalled Chief Judge Smith mailing him a calendar featuring his beloved dog, Katie, in response to the Supreme Court's affirmance of an opinion authored by Judge Smith, *U.S. v. Stevens*, in which the Third Circuit dismissed a criminal case against a filmmaker who produced a video depicting dog fights on the grounds that the statute violated free speech rights. Justice Alito, the sole dissent in *Stevens*, credited Judge Smith's "sense of duty" for striking the statute despite being a well-known dog lover.

Former Third Circuit Judge Timothy K. Lewis, whose seat on the Third Circuit Chief Judge Smith filled, and Senior Judge Marianne Trump Barry were among those who sent letters of appreciation, which Judge McKee read aloud. Attorneys David J. Porter and Meredith Price, speaking on behalf of all of Chief Judge Smith's past and current law clerks, expressed their warmest appreciation for the opportunity to serve in his chambers and they recalled lessons learned from their clerkships.

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CHIEF JUDGE D. BROOKS SMITH'S PORTRAIT UNVEILED DURING SPECIAL SITTING OF THE THIRD CIRCUIT

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Chief Judge Smith's wife, Karen, had the honor of unveiling the portrait. Nashville artist Michael Shane Neal captured Chief Judge Smith with a half-smile and a characteristic twinkle in his eyes. Neal has also done portraits of retired Supreme Court Justice Sandra Day O'Connor, Third Circuit Judges Anthony Scirica and Julio Fuentes, and the late U.S. Senator Arlen Specter.

In his concluding remarks, Chief Judge Smith was quick to emphasize that the unveiling of his portrait is not a sign that he is taking senior status. He also was generous in his praise of his current and former colleagues on the bench. Obliquely referencing the current state of American politics, Smith also observed in his remarks that "[w]e live in a time that poses challenges for an independent judiciary," and that "the rule of law may be facing some of its greatest challenges in modern times." He expressed confidence, however, that our independent judiciary "is up to those challenges" and will continue to do its job of rendering justice dispassionately and "without yielding to popular outcry."

Chief Judge Smith was nominated to the U.S. District Court for the Western District of Pennsylvania by President Ronald Reagan in 1988. He served as the chief judge of that court from 2001 to 2002. President George W. Bush nominated Smith to the Third Circuit in 2002. He has served as the Chief Judge of the Third Circuit since October 2016.

The Bar Association for the Third Judicial Circuit was represented at the presentation by board members Donna Doblick and Vic Walczak, past president Jim Martin, and founding members Tom McGough and Rob Byer.

THIRD CIRCUIT CLERK OF COURT MARCIA WALDRON ANNOUNCES RETIREMENT

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Marcia Waldron (known affectionately as Marcy) has served the U.S. Court of Appeals for the Third Circuit through a period of significant changes. Her 17 years as Clerk of Court will come to an end on December 31, 2017, but members of the bar, her friends and colleagues at the court, and Third Circuit judges undoubtedly will miss, as Chief Judge Smith put it, the "steadiness and competency" with which she undertook her duties during that time.

A lawyer by training, Marcy received her undergraduate degree from the University of Pennsylvania, a master's degree from Villanova University, and her J.D. from the Dickinson School of Law. She began her career with the Third Circuit as a staff attorney. After a brief stint with the Pennsylvania Commonwealth Court, Marcy returned to the Third Circuit as a supervising staff attorney and eventually became director of the staff attorney's office. In 2000, she assumed her current role as Clerk of Court.

During her career at the court, Marcy enjoyed keeping abreast of changes in the law, particularly when major decisions—such as *United States v. Booker*—promised to impact the court's caseload. She also notes that she enjoyed working on the Third Circuit's local rules, aiming to use "clear language" to put "procedures in place that would efficiently move cases and guide litigants in what they needed to do."

With characteristic modesty, Marcy recalls two of the significant challenges she faced during her tenure: implementing the court's CM/ECF system and addressing a shrinking budget. She notes that the transition to electronic filing was "not as hard as we thought it would be," thanks to extensive help and training from the Administrative Office of the U.S. Courts and her team in Philadelphia. As for the budgetary challenges, she notes that the judges and administrative staff worked hard to weather the cuts without laying people off. Marcy's ability to handle these undertakings with aplomb while always giving credit to others underscores why Chief Judge Smith has called her an "institution within the institution" of the Third Circuit.

But Marcy's impact extends far beyond the Third Circuit. Her friend and colleague, Circuit Executive Margaret Wiegand, adds that Marcy has "had a tremendous impact nationally on the judiciary," and is "highly regarded and considered a leader" among clerks of court across the country. Marcy played key roles in the national judiciary, serving two terms on the budget and finance advisory committee of the Judicial Conference of the United States, as well as on the Federal Appellate Rules Committee.

She also served alongside Judges Smith and Stapleton on the committee that studied the readiness of the Virgin Islands Supreme Court for direct review by the U.S. Supreme Court. The committee visited the Virgin Islands, met with high-ranking members of the government and judiciary, and ultimately concluded that the Virgin Islands Supreme Court had "developed sufficient institutional traditions to justify direct review by the Supreme Court of the United States."

Marcy's professional accomplishments, however, are not the end of the story. She "is incredibly kind and compassionate with her staff," according to Ms. Wiegand, who notes that Marcy has always been willing to help others and to foster their careers. Chief Judge Smith adds that Marcy "quietly goes about the work of managing the office, never calling attention to herself, and providing the court and its judges with administrative leadership that is unequalled."

The Third Circuit Bar Association wishes Marcy the best in her retirement.

THIRD CIRCUIT ARTICULATES STANDARD FOR DETERMINING WHETHER A FEDERAL DECLARATORY JUDGMENT ACTION IS “PARALLEL” TO A STATE PROCEEDING

Kelly v. Maxum Specialty Insurance Group, 868 F.3d 274 (3d Cir. 2017)

D. Patrick Huyett

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District courts enjoy broad discretion to abstain from hearing an action seeking only declaratory relief. That holds true especially when the declaratory judgment action runs “parallel” to a state proceeding. But what makes these dual proceedings “parallel?” The Third Circuit recently answered that question in *Kelly v. Maxum Specialty Insurance Group*, 868 F.3d 274 (3d Cir. 2017), and held that a federal declaratory judgment action and a state proceeding are parallel when they involve “substantially similar” issues and parties. That occurs when the parties in both proceedings are identical or closely related and when the issue underlying the declaratory judgment action is also at issue in the state proceeding.

Whether a parallel state proceeding exists often arises in declaratory judgment actions asking the district court to determine insurance coverage. So was the case in *Kelly*. There the Kellys sued an insurance broker in state court, seeking damages for its alleged negligence. The Kellys then separately sued in state court the insurance broker’s professional liability insurer, Maxum Specialty Insurance Group, seeking a declaratory judgment that the company was obligated to defend and indemnify the insurance broker in the tort case. Maxum removed this suit to federal court, asserting diversity jurisdiction.

The District Court abstained from hearing the case, relying largely on its conclusion that this declaratory judgment action and the state tort action constituted parallel proceedings. According to the District Court, these proceedings were parallel because the insurance coverage issue would likely arise in the state tort action. By employing this rationale, the District Court followed other district courts in the Third Circuit that had tagged state court actions for damages as parallel to federal declaratory judgment actions over insurance coverage because of the “potential” that the coverage issues would arise in the state court actions.

The Third Circuit rejected this “potentiality standard” in an opinion written by Judge Chagares and joined by Judges Hardiman and Scirica. According to the Circuit, two proceedings are not parallel because of the “mere potential or possibility” that the issue underlying the federal declaratory judgment action will arise in the state court action. Rather, it held, they are parallel only when they are “substantially similar” in “issues and parties.” This standard, it explained, means that the parties in both proceedings are identical or “closely related.” It also means that the issue underlying the declaratory judgment action currently exists in the pending state proceeding; the district court cannot speculate that it *may* arise there.

In reaching this conclusion, the Third Circuit recognized that the “substantially similar” standard is consistent with the definition of parallelism that it employs when considering abstention in other circumstances. In particular, when determining whether to abstain under the doctrine articulated in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), the Third Circuit holds that “cases are parallel when they involve the same parties and claims.” *Ryan v. Johnson*, 115 F.3d 193, 196 (3d Cir. 1997). That is, for purposes of *Colorado River* abstention, parallel proceedings are ones that are “truly duplicative,” which means that the parties and the claims are “identical,” or at least are “effectively the same.” *Trent v. Dial Med of Fla., Inc.*, 33 F.3d 217, 223-24 (3d Cir. 1994).

Applying the “substantially similar” standard, the Third Circuit held that the proceedings were not parallel. It emphasized that Maxum was not a party to the state tort action. It also stressed how deciding the insurance coverage issue was not necessary to resolving the state tort action—that issue may or may not arise as the state proceeding progressed. So, it held, the state tort action and the federal declaratory judgment action were not “substantially similar.” It then decided that the lack of a parallel state proceeding counseled strongly in favor of the district court’s hearing the case and was not outweighed by opposing factors. The Third Circuit thus reversed the District Court’s decision to abstain.

With this opinion, the Third Circuit reined in district courts’ discretion to abstain from hearing cases involving only declaratory relief. Although that discretion is broad, the Third Circuit decided that the “potentiality standard” afforded district courts too much leeway to abstain based on speculation about how the state action could unfold. That leeway, it decided, undermined the utility of the federal declaratory judgment action. The “substantial similarity” standard, by contrast, strikes the right balance between district courts’ broad discretion to abstain and litigants’ access to declaratory relief in federal court, according to the Third Circuit. By articulating the standard to be applied in this “familiar” situation, the Third Circuit has provided needed guidance and clarity to the district courts and to the parties litigating these cases.

THIRD CIRCUIT CLARIFIES FRAMEWORK FOR EVALUATING FORUM TRANSFER WHERE SOME—BUT NOT ALL—PARTIES ARE BOUND BY A FORUM-SELECTION CLAUSE

In re: Howmedica Osteonics Corp., 867 F.3d 390 (3d Cir. 2017)

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The Third Circuit granted mandamus in *In re: Howmedica Osteonics Corp.*, 867 F.3d 390 (3d Cir. 2017) to clarify the proper application of the standard for enforcing forum-selection clauses set forth by the Supreme Court in *Atlantic Marine Construction Co. v. U.S. District Court*, 134 S.Ct. 568 (2013). *Atlantic Marine* directed courts to honor valid forum-selection clauses except in “the most unusual cases,” and *Howmedica* addressed an unusual case in which some, but not all, of the parties agreed to a forum selection clause. *Howmedica* established a four-step framework for determining the effect of forum-selection clauses where both contracting and non-contracting parties seek transfer to another judicial district.

Factual Background and Proceedings Below

The case was filed in New Jersey federal court by Howmedica Osteonics Corp. against five of its former sales representatives and their new employer, DePuy Orthopaedics, Inc., alleging that the former representatives breached non-compete clauses in their employment agreements. The agreements at issue contained forum selection clauses: four designated New Jersey as the forum for litigating any disputes, and one designated Michigan. Howmedica also sued DePuy’s regional distributor, Golden State Orthopaedics, as a “necessary party,” even though Golden State asserted that New Jersey had no personal jurisdiction.

The defendants moved to transfer the suit to the Northern District of California pursuant to 28 U.S.C. § 1404(a), arguing that all of the defendants and other witnesses were located in California. The New Jersey district court balanced the relevant public and private interests, and ordered transfer of the entire case to California. Howmedica challenged the interlocutory order by petitioning the Third Circuit for a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651.

Despite Orders Issued by the Transferee Court, the Third Circuit Found that it Possessed Mandamus Jurisdiction, and that Mandamus Was Warranted

As a threshold issue, Third Circuit noted that mandamus jurisdiction generally ends “once the transferee court proceeds with the transferred case.” It therefore faced the question “at what point the transferee court ‘proceeds’ with a transferred case,” and whether the transferee California court crossed the threshold by issuing two scheduling orders and deeming the case related to a subsequent declaratory judgment case filed by Golden State in California.

The appellate court’s answer relied heavily on its prior decision in *In re United States*, 273 F.3d 380 (3d Cir. 2001). In that case, the Court found that it retained mandamus jurisdiction where the mandamus petition was filed 33 days after denial of reconsideration of the transfer order, and after the transferee court had issued a trial scheduling order. Without further analysis or definition of the point at which a transferee court “proceeds” with a transferred case, *Howmedica* determined that it retained mandamus jurisdiction because the facts in that case were consistent with the facts previously found acceptable in *In re United States*.

Acknowledging that mandamus is an “extraordinary” remedy, the Third Circuit found that transfer orders as a class meet the second and third elements for issuance of the writ: lack of an alternate avenue for adequate relief and a likelihood of irreparable injury. It went on to find that the first element, “a clear and indisputable ‘abuse of discretion or . . . error of law’” was met based on the district court’s misapplication of *Atlantic Marine*. In particular, it found that the district court misapplied that case in two ways: (1) the parties’ and witnesses’ convenience were erroneously considered as public interests, rather than private interests; and (2) it created a false dichotomy between applying *Atlantic Marine* to all parties in the case and applying it to none.

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PRESIDENT’S NOTE

Charles “Chip” Becker
Kline & Specter PC, Philadelphia, PA

This edition of the newsletter highlights three members of the Third Circuit family who have been mentors, friends, and leaders over many years. Chief Judge D. Brooks Smith was recently honored by his law clerks for his thirty years of service on the federal bench by the presentation of a beautiful portrait. The portrait will hang in the library of the Philadelphia courthouse. Former Chief Judge Anthony Scirica recently was awarded the 2017 American Inns of Court Lewis F. Powell, Jr., Award for Professionalism and Ethics. This award and the Devitt Award are among the greatest honors that can be bestowed on an American judge to acknowledge the judge’s contributions to the bench and bar. Fittingly, Judge Scirica now has been honored with both awards. Finally, the Clerk of the Third Circuit, Marcy Waldron, recently announced her intention to retire after three decades of service to the federal courts. The Third Circuit is blessed with an outstanding Clerk’s Office. Marcy is the heart and soul of that operation. Marcy, thank you for everything you have done for us and the Court! We wish Marcy well in her next adventure. We wish the Third Circuit good fortune in finding a new leader of the Clerk’s Office who will continue Marcy’s tradition of excellence.

As you all know, the Senate recently confirmed Penn Law Professor Stephanos Bibas as the newest judge on the Third Circuit Court of Appeals. Judge Bibas, welcome to the Court! We hope that you will find the Court and the bar surrounding it to be congenial and professionally satisfying in every respect.

CLE - EFFECTIVE THIRD CIRCUIT ADVOCACY

On **Wednesday, January 10, 2018**, the Third Circuit Bar Association and the Delaware Chapter of the Federal Bar Association will present a CLE on Effective Third Circuit Advocacy at the Federal District Courthouse, 844 N. King St., Wilmington, Delaware from 3-5 p.m. with refreshments available afterwards. The presenters include:

The Honorable Kent A. Jordan, Circuit Judge, U.S. Court of Appeals for the Third Circuit
The Honorable Jane R. Roth, Circuit Judge, U.S. Court of Appeals for the Third Circuit
The Honorable Christopher J. Burke, Magistrate Judge, District of Delaware
Tieffa Harper, Assistant Federal Public Defender, District of Delaware
Iana Eisenstein, DLA Piper partner and former Assistant to the Solicitor General

Fee: \$20 for 3CBA or FBA-DE members, \$40 for non-members

Interested attendees may register by emailing Matthew@Stieglerlaw.com.

THIRD CIRCUIT CLARIFIES FRAMEWORK FOR EVALUATING FORUM TRANSFER WHERE SOME—BUT NOT ALL—PARTIES ARE BOUND BY A FORUM-SELECTION CLAUSE — continued from page 4

Four-Step Framework Determines Effect of Forum-Selection Clause on Transfer Analysis in Cases Involving Both Contracting and Non-Contracting Parties

Using the analysis in a similar case, *In re Rolls Royce*, 775 F.3d 671 (5th Cir. 2014), as modified to address “the challenges raised in this case,” the Third Circuit prescribed a four-step inquiry to be considered in sequence. First, based on *Atlantic Marine*, parties who agree to forum-selection clauses should generally be required to litigate in the fora designated in the agreements. Second, the Court performs an independent analysis of private and public interests relevant to non-contracting parties. If the analysis in Steps One and Two point to the same forum, the case should proceed in that forum; if not, the Court should proceed to the next Step. Third, the Court should consider whether severance and transfer are appropriate to remedy jurisdictional and procedural defects. Fourth, the Court measures efficiency interests, such as avoiding duplicative litigation, with the non-contracting parties’ private interests, including any prejudice caused by a transfer.

Applying this framework, the Court in *Howmedica* determined that the individual defendants’ cases should remain in New Jersey federal court, whereas the actions against the non-contracting parties, DePuy and Golden State, should be transferred to the Northern District of California.

As to the First Step, the Third Circuit gave effect to the agreements selecting New Jersey as the forum. Although one of the agreements selected Michigan as the forum, the Court found that the parties did not seek to enforce that clause, and that venue objections are waivable. Accordingly, it found that the non-contracting defendants and the representative with the agreement selecting Michigan were not subject to the presumption that their claims should be litigated in New Jersey. At the Second Step, the Court found that the public and private interests weighed in favor of transfer to California. Because the first two steps were in conflict, the Court proceeded to the Third Step. Although Golden State was purportedly joined as a “necessary party,” the Third Circuit determined that it did not meet the relevant criteria under Federal Rule of Civil Procedure 19(b). As such, and given New Jersey’s lack of personal jurisdiction over Golden State, it found that dismissal or transfer of the claims against it was mandatory. At the Fourth Step, the Court found that the interests of efficiency favored the severance and transfer of the claims against DePuy and Golden State, because the allegations against these corporate defendants were similar.

Unusual Cases Following *Howmedica*

Like the Fifth Circuit’s structure in *Rolls Royce*, the Third Circuit’s framework may not address all of the “unusual cases” that may arise involving forum selection clauses. However, the detailed and methodical analysis provided by *Howmedica* should prove helpful to courts and practitioners in addressing these complex questions.

JUDGE SCIRICA RECEIVES THE AMERICAN INNS OF COURT 2017 LEWIS F. POWELL, JR., AWARD FOR PROFESSIONALISM AND ETHICS

We are pleased to report that on October 21, 2017, Judge Anthony J. Scirica received the prestigious 2017 American Inns of Court Lewis F. Powell, Jr., Award for Professionalism and Ethics at the organization’s annual Celebration of Excellence at the Supreme Court of the United States. The event was hosted by Associate Justice Elena Kagan.

Judge Scirica is a senior judge on the U.S. Court of Appeals for the Third Circuit and a Senior Fellow at the University of Pennsylvania Law School. He was nominated in 1987 by President Ronald Reagan, who had previously nominated him to the U.S. District Court for the Eastern District of Pennsylvania in 1984. He served as chief judge of the Circuit from 2003 to 2010, and took senior status in 2013. He has served in the Pennsylvania House of Representatives, as chair of the Pennsylvania Sentencing Commission, and as a judge on the Court of Common Pleas of Pennsylvania.

Currently, Judge Scirica chairs the Judicial Conference Committee on Judicial Conduct and Disability. He previously chaired the Executive Committee as well as the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. He was a member of the Advisory Committee on Civil Rules, chaired the Working Group on Mass Torts, and served as a member of the Judicial Panel on Multi-District Litigation. In 2010, he was honored for his service to the federal judiciary with the Edward J. Devitt Distinguished Service to Justice Award.

After graduating from Wesleyan University and the University of Michigan Law School, Judge Scirica began his career in public service as an assistant district attorney. He also was a Fulbright Scholar at Central University in Venezuela.

The Lewis F. Powell, Jr., Award for Professionalism and Ethics is awarded each year to a lawyer or judge who has rendered exemplary service in the areas of legal excellence, professionalism, and ethics.

The American Inns of Court, headquartered in Alexandria, Virginia, inspires the legal community to advance the rule of law by achieving the highest level of professionalism through example, education, and mentoring. The organization’s membership includes more than 30,000 federal, state, and local judges; lawyers; law professors; and law students in more than 360 chapters nationwide and more than 100,000 alumni members. More information is available at www.innsofcourt.org.

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