

## Court Defends Secretive Arbitrations To 3rd. Circ.

By **Dan Packel**

*Law360, Philadelphia (May 16, 2013, 2:58 PM ET)* -- An attorney defending the constitutionality of the Delaware Chancery Court's confidential arbitration program told a Third Circuit panel Thursday that the involvement of judges as arbitrators didn't violate the First Amendment since related proceedings have a long history of being closed to the public.

Andrew Pincus of Mayer Brown LLP emphasized that judges adjudicating arbitration proceedings were empowered not by the state but rather by the consent of participating parties, and that consequently their involvement did not trigger a right of public access.

"The power they have to act flows purely from the parties' consent," Pincus told the three-judge panel.

Created by a Delaware law passed in April 2009, the now-halted arbitration program allowed the Chancery Court judges to serve as arbitrators and was touted as a quicker and cheaper alternative to traditional litigation for complex business and technology disputes.

Roughly 1 million business entities — including more than half of all publicly traded companies in the U.S. and 63 percent of all Fortune 500 companies — legally reside in Delaware. This speaks to the influence the Chancery Court holds over the most important corporate cases in the country, according to a dozen news organizations, including The Associated Press and News Corp., who filed an amicus brief in January.

In September 2012, U.S. District Judge Mary McLaughlin ruled in favor of the Delaware Coalition For Open Government when she halted the program — which was limited to business disputes of greater than \$1 million — finding that the process violates the First Amendment right of access to the courts.

Pincus, representing the court and five of its judges, said that the judges were state employees who would act in several roles: as judges overseeing open court proceedings and as arbitrators presiding over traditional binding arbitration proceedings that have been historically closed to the public.

But the appeals panel questioned whether the Chancery Court arbitration program was truly analogous to pre-existing forms of arbitration.

"Have other places been doing arbitration with the model that Delaware is doing arbitration?" U.S. Circuit Judge Julio Fuentes asked. "It seems to me that the Delaware model is a very novel model for judges running arbitration."

David Finger of Finger & Slanina LLC, representing opponents of the arbitration program, argued that the Delaware program was not at all akin to other forms of arbitration, but rather to civil trials, which must be open to the public.

“In briefing, the question of whether this is analogous to a trial came up. It's not analogous to a trial, it is a trial,” he said. “The only difference is the format.”

Finger also attacked Pincus' efforts to differentiate the functions of the judges between “chancellors” in the courtroom and “arbitrators” in the closed-door arbitration proceedings, even after U.S. Circuit Judge Jane Roth suggested that the Delaware state legislature had the right to enact a statute that stated the judges could hold the differing roles.

“The nomenclature can't override the First Amendment,” Finger said.

Finger also expressed concern over the Chancery Court arbitration proceedings' ability to impose enforceable judgments, suggesting that a nonbinding procedure would not raise the same constitutional questions.

And Pincus conceded that if the enforcement was deemed the key issue, the appeals court could strike down the rule making the arbitration rulings enforceable. In that case, according to Pincus, the Delaware Supreme Court could then impose a new rule that would give that court the power to enforce the decisions reached in the confidential arbitrations.

The Delaware Coalition for Open Government Inc. is represented by David L. Finger of Finger & Slanina LLC.

The Chancery Court and its judges are represented by Andrew Pincus of Mayer Brown LLP, by Andre Bouchard, Joel Friedlander and Jeffrey Gorris of Bouchard Margules & Friedlander PA, and by Professor Lawrence A. Hamermesh of Widener University School of Law.

The case is Delaware Coalition for Open Government Inc. v. The Hon. Leo E. Strine Jr. et al., case number 12-3859, in the U.S. Court of Appeals for the Third Circuit.

--Additional reporting by Sindhu Sundar. Editing by Eydie Cubarrubia.