

## Securities Regulation Daily Wrap Up, TOP STORY—U.S.: Delaware judges ask Supreme Court to opine on public access to arbitrations, (Jan. 22, 2014)

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By Anne Sherry, J.D.

The five judges of the Delaware Court of Chancery have petitioned the United States Supreme Court for a writ of *certiorari* to decide whether the public has a First Amendment right of access to state-sanctioned arbitrations. A Third Circuit panel last year, examining a 2009 Delaware statute permitting judges to conduct confidential arbitrations of business disputes, found that the public had a right of access under the Supreme Court's "experience and logic" tests. According to the petitioners, those tests argue against public access, and removing confidentiality would effectively destroy the viability of arbitration as a dispute resolution method (*Strine v. Delaware Coalition for Open Government, Inc.*, January 21, 2014).

**Background.** The Delaware Coalition for Open Government, Inc., sued the State of Delaware, the Court of Chancery, and the court's five members in their official capacities in the district court, arguing that the Delaware statute granting the Court of Chancery the power to conduct confidential arbitrations violated the First Amendment. A proceeding pursuant to the statute is confidential unless and until a party appeals the arbitrator's determination. The statute provides that to qualify for arbitration, at least one party must be a "business entity formed or organized" under Delaware law, no party can be a "consumer," and the amount in controversy (in disputes involving solely monetary damages) must be at least \$1 million.

The district court agreed that the statute violated the First Amendment, reasoning that the arbitration proceedings functioned essentially as a civil trial that must be open to the public. In a *de novo* review on appeal, a three-judge panel of the Third Circuit Court of Appeals applied the "experience and logic" test of *Press-Enter. Co. v. Super. Ct. of Cal.* (U.S. 1986), which questions whether "the favorable judgment of experience" is demonstrated by accessibility and whether public access plays a significant, positive role in the functioning of the process in question. The panel narrowly affirmed the district court, with one panel member concurring in the decision and another dissenting. The decision of the Third Circuit was discussed more fully in the October 23, 2013, issue of *Securities Regulation Daily*.

**Rationale for confidentiality.** The chancellors' *cert* petition focuses on the fact that the arbitrations at issue are business disputes. In the petitioners' view, arbitration satisfies the growing desire for more expeditious, less costly business dispute resolutions, particularly in cross-border disputes where the non-U.S. party may be reluctant to become enmeshed in the U.S. judicial system. Confidentiality allows businesses to take full advantage of arbitration's informality and flexibility, they contend, in contrast to a public proceeding where any statement may be used against a party.

The chancellors also stress that Delaware attracts large businesses to organize there in large part because its corporate law and dispute resolution mechanisms "are up-to-date, fair, predictable, efficient, and respected." If other developed nations' dispute resolution systems surpassed Delaware's, they reason, large companies would have an incentive to relocate, and technological advancements mean fewer barriers to relocation than in the past. This competitive threat was an impetus for the Delaware statute, the petition asserts.

**Rationale for *certiorari*.** The petitioners seek Supreme Court intervention because lower courts are divided over how to apply the "experience and logic" test. The majority below, they posit, held that the "experience" test was satisfied by at best a "mixed" tradition regarding public access, while other courts require proof of a long tradition of access to find a First Amendment right to access. According to the chancellors, Delaware's statute would have been upheld under that standard, a standard compelled by the Supreme Court's right-of-access cases.

According to the petition, there is no constitutional right of access to state arbitration proceedings, even if the arbitrator is a judge, because arbitration lacks the long tradition of public access needed to satisfy the experience requirement. Furthermore, mandating public access would effectively nullify Delaware's arbitration process, so

the “logic” element of the First Amendment standard fails “because public access will effectively eliminate the arbitration proceeding, it would not serve a ‘significant positive role.’”

The petitioners also argued that the question presented is important because: (1) the ruling below invalidates a state law and prohibits Delaware from providing a dispute resolution option; (2) the impact of the Third Circuit ruling extends beyond the Delaware statutes to numerous laws providing for court-sponsored binding arbitration; and (3) “many lower courts have construed this Court’s First Amendment right-of-access rulings to provide a roving license to upend legislative policy choices about the propriety of public access to government proceedings.” The petition cites several examples of proceedings that were opened to public scrutiny, including driver’s license revocation hearings and state executions.

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