



Last week, the Delaware Court of Chancery appealed to the United States Supreme Court to overturn the Third Circuit's decision that Delaware's state-sponsored business arbitration program (the "Program") violated the First Amendment. (*Leo E. Strine, Jr., Chancellor, Delaware Court of Chancery, et al. v. Delaware Coalition for Open Government, Inc.*). A copy of the Chancery's Petition can be found [here](#). In October 2013, the Third Circuit affirmed a lower court and found the Program violated the public's right of access to judicial proceedings.

The Program, which was implemented by Delaware in 2010, allowed certain business arbitrations to be conducted before a Court of Chancery judge. The Program was limited to business disputes involving Delaware companies with an amount in dispute of at least \$1 million. The public and press had no access to such arbitrations, nor did they have access to the ultimate arbitration award. Concerns mounted with the Program because shareholders felt they were left in the dark about the proceedings and further, neither outside lawyers nor businesses knew of the outcomes and whether such outcomes impacted other corporate law.

The Delaware Coalition of Open Government (the "Coalition") filed suit against the Court of Chancery, the individual judges and Delaware State (the "Defendants") arguing the Program was unconstitutional. Specifically, the Coalition argued that the Program violated the First Amendment right to access civil trial. In response, the Defendants argued that privacy has always been a hallmark of arbitration.

The lower court disagreed with Defendants and found that the Program was akin to a civil trial. It found the Program differed from other private arbitrations because there was no independent arbitrator; rather, the Program allowed for judges to hear disputes. As such, it found the First Amendment principle of open access applied, and was violated. In a split decision, the Third Circuit ultimately agreed with the lower court after applying an "experience and logic" test. It held that the benefits of openness weighed in favor of public access to Delaware's arbitration proceedings.

As it currently stands, the Third Circuit's decision does create some uncertainty regarding the ability of other state and federal courts to utilize various ADR practices. It will be interesting to see if the U.S. Supreme Court elects to hear the matter and shed some light on this issue of importance.