**Docket No.**

# In the Supreme Court of the United States

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ODYSSEY CONTRACTING CORP.,

*Petitioner*,

v.

L&L PAINTING CO., INC.,

*Respondent*.

◆

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether a stipulation that is not a consent judgment and simply establishes a mechanism under which the district court will resolve certain claims, forfeits the right of appeal from the final judgment where there is no clear and unequivocal waiver of that right in the stipulation itself.

2. Whether the holding of the Third Circuit is contrary to the decisions of this Court in *United States v. Procter & Gamble*, 356 U.S. 677 (1958) and *Thomsen v. Cayser*, 243 U.S. 66 (1917), and admittedly contrary to the decisions of the Second, Fifth and Tenth Circuits, as well as an non-precedential decision of the Sixth Circuit that followed the Fifth Circuit holding.

3. Whether the determination of the Third Circuit should be summarily reversed on authority of *United States v. Procter & Gamble*, 356 U.S. 677 (1958) and *Thomsen v. Cayser*, 243 U.S. 66 (1917).

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page, with the exception of Federal Insurance Company, which is a surety and did not participate in the proceedings.

## CORPORATE DISCLOSURE

Odyssey Contracting Corp. is a Pennsylvania close corporation. None of its shares are held by a publicly traded company.

## RELATED CASES

*L & L Painting Co. v. Odyssey Contracting Corp.*, 140 A.D.3d 519, 35 N.Y.S.3d 305 (1st Dept. 2016).

*L & L Painting Co., Inc. v. Contract Dispute Resolution Board of City of New York*, Index No. 0117508/2006 2008 NY Slip Op 30177(U), New York, Supreme Court, Judgment entered January 14, 2008.

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# IN THE
# SUPREME COURT OF THE UNITED STATES
# PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

## OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit appears in the Appendix at A1 and is reported as *In re Odyssey Contracting Corp.*, 944 F.3d 483 (3d Cir. 2019).

The Opinion of the United States District Court for the Western District of Pennsylvania has not been officially reported and may be found in the Appendix at A18. The decision of the bankruptcy court has been officially reported as *L & L Painting Co. v. Odyssey Contracting Corp. (In re Odyssey Contracting Corp.)*, 581 B.R. 762 (Bankr. W.D. Pa. 2018) and may be found in the Appendix at A26.

## JURISDICTION

The Court of Appeals issued its decision on December 12, 2019. A timely petition for rehearing and rehearing en banc was denied on January 6, 2020. A copy of the order denying rehearing and rehearing en banc may be found in the Appendix at A16.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C § 158.

(a)The district courts of the United States shall have jurisdiction to hear appeals

(1) from final judgments, orders, and decrees;

* * *

of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

* * *

(d)(1) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

## STATEMENT OF THE CASE

Petitioner Odyssey was a subcontractor involved in painting the Queensboro Bridge, and claimed that it had been underpaid. In an adversary proceeding to resolve the underpayment issue, the parties entered into a final pretrial stipulation that provided that if the Bankruptcy Court determined that Odyssey was the party that breached the contract, then "all of the [p]arties' pending claims will be withdrawn and disposed of in their entirety with prejudice" and the adversary proceeding "shall be deemed to be finally concluded in all respects." The stipulation was designed to expedite consideration of all issues and render a final determination that could be appealed by the unsuccessful party. The stipulation was silent with to respect appeals.

Upon a finding that Odyssey was the breaching party, the bankruptcy court entered an order directing the parties to "resolve the . . . adversary proceeding . . . in compliance with the [s]tipulation." Odyssey filed an appeal from the bankruptcy court's order. The district court modified the bankruptcy court's order by finalizing it and ultimately dismissed Odyssey's appeal upon a motion by L&L arguing that Odyssey had released its claims and waived its right to appeal under the terms of the court-approved stipulation.

The Third Circuit agreed, and dismissed the appeal.[1]

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[1] . On appeal to the Third Circuit, L & L contended that, in determining the appeal, and rendering a final

The court specifically stated that the stipulation was not a consent judgment and noted that the stipulation did not expressly waive the right to appeal, or even mention that right, but reasoned that the intent of the parties was clear enough to

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order, the district court was exercising original jurisdiction. It went on to argue that the assertion of original jurisdiction precluded appellate review under 28 U.S.C. § 158(d)(1) because the section only authorizes appeals to the Court of Appeals from orders of the district court acting in an appellate capacity over bankruptcy determinations. The Third Circuit found jurisdiction by finding that the bankruptcy court's determination was a final order.

Although it makes little difference here, it is sufficient to note that if the district court did, in fact, assert original jurisdiction, that would not render its order non-appealable. The district court has "original jurisdiction" of bankruptcy proceedings, 28 U.S.C. § 1334(a) & (b), but, as in other districts, in the Western District of Pennsylvania such proceedings "are referred to the Bankruptcy Judges of this district for consideration and resolution consistent with law." See *Phar-Mor, Inc. v. Coopers & Lybrand*, 22 F.3d 1228, 1234 (3d Cir. 1994) (quoting General Order of Reference dated October 16, 1984); *In re Pruitt*, 910 F.2d 1160, 1164 (3d Cir. 1990) ("By its General Order of Reference of October 16, 1984, the United States District Court for the Western District of Pennsylvania has provided for automatic reference to bankruptcy judges."). Since the bankruptcy court functions as an adjunct of the district court, *Republic Health Corp. v. Lifemark Hospitals of Florida, Inc.*, 755 F.2d 1453, 1455 (11th Cir.1985) (per curiam), "the district court may sua sponte withdraw any case that it previously has referred to the bankruptcy court" and enter its own final order. *In re Red Carpet Corp. of Panama City Beach,* 902 F.2d 883, 891 (11th Cir. 1990). Inasmuch as that is precisely what occurred here, there can be no question that the Court of Appeals had jurisdiction.

support a waiver. In particular, "with prejudice" indicated a level of finality inconsistent with any right to appeal.

The panel noted that its decision conflicted with that of the Fifth and Tenth Circuits, and, by implication, a Sixth Circuit non-precedential decision and the leading treatise on federal practice, but found them unpersuasive and distinguishable, as they arose from class action settlements.

Rather, the panel found the rules governing consent judgments were applicable. The court reasoned that the rules were equally applicable regardless of whether a stipulation concerns past or prospective action by the court. No authority was cited for that proposition.

Odyssey filed a petition for rehearing and rehearing en banc, arguing, among other things, that the opinion was contrary to *United States v. Procter & Gamble*, 356 U.S. 677 (1958) and *Thomsen v. Cayser*, 243 U.S. 66 (1917).

The petition was denied without opinion.

## REASONS WHY THE WRIT SHOULD ISSUE

A. Introduction

There is little doubt that the decision of the Third Circuit has turned the rules concerning stipulations between and among counsel on their head. Until that decision, it was settled by decisions of this Court and other Circuits, that if "a settlement agreement . . . calls for resolution of some disputed matter by the district court," there is no waiver of right to appeal absent an "explicit agreement that the district court decision shall be final and that all rights of appeal are waived." 15A Charles Alan Wright et al., Federal Practice and Procedure § 3901 (2d ed. 2014).

Now, the Third Circuit has created a new peril for practitioners:[2] If there is an intention to preserve

[2] Third Circuit practitioners have taken note of the change in law and warn that after the panel decision, the "opinion . . . may have consequences far beyond the circumstances involved in the case . . . . [¶[Thus, [i]f your client is resolving a matter by stipulation but still wants to preserve a right to appeal, be sure to specify that intent in the stipulation." Judith Fitzgerald, Losing Your Right to Appeal Through Silence, The Law Firm Alliance, at https://www.lawfirmalliance.org/news-insights-events/losing-your-right-to-appeal-through-silence. They caution that if your client "intends to preserve its appellate rights in connection with otherwise-stipulated relief, it should expressly so state in the stipulation." Kevin C. Maclay and Todd E. Phillips, Appeal or No Appeal: In Stipulations, Silence on Appellate Rights Could Mean Waiver, at http://www.capdale.com/appeal-or-no-appeal-in-stipulations-silence-on-appellate-rights-could-mean-

appellate rights in connection with otherwise-stipulated relief, it must expressly so state in the stipulation.

Given that the decision conflicts with decisions of this Court and that of every other Circuit, the determination should be summarily reversed on the basis of this certiorari petition. See *Pennsylvania v. Bruder*, 488 U.S. 9 (1988) (per curiam); *Pavan v. Smith*, ___ U.S. ___, 137 S.Ct. 2075, 2079 (2017) (Thomas, Alito and Gorsuch, JJ., dissenting, quoting *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting) (summary reversal appropriate where "the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error.")

B. Analysis

The position of the Wright treatise is supported by decades of precedent, beginning with this Court's decision over one hundred years ago in *Thomsen v. Cayser,* 243 U.S. 66 (1917). In that case, judgment was entered in the form finally adopted at the request of plaintiffs and by their consent, and it was contended that the errors assigned by plaintiffs were waived by such request and consent.

This Court rejected that argument, simply stating:

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waiver. "The language of stipulations needs to be plain, and to leave no doubt as to whether and under what, if any, circumstances an appeal will be permitted. " Bruce D. Greenberg , Parties' Stipulation Waived Right to Appeal, New Jersey Appellate Rights; at http://appellatelaw-nj.com/ parties-stipulation-waived-right-to-appeal/.

> The plaintiffs did not consent to a judgment against them, but only that, if there was to be such a judgment, it should be final in form instead of interlocutory, so that they might come to this court without further delay.

243 U.S. at 83.

The argument was again made in *United States v. Procter & Gamble*, 356 U.S. 677 (1958) and again rejected. In that case, the government consented to dismissal of the complaint, and it was contended the right of appeal was waived. Following *Thomsen*, this Court held that the rule that a plaintiff who has voluntarily dismissed his complaint may not appeal from the order of dismissal had no application since the Government's motion to amend the original order was designed only to expedite review of that order. 356 U. S. at 680-681.

The rule has been uniformly followed in other Circuits in circumstances identical to those implicated here.

In *United States v. International Brotherhood of Teamsters*, 905 F.2d 610 (2d Cir.1990), a case ignored by the Third Circuit panel, a consent decree did not itself resolve claims, similar to the circumstances here, but instead simply established a mechanism under which claims would be decided. Basically, the parties agreed that an independent administrator would sit as a decisionmaker in disciplinary labor cases, with his decisions to be

"final and binding, subject to the [district] Court's review as provided herein." *Id.* at 615. The consent decree further provided that the district court would "have exclusive jurisdiction to decide any and all issues relating to the Administrator's actions or authority" under the consent decree. *Id.*

When certain individuals attempted to appeal the district court's affirmance of the administrator's disciplinary sanctions against them, the investigations officer and the federal government argued the Second Circuit lacked appellate jurisdiction to consider these appeals under the terms of the consent decree. The Second Circuit concluded, however, that the consent decree did not contain a clear and unmistakable expression of the intent to waive appellate rights, reasoning the statement that the district court had "exclusive jurisdiction" did not unambiguously exclude appellate review. *Id.*

In *Montez v. Hickenlooper,* 640 F.3d 1126, 1132 (10th Cir. 2011), the Tenth Circuit relied upon *International Brotherhood of Teamsters*, and "h[e]ld that we have the authority to review claims decided pursuant to a dispute-resolution mechanism established in a consent decree, so long as that decree does not contain a clear and unequivocal waiver of appellate rights . . . ."

Following these authorities and others, the Fifth Circuit in *Lake Eugenie Land Dev., Inc. v. BP Exploration & Prod., Inc. (In re Deepwater Horizon)*, 785 F.3d 986, 997(5th Cir. 2015), explained "where a settlement agreement does not resolve claims itself but instead establishes a mechanism pursuant to

which the district court will resolve claims, *parties must expressly waive what is otherwise a right to appeal from claim determination decisions by a district court*. Given that there has been no such express waiver in the instant case, the parties have preserved their right to appeal from the district court to this court." 785 F.3d at 997 (emphasis added).

*Deepwater Horizon* was followed by the Sixth Circuit in *Dixon v. Travelers Indem. Co.*, 630 F. App'x 518, 520 (6th Cir. 2015), a case involving facts parallel to those here. As that Court succinctly stated:

> [T]he Dixons argue that Travelers waived its right to appeal the district court's award of fees because the parties' settlement agreement stipulated that the district court would decide whether the Dixons were entitled to fees under Michigan Compiled Laws § 500.3148. But a settlement agreement providing that a district court will resolve certain claims does not strip the parties of the right to appeal the district court's determinations of those claims. See *In re Deepwater Horizon*, 785 F.3d 986, 997 (5th Cir. 2015). Instead, for a party to waive its right to appeal the district court's determination, it must "expressly" do so. *Id.* Travelers did not, so it did not waive its right to appeal.

The Third Circuit found these authorities

unpersuasive and purported to distinguish them on the grounds that the *Montez* and *Deepwater Horizon* cases involved class actions. No distinction was offered for the Second and Sixth Circuit decisions.

That the *Montez* and *Deepwater Horizon* matters involved class actions is hardly a basis for distinction. As Judge Posner observed in writing for the Seventh Circuit, ". . . settlements with class representatives often, as in this case, contain explicit waivers of the right to appeal; in an ordinary civil settlement it is taken for granted that the settlement extinguishes all rights to further prosecution of the suit, including the right to appeal." *Wrightsell v. Cook County, Ill.*, 599 F.3d 781, 784(7th Cir. 2010) (Posner, J.)

Moreover, the standard of review of the approval of a class action settlement is abuse of discretion. *Charron v. Wiener*, 731 F.3d 241, 247 (2d Cir. 2013); *Day v. Persels & Assocs., LLC,* 729 F.3d 1309, 1316 (11th Cir. 2013); *Officers for Justice v. Civil Serv. Comm'n*., 688 F.2d 615, 626 (9th Cir.1982), cert. denied, 459 U.S. 1217 (1983). This deferential standard applies not only because settlements are favored, but also because "[t]rial courts generally have a greater familiarity with the factual issues and legal arguments in the lawsuit, and therefore can make an evaluation of the likely outcome were the lawsuit to be fully tried." *United States v. City of Miami,* 614 F.2d 1322, 1334-335 (5th Cir. 1980).

Thus, if anything, there would be more of a reason to find an implicit waiver in class action litigation than here.

In short, *Montez*, *Deepwater Horizon*, *International Brotherhood of Teamsters* and *Dixon* are clearly in conflict with the determination of the Third Circuit and cannot be distinguished away. The principles stated in those cases apply with equal force here.

The Third Circuit said that the rules concerning a consent judgment should apply even though the stipulation, which was entered before trial and simply set out the effect that a subsequent determination at trial would have on the proceedings, it should nonetheless be considered a consent judgment and thus bar an appeal, finding that this was a distinction without a difference. This is contrary to well-established precedent apparently ignored by the panel.

This Court and the Circuits have repeatedly held that the entry of a stipulated final judgment after a dispositive ruling does not bar an appeal. See *United States v. Procter & Gamble*, 356 U.S. at 680-81 (finding appeal was proper because "[t]he Government at all times opposed the production orders," and "[w]hen the Government proposed dismissal for failure to obey, it had lost on the merits and was only seeking an expeditious review"); *OFS Fitel, LLC v. Epstein, Becker & Green, P.C.*, 549 F.3d 1344, 1358 (11th Cir.2008) (finding plaintiff could appeal where, "[b]ecause the interlocutory sanctions order was case-dispositive and [plaintiff] opposed that interlocutory order on the merits, [plaintiff stood] adverse to the resulting final judgment that was expressly based on the undisputed case-dispositive nature of the contested interlocutory ruling"); *The Ansaldo San Giorgio I,* 73 F.2d 40, 41

(2d Cir.1934) ("[I]t is clear from the record that this was not a decree to which the libelant consented in any such sense as to bar an appeal.... [T]he entry of the final decree merely carried into effect the court's previous decision on a litigated issue. The appeal is properly here."); *United States v. Safeco Insurance Co.*, 65 F. App'x 637, 638-39 (9th Cir.2003) (unpublished) (the court found that the defendant "consent[ed] merely to the form of judgment," because the 'evidence, including the lack of a rational reason for abandoning its right to appeal, indicate[d] that [the defendant's] signature was not intended to represent [its] consent to the court's summary judgment rulings.")

There is no reason to tolerate a division in the Circuits where the decision under review deviates from this Court's precedent. Attorneys in all Circuits should be able to rely upon the rule that a stipulation does not waive a right of appeal unless there is an explicit provision that does so.

## CONCLUSION

Certiorari should be granted, and the judgment summarily reversed, and that matter remanded to the Court of Appeals for determination of the merits. Summary reversal is appropriate because the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error

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