

Third Circuit Clarifies Standards Governing Confidentiality of Litigation Documents

By: Justin K. Fortescue and Marianne Bradley

Reinsurance Alert

12.13.19

As an update to our April 1, 2019 Reinsurance Alert, the Third Circuit Court of Appeals recently affirmed the U.S. District Court for the Middle District of Pennsylvania's holding in *Pennsylvania National Mutual Casualty Insurance Company v. Everest Reinsurance Company*, and found that procedural issues relating to the interpretation of consolidation language in an arbitration provision should be considered by a newly-appointed panel, as opposed to the panel from an earlier arbitration involving different reinsurers.

However, with respect to the issue of whether certain documents should remain under seal, the Third Circuit found that the correct analysis to apply was the standard as articulated in *In Re Avandia Mktg., Sales Practices and Prods. Liab. Litig.*, 924 F.3d 662 (3d Cir. 2019). More specifically, the Third Circuit described the three distinct standards governing the confidentiality of litigation documents: the standard governing protective orders, the standard for filing court documents under seal, and the First Amendment Right of Access standard.

According to the Third Circuit, protective orders are meant to ensure the confidentiality of discovery documents that are not filed with the court. Whether a protective order should remain confidential should be analyzed under the first standard which uses the seven-factor balancing test articulated in *Pansy v. Borough of Stroudsburg*, 23 F.2d 772 (3d Cir. 1994).

In contrast, when court documents are filed under seal, courts should employ the more rigorous common law standard, which provides that "there is a presumptive right of public access to pretrial motions of a non-discovery nature, whether preliminary or dispositive." This common law presumption is not absolute, and may be overcome by a showing that the "interest in secrecy" outweighs the "presumptive right of public access." This may be achieved by demonstrating that disclosure of the material will work a clearly defined, serious injury to the party seeking to keep documents under seal. A party must be able to articulate the compelling, countervailing interests to be protected; broad allegations of harm, bereft of specific examples or articulated reasons, will be insufficient to permit documents to remain confidential.

The final standard – the First Amendment Right of Access standard – applies to the public right of access to civil proceedings. It provides that the press and the public have a constitutional right of access to civil trials, such that there is a presumption that proceedings will be open to the public. This can be overcome by demonstrating that there is an overriding interest in excluding the public, provided that maintaining documents under seal is essential to "preserve higher values and is narrowly tailored to serve that interest."

Relying on *In Re Avandia*, the Third Circuit in *Everest* found that the Middle District had improperly applied only the first standard, clarifying that, for discovery materials filed as court documents, courts should apply the more rigorous common law right of access standard. The court remanded in accordance with these findings.

This case is significant for reinsurers, as it narrows the scope of those documents which will presumptively be kept under seal. For reinsurers seeking to designate documents filed with the court as confidential, it will be necessary to articulate specific examples of the reasons why disclosure will result in a "clearly defined, serious injury." Broad allegations of nebulous harm will likely not be enough to overcome the common law presumption of right of access to documents filed with the court.

125th
ANNIVERSARY



White and
Williams LLP

If you have questions or would like further information, please contact Justin K. Fortescue (fortescuej@whiteandwilliams.com; 215.864.6823) or Marianne Bradley (bradleym@whiteandwilliams.com; 215.864.7094).

This correspondence should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only and you are urged to consult a lawyer concerning your own situation and legal questions.

