

## Strine Asks High Court To Take Up 'Secret' Arbitration Case

By **Matt Chiappardi**

*Law360, Wilmington (January 22, 2014, 3:17 PM ET)* -- Chancellor Leo E. Strine Jr. and the rest of the judges on the Delaware Chancery Court asked the U.S. Supreme Court late Tuesday to review an October Third Circuit decision that struck down a private arbitration program on the grounds it violated the First Amendment right of public court access.

The judges filed a petition for writ of certiorari, contending that the question is important enough to be considered by the highest court because the **decision** by the U.S. Court of Appeals for the Third Circuit not only impacts the 2009 statute that established the controversial program, but would extend to numerous federal and state laws that provide for binding forms of alternative dispute resolution.

"Alternative dispute resolution is widely recognized as a critical tool in addressing the pressing problem of overcrowded court dockets," the petition states. "The uncertainty created by the majority's ruling leaves states considering adopting or revising ADR laws with no clear guidance regarding the constitutionality of court sponsored arbitration systems."

The Delaware Legislature established the program more than four years ago, allowing Chancery judges to arbitrate business disputes involving more than \$1 million beyond the view of the public, and with a minimal paper trail, when requested by the clashing parties.

The proceedings were touted as a quicker and cheaper alternative to traditional litigation for complex business and technology disputes, but the program was challenged by the nonprofit Delaware Coalition For Open Government in 2011.

The group won the first blow in the dispute when U.S. District Judge Mary A. McLaughlin ruled in 2012 that the program did indeed run afoul of the First Amendment, likening it to "a secret judicial proceeding."

The Chancery Court appealed to the Third Circuit, which upheld the district court's decision, noting that Delaware has a centuries-old tradition of open proceedings before a judge.

But one of the judges on the three-judge panel did offer a dissenting opinion.

Judge Jane Roth called the program "a perfect model for commercial arbitration," and wrote that it was designed to compete with private arbitration not to replace civil trials.

Andrew J. Pincus of Mayer Brown LLP, one of the attorneys retained to represent the Chancery Court, echoed Judge Roth's sentiment in a statement released Thursday where he couched the issue as a competitive one for the United States in the global marketplace.

Global business entities that find the U.S. judicial system too expensive or slow are choosing international arbitration to settle their disputes, Pincus said.

"The challenged statute provides an efficient, cost-effective and prompt means of resolving business disputes, and an additional reason for global firms to domicile in the United States," the attorney said. "Because of the importance of this issue, and the job-creating potential for Delaware and the nation of finding innovative solutions to temper the growing costs and delays of resolving business disputes, a definitive answer is being sought from the Supreme Court."

The attorney for the nonprofit coalition, David L. Finger of Finger & Slanina LLC, told Law360 on Thursday that he expected the Chancery Court would challenge the Third Circuit ruling, but wasn't entirely confident the U.S. Supreme Court would even take up the question.

"The Third Circuit decision does not conflict with any decision of any other circuit and involves a statute unique to Delaware," he said. "I question whether these circumstances make it important enough for the Supreme Court."

The Chancery Court and its judges are represented by Andrew J. Pincus and E. Brantley Webb of Mayer Brown LLP, Andre G. Bouchard and Joel Friedlander of Bouchard Margules & Friedlander PA and Lawrence A. Hamermesh of Widener University School of Law.

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

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

--Additional reporting by Lance Duroi, Dan Packel and Jamie Santo. Editing by Katherine Rautenberg.