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3CBA FILES AMICUS BRIEF ASKING COURT TO RECONSIDER WHAT CONSTITUTES "GOOD CAUSE" FOR AN EXTENSION OF TIME

by Donna M. Doblick, Reed Smith LLP

On July 5, 2011, the Third Circuit issued an opinion in *Joseph v. Hess Oil Virgin Islands Corp.*, 651 F.3d 348 (3d Cir. 2011), that examined, for the first time, what constitutes "good cause" under Local Appellate Rule ("LAR") 112.4(a) sufficient to obtain an extension of time to file a petition for a writ of certiorari to the Supreme Court of the Virgin Islands. The precedential single-judge opinion, authored by Judge Smith, was written to accompany the Court's disposition of Hess Oil's motion for extension of time.

The Court first explained that "[a] petitioner may seek review in this Court 'of a *final* decision of the Supreme Court of the Virgin Islands … by filing a petition for a writ of certiorari … within 60 days from the entry of judgment sought to be reviewed[.]'" *Joseph*, 651 F.3d at 349-50 (quoting LAR 112.2(a) and citing *Pichardo v. V.I. Comm'r of Labor,* 613 F.3d 87, 92 (3d Cir. 2010), which explains that "[u]nder 48 U.S.C. § 1613, the Third Circuit has temporary certiorari jurisdiction over final decisions of the Virgin Islands Supreme Court."). The Court concluded that Hess Oil did not show "good cause" in its motion for extension of time. *Joseph*, 651 F.3d at 349. But because the Court had not "previously addressed standards applicable to the showing required under LAR 112.4(a)," the Court granted the extension nonetheless. *Id.* The Court then proceeded to announce a new standard, holding that an applicant seeking additional time must make a showing of "unforeseen or uncontrollable events." *Id.* at 355. In response, Hess Oil filed a motion requesting that the Court materially revise or withdraw the precedential opinion. The 3CBA's Board of Governors unanimously voted to file an amicus brief supporting Hess Oil's motion.[1]

The 3CBA advised the Court in its amicus brief that the Court's narrow view of what constitutes "good cause": (1) discourages litigants from retaining appellate counsel; (2) unfairly penalizes litigants for

(continued on page 2)

FROM THE PRESIDENT'S DESK

As you can see from the articles in this newsletter, the 3CBA is making progress on all fronts in our mission to improve the standards of practice in the Third Circuit, aid the Court in the administration of justice, and facilitate bench-bar relations. We recently filed an amicus brief relating to the administration of Third Circuit local rules (see article above), and to assist you in your practice, we have provided a helpful summary of Third Circuit statistics, notice about changes in local rules, and a digest of a recent opinion pertaining to subpoenas of the Third Circuit mediator. In addition, our website provides a one-stop shop for a variety of resources you can use every day.

We advance our mission through the efforts of our members. Your dues notice will be coming in the next few weeks. Please return it promptly—our dues are a bargain at $40—and help keep our membership strong. So that we can continue to grow, please think of a colleague who practices before the Third Circuit and would appreciate the resources we provide, and then tell that person about the benefits of 3CBA membership.

And finally, 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

3CBA FILES AMICUS BRIEF…—continued from page 1

their lawyers' competing professional obligations; and (3) is inconsistent with the Supreme Court rule upon which LAR 112.4(a) was modeled. The 3CBA submitted that the Court should adopt rules that encourage litigants to engage experienced appellate lawyers. Under the Court's holding in *Joseph*, however, a litigant seeking certiorari review that wishes to retain a lawyer specializing in federal appellate litigation will be faced with the Court's disinclination to extend deadlines and lawyers' competing obligations to other clients. This could mean that the litigant's appellate lawyer of choice very well may lack sufficient time to fully review the record and formulate the legal issues that may persuade the Court to grant discretionary certiorari review which, in turn, may dissuade the litigant from retaining appellate counsel.

Conversely, a construction of the "good cause" standard in LAR 112.4(a) that facilitates the retention of appellate counsel at the petition stage would not only benefit litigants, but the Court as well. Seasoned federal appellate practitioners who are well-versed in the Court's jurisprudence often are able to focus and limit the issues presented in a petition for writ of certiorari to only those very few issues that meet the Court's stringent standards for discretionary writ relief. If given an appropriate amount of time for review and study, a seasoned appellate litigator might advise the client to forego filing a petition for a writ of certiorari that lacks merit. And if the Court were to issue the writ, the presence of appellate counsel before this Court could improve the quality of the presentation of the issues on the merits, thereby further assisting the Court.

The 3CBA's amicus brief explained that whether a litigant retains new appellate counsel or proceeds on appeal exclusively with its trial counsel, the factual premise of the Court's opinion — that a lawyer's competing professional obligations are neither "unforeseen" nor "uncontrollable" — is still flawed. In a very real sense, the 3CBA reminded the Court, lawyers simply do not control their workload at any given point in time. To the contrary, courts unpredictably issue opinions and orders that trigger relatively short (and, frequently, jurisdictional and therefore non-negotiable) deadlines for filing notices of appeal, petitions for rehearing, new trial motions, motions for judgment as a matter of law, and the like—these cannot fairly be said to be within the control of either the lawyer or her client. The 3CBA took the position that it is neither fair nor reasonable for the Court to penalize a client for its lawyer's need to juggle multiple competing deadlines in order to serve multiple clients by deeming those types of events insufficient to constitute "good cause" for extending a deadline.

Although the Court recognized (correctly) that LAR 112.4(a) was modeled after U.S. Supreme Court Rule 13(5), it appended an "unforeseen and uncontrollable events" standard of what constitutes "good cause" that rested primarily upon four published opinions in which Justice Scalia applied Rule 13(5) very narrowly. The 3CBA agreed with Hess Oil that Justice Scalia's opinions in this regard do not represent the prevailing view of what constitutes "good cause" for seeking an extension of time to file a petition for writ of certiorari in the Supreme Court. Rather, as the amicus brief pointed out, it is the experience of members of the 3CBA's Board of Governors that extensions of thirty to sixty days are regularly and routinely granted by individual Circuit Justices.

On September 12, 2011, the Third Circuit granted the 3CBA's motion for leave to file its amicus brief. The parties and the 3CBA await the Court's ruling on Hess Oil's motion.

Appellate lawyers (and members of the 3CBA's Board of Governors) Donna Doblick and Jim Martin from Reed Smith wrote the amicus brief on the 3CBA's behalf, with 3CBA President Stephen Orlofsky appearing Of Counsel. Steve commented on the filing: "The 3CBA is pleased to have drawn on the experience of our practitioners in drafting this amicus brief. The brief directly advances our goals of developing improved rules of practice and facilitating bench-bar relations. We are gratified that the Third Circuit has accepted our amicus brief for filing, and we hope that the Court's decision will implement a fair and workable standard for 'good cause' in extensions of time for petitions for writ of certiorari to the Supreme Court of the Virgin Islands."

1 Hess Oil's appellate attorney, Peter Goldberger, is a member of the 3CBA's Board of Governors. Mr. Goldberger did not participate in the deliberations or vote regarding the filing of the amicus brief.

REVISED THIRD CIRCUIT RULES IN EFFECT AS OF AUGUST 1, 2011

By Peter Goldberger, Law Office of Peter Goldberger

The Third Circuit has published on its website a revised set of the Local Appellate Rules, effective August 2, 2011. This edition reflects several relatively minor amendments published for comment in May, as modified after the receipt of public comments, including several from the 3CBA. The complete rules, as revised, are available here.

Notable changes include a revision to the number of briefs for which printing costs can be taxed. The LAR had previously allowed taxation of the costs of printing two copies of the brief for each party; the Court had proposed that costs for printing only be taxable where a party was not served electronically. At the suggestion of the Association, based on our description of actual practice, the Court will now allow taxation of the costs of printing two copies of the brief for the prevailing party plus one for each other party separately represented. Similarly, contrary to the revision as initially proposed, the Court will continue to allow taxation of the costs of printing a copy of the appendix for each party, provided that a paper copy was actually served on the other parties.

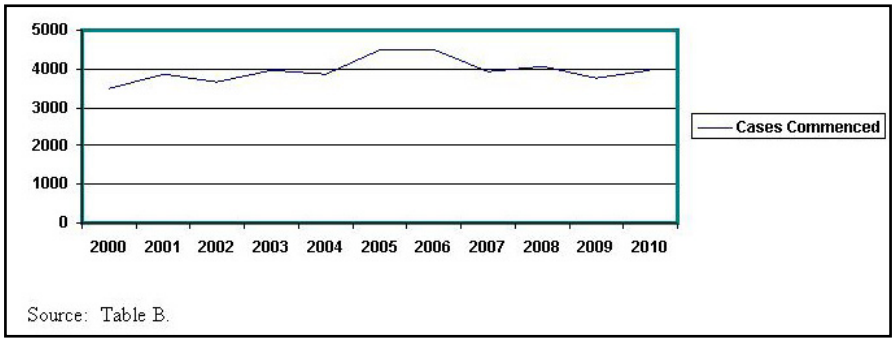
In addition, the Court accepted the 3CBA's comment on a proposed revision to the rule on student practice, LAR 46.3, and will not require that students be enrolled in a clinical program for a full year in order to be allowed to appear under supervision before the Circuit. Law school clinical faculty concurred in our comments, assuring the Court that the schools could take responsibility for ensuring continuity and availability of student representation, without making the rule unduly restrictive. At our suggestion, the scope of potential supervised student representation was expanded in the revised rule from prisoner cases to any civil or administrative case with an indigent party needing counsel.

As has been true each time the Court has revised its rules since the founding of the 3CBA, our comments appear to have been well received and largely accepted in the final version of the revision.

ANNUAL COURT STATISTICS PROVIDE PRACTICAL INSIGHTS FOR THIRD CIRCUIT PRACTITIONERS

by Donna M. Doblick, Reed Smith LLP

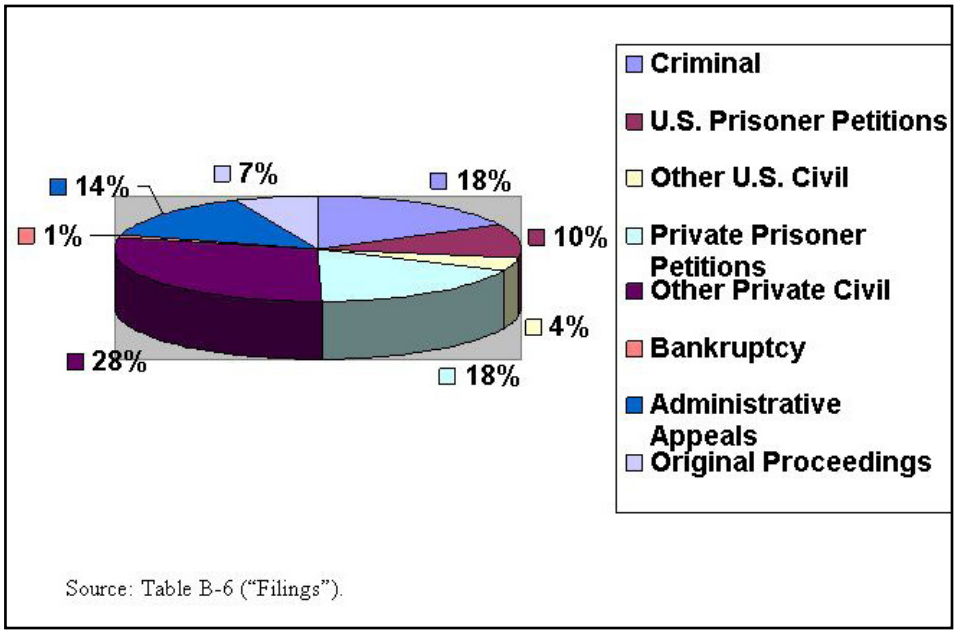
The Administrative Office of the U.S. Courts has released its annual report on the Judicial Business of the United States Courts (available here). These reports contain a treasure trove of useful information that will help you answer questions clients frequently ask about proceedings in the federal courts of appeals. This article recaps some salient statistics regarding appeals in the Third Circuit for the twelve-month period ending September 30, 2010.



The Court's Caseload. As shown in the graph, top right, the Third Circuit's caseload has increased 13.5% between 2000 (3,482 cases initiated) and 2010 (3,951 cases initiated).

Once you realize how very busy the Court is, you may better appreciate the oft-heard advice that appellate lawyers should: keep their briefs as brief as possible; use plain, easy-to-understand English; and ensure that the joint appendix puts the most pertinent information at the fingertips of the judges and their law clerks.

As depicted in the pie chart to the right, non-prisoner private civil litigation made up (only) 28% of the Court's caseload in 2010. Criminal appeals made up another 18% of the Court's caseload.



Will The Court Hear Oral Argument? There has been a noticeable uptick in the percentage of cases the Third Circuit decides "on the briefs" (without hearing oral argument). As reflected below, in 2010, the Court decided more than 86% of all cases without the benefit of oral argument. This is markedly higher than the average for all courts of appeals (73.6%).

12-Month Period Ending	Decided After Oral Argument	Decided After Submission On Briefs
9/30/10	13.9%	86.1%
9/30/09	15.8%	84.2%
9/30/08	16.9%	83.1%
9/30/07	15.9%	84.1%
9/30/10 (Average Of All Circuits)	26.4%	73.6%

Source: Table S-1.

These statistics do not, however, paint a wholly accurate picture of the likelihood that you will get oral argument, for two primary reasons. *First*, these statistics do not identify cases in which the litigants affirmatively *waived* oral argument. *Second*, they do not identify the *types* of cases the Court tends to decide without oral argument. In my experience, the Third Circuit remains quite likely to hear oral argument in counseled (non-pro se) civil and criminal appeals that raise non-frivolous arguments.

Will The Court Issue A Precedential Opinion? The Third Circuit continues to be one of the most prolific issuers of "unpublished" opinions. In 2010, it designated 89.8% of opinions issued in cases that were terminated on the merits as "unpublished" opinions. No other Circuit issued more unpublished opinions (on a percentage basis) in 2010 (and compare the Third Circuit's figures to the nationwide average of 84.0%). Circuits that issued far fewer unpublished opinions in 2010 included the First Circuit (62.3%), the Second Circuit (65.1%), and the Seventh Circuit (59.8%). Source: Table S-3. Although courts no longer may forbid litigants from citing to unpublished opinions in their briefs (Fed. R. App. P. 32.1), unpublished opinions have no precedential value.

When Can We Expect To Receive A Ruling? On average, as shown below, in civil (non-prisoner) appeals it takes approximately one year from the time you file your notice of appeal to receive a ruling on the merits from the Third Circuit. Clients also may be interested in knowing that, on average, the Court issues rulings in civil cases 3.3 months after hearing oral argument. This pace is consistent

(continued on page 5)

CASE OF INTEREST: *MCKISSOCK & HOFFMAN P.C. V. WALDRON* (E.D. PA. NO. 10-7108)

By Thomas S. Jones and Anderson T. Bailey, Jones Day

Adopting "a broad interpretation of 'the courts' that includes the entire judicial branch," a recent decision from the United States District Court of the Eastern District of Pennsylvania held that actions of court staff are not subject to review under the Administrative Procedures Act ("APA"). *McKissock & Hoffman P.C. v. Waldron,* No. 10-7108, 2011 WL 3438333, at *5-7 (E.D. Pa. Aug. 5, 2011). In so holding, the court determined that decisions and actions of court personnel employed by the Administrative Office of the United States Courts ("AOUSC") could not be challenged under the federal APA, 5 U.S.C. §§ 701 *et. seq.*

The *McKissock* case grew out of earlier litigation in which Polymer Dynamics, Inc. ("Polymer") sought hundreds of millions of dollars in damages from Bayer Corporation ("Bayer") for breach of contract, negligent misrepresentation, and fraud. McKissock & Hoffman, PC, represented Polymer at the trial on those claims, which resulted in a partial jury verdict and an award of slightly more than $12.5 million. *See Polymer Dynamics, Inc. v. Bayer Corp.,* No. 99-4040, 2007 WL 2343796 (E.D. Pa. Aug. 10, 2007).

Both parties appealed to the Third Circuit and unsuccessfully appeared before Chief Circuit Mediator Joseph Torregrossa to explore settlement. *McKissock & Hoffman,* 2011 WL 3438333, at *1. Following the failed mediation, the Third Circuit affirmed the damages award in relevant part. *See Polymer Dynamics, Inc. v. Bayer Corp.,* 341 F. App'x 771, 772 (3d Cir. 2009). Claiming that Mr. Torregrossa had conveyed an offer from Bayer to settle the case for $25 million, Polymer then filed a malpractice claim against *McKissock & Hoffman* for failing to advise Polymer to accept the purported offer. McKissock & Hoffman, 2011 WL 3438333, at *1. The law firm denied that the offer was ever made. *Id.*

The firm served a subpoena seeking to depose Mr. Torregrossa. A particular set of regulations covers responses to subpoenas of the federal judiciary, and those regulations conferred on the Third Circuit Clerk of Courts, Marcia Waldron, the authority to permit or disallow any response to McKissock & Hoffman's subpoena. *See* Sections 7 and 8, Testimony of Judiciary Personnel and Production of Judiciary Records in Legal Proceedings.[1] On November 5, 2010, Ms. Waldron denied the request to depose Mr. Torregrossa, citing, *inter alia,* the confidentiality of the mediation and sovereign immunity. *McKissock & Hoffman,* 2011 WL 3438333, at *1. McKissock & Hoffman then sued Ms. Waldron in her official capacity, the AOUSC, which it alleged enforces the regulations at issue, and AOUSC director James C. Duff. The firm claimed that Ms. Waldron's decision was an arbitrary and capricious agency action within the meaning of the APA, and that the AOUSC lacked the authority to promulgate the subpoena regulations. *Id.*

The court, through Judge Mary McLaughlin, dismissed the case for lack of subject matter jurisdiction, noting that although the APA creates a cause of action for anyone "'aggrieved by agency action,'" the statute specifically excludes "'the courts of the United States'" from the definition of "agency." *Id.* at *2 (citing 5 U.S.C. § 701(b)(1)(B)). Based on both the APA's legislative history and case law from other jurisdictions, the court applied "a broad interpretation of 'the courts' that includes the entire judicial branch" within the statute's exemption. *Id.* Here, "the AOUSC is supervised by judges and its activities are interwoven with those of the judiciary." *Id.* Moreover, Ms. Waldron "is the Clerk of the United States Court of Appeals for the Third Circuit and her decision related directly to a case that was pending before the Court. [She] is bound by Third Circuit Rules and reports to the Judges of that Court." *Id.* at *3. All three defendants therefore fell within the APA's broad definition of "courts," and their decisions were not reviewable under that statute. *Id.* at *2-3.

The court also rejected McKissock & Hoffman's argument that the adoption of subpoena regulations opened both the AOUSC and Ms. Waldron to judicial review notwithstanding the terms of the APA. In fact, the court held, those regulations were promulgated by the Judicial Conference, "a policy-making body composed of federal judges [that] acts as an auxiliary of the courts [and] is not an agency." *Id.* at *3. Further, the Judicial Conference has the statutory authority to make rules that bind judicial officers and their staff. *Id.* (citing 28 U.S.C. § 331). The court thus was "not persuaded that, in abiding by the Judicial Conference's regulations for responding to subpoenas," a judge or court staff would be subject to the APA. *Id.*

The decision—which was not appealed—notably insulates the actions of court staff and similar "auxiliaries" from judicial review. Courts are by no means unanimous on this point. Judge McLaughlin's decision was consistent with the greater weight of authority. *See, e.g., In re Fidelity Mortgage Investors,* 690 F.2d 35, 38 (2d Cir. 1982) (finding the Judicial Conference exempt from the APA); *Novell, Inc. v. United States,* 109 F. Supp. 2d 22, 25-27 (C.D. Cal. 2000) (finding the AOUSC exempt from the APA). Nevertheless, another court in the Eastern District has found that "the functions of the [AOUSC] are much more akin to those of an administrative or executive agency." *Goldhaber v. Foley,* 519 F. Supp. 466, 480 (E.D. Pa. 1981). Thus, AOUSC officers in that case were enjoined under the APA from arbitrarily awarding contracts for court reporting services. *Id.* at 483; *see also Novell, Inc. v. United States,* 46 Fed. Cl. 601, 611 (Fed. Cl. 2000) (distinguishing in the context of the APA between the Judicial Conference, which is composed of judges with constitutionally guaranteed tenure and compensation, and the AOUSC, which is not).

As *McKissock & Hoffman* illustrates, the consequences can be significant to anyone affected by the discretionary action of court staff. Here, multimillion dollar malpractice claims were based primarily on what a court-appointed mediator said and did in performance of his official function. Despite the importance of the testimony to the underlying suit, the court held that the discretionary decision to bar the testimony was, effectively, unreviewable.

1 Subpoena regulations of the AOUSC are available here.

Annual Court Statistics Provide Practical Insights for Third Circuit Practitioners—continued from page 3

with the nationwide averages. Criminal appeals, on the other hand, take two full months longer here in the Third Circuit than the nationwide average (13.8 months vs. 11.6 months).

	Civil Appeals (Non-Prisoner)		Criminal Appeals	
	From Filing of Notice of Appeal to Final Disposition (in months)	From Oral Argument to Final Disposition (in months)	From Filing of Notice of Appeal to Final Disposition (in months)	From Oral Argument to Final Disposition (in months)
Nationwide Average:	**12.2**	**2.4**	**11.6**	**1.7**
District of Columbia	9.4	2.6	19.9	2.6
First	11.6	3.0	12.6	3.3
Second	12.8	0.7	13.7	0.4
Third	**12.1**	**3.3**	**13.8**	**3.7**
Fourth	9.0	2.4	11.3	1.9
Fifth	10.6	1.8	10.6	1.1
Sixth	14.3	2.7	17.2	1.4
Seventh	10.5	3.8	11.5	2.8
Eighth	11.1	3.8	10.3	3.5
Ninth	16.5	1.7	13.6	1.0
Tenth	11.0	4.9	9.3	2.8
Eleventh	9.5	1.9	9.1	1.8

Source: Table B-4A.

What Are The Odds The Third Circuit Will Reverse The District Court's Ruling? It likely will come as no surprise to you that the Third Circuit (like all of the federal courts of appeals) affirms the vast majority of cases that come before it on the merits. During the past few years (2008-2010), only between 8.7% and 11.5% of cases were reversed.

	Percent Reversed		
	2008	**2009**	**2010**
Average Of All Cases	10.1%	11.5%	8.7%
U.S. Civil (Non-Prisoner)	9.3%	12.3%	7.0%
Other Private Civil (Non-Prisoner)	14.3%	15.7%	12.3%
Administrative Appeals	5.4%	12.2%	7.4%
Criminal	8.3%	6.5%	6.1%

Source: Table B-5.

(continued on page 6)

Annual Court Statistics Provide Practical Insights for Third Circuit Practitioners—continued from page 5

On average, the Third Circuit continues to reverse slightly more cases than the national average:

Percent Reversed (All Cases)			
	2008	**2009**	**2010**
Nationwide Average	9.1%	9.1%	8.3%
District of Columbia	13.8%	10.1%	15.3%
First	7.0%	8.9%	9.5%
Second	6.9%	7.4%	7.1%
Third	**10.1%**	**11.5%**	**8.7%**
Fourth	5.7%	4.2%	5.6%
Fifth	8.1%	9.0%	7.5%
Sixth	10.4%	10.7%	10.0%
Seventh	16.7%	13.2%	15.4%
Eighth	7.9%	9.6%	4.9%
Ninth	10.0%	10.9%	9.5%
Tenth	6.9%	6.8%	5.8%
Eleventh	10.4%	8.7%	8.0%

Although the reversal rate for private (non-prisoner, non-U.S. government) civil cases is somewhat higher than the average in all cases (between 12.3% and 15.7% during the 2008-2010 period), the odds definitely are not with the appellant. These sobering statistics illustrate the importance (particularly if you're the appellant) of retaining experienced appellate attorneys who can position your appeal in a way that maximizes your chances of beating these odds.

How Likely Is The Supreme Court To Issue A Writ Of Certiorari To Address An Adverse Decision? In a word (actually, two), the chances of obtaining certiorari review are "extremely slim." With the exception of 2009, over the past five years, the Supreme Court has granted only 4 petitions per year from Third Circuit decisions.[1]

Type of Case	**2006**	**2007**	**2008**	**2009**	**2010**
Total Petitions Granted:	4	4	4	11	4
Criminal	1	0	2	0	2
U.S. Civil	0	1	1	1	0
Private Civil	3	3	1	9	2
Administrative Appeal	0	0	0	1	0

Source: Table B-2.

Here, too, the sheer statistical unlikelihood that the Supreme Court will hear your case brings home the importance of marshalling all appropriate resources to ensure that you win (or keep your victory) here in the Third Circuit.

1 The anomalous increase in certiorari grants in 2009 (9 of them in private civil cases) is largely attributable to the Supreme Court granting certiorari and remanding a half-dozen cases to the Third Circuit for further consideration in light of the Court's decisions in *FCC v. Fox Television Stations,* 129 S. Ct. 1800 (2009), *Chambers v. United States,* 129 S. Ct. 687 (2009), or *Wyeth v. Levine,* 129 S. Ct. 1187 (2009).

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