

## Third Circuit Holds That an Arbitration Award Was a Judicial Record and Must Be Unsealed

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January 12, 2021

People often agree to arbitrate their disputes because they presume that, unlike litigation, the proceedings will be confidential. An increasing number of court decisions suggest that this presumption may be unwarranted. Last month, the United States Court of Appeals for the Third Circuit held that an arbitration award filed with a petition to confirm the award was a judicial record and therefore subject to the common-law right of access.

In *Pennsylvania National Mutual Casualty Insurance Group v. New England Reinsurance Corp.*, Nos. 20-1635, 20-1872, 2020 WL 7663878 (3d Cir. Dec. 24, 2020), insurance company Penn National obtained a favorable arbitration award against two of its reinsurers. It then filed with the United States District Court for the Middle District of Pennsylvania a petition to confirm the award and reduce it to a judgment. Penn National filed the arbitration award with the court and requested that it be sealed, which the court granted.

Before the reinsurers could respond to the petition to confirm, the parties settled and Penn National withdrew its petition. Then one of Penn National's reinsurers—a reinsurer that was *not* a party to the action—moved the Court to intervene and unseal the arbitration award. The District Court unsealed the award pursuant to the common-law right of access, which allows members of the public to access documents in a judicial proceeding.

In affirming, the Third Circuit held that if a document makes its way into the clerk's file, then it is subject to the presumption of common-law right of access.

The Third Circuit also held that Penn National could not overcome the presumption of access because it failed to demonstrate a clearly defined injury. Penn National argued that other reinsurers might decline to pay Penn National and contest their contractual obligations if they knew of the contents of the award. But this was not enough for the Court. It reasoned that this was not a clearly defined injury because it "could not determine how many possible relationships could be impacted, the amount of money that could be at stake, the types of actions other parties may pursue, or the likelihood that any such actions would be successful." *Id.* at \*2.

The Third Circuit's holding is only one example of a trend in which courts are increasingly deciding to unseal arbitration awards—a trend that has special implications for any party concerned with maintaining the confidentiality of arbitration awards. Please contact the authors or your Miller Canfield attorney with questions