



**FROM: GLENN SUGAMELI, EARTHJUSTICE Senior Legislative Counsel  
202-667-4500 x 221 gsugameli@earthjustice.org**

**RE: EARTHJUSTICE URGES THE SENATE TO OPPOSE THE PENDING  
NOMINATION OF FEDERAL DISTRICT JUDGE D. BROOKS SMITH  
TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD  
CIRCUIT**

**DATE: MAY 16, 2002**

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As explained in detail below, **Earthjustice urges the Senate to oppose Judge D. Brooks Smith's pending nomination to the United States Court of Appeals for the Third Circuit.**

The Senate Judiciary Committee is considering whether or not to approve the pending nomination of federal district Judge D. Brooks Smith (W.D. Pa.) to a lifetime seat on the US Court of Appeals for the Third Circuit. The Third Circuit nearly always serves as a "regional Supreme Court" with final say on federal environmental and other issues for Pennsylvania, New Jersey, Delaware and the U.S. Virgin Islands.

In a February 1, 2002 letter to the Senate Judiciary Committee, Earthjustice and 26 other national environmental, women's rights and disability rights groups expressed "serious concerns" that "Judge Smith's rulings show a disturbing pattern of bias in favor of powerful interests and disregard for the rights and needs of ordinary Americans."  
[http://www.earthjustice.org/policy/judicial/brooks\\_letter.html](http://www.earthjustice.org/policy/judicial/brooks_letter.html)

Subsequently, Judge Smith answered oral questions at a February 26, 2002 Committee hearing on his nomination and has been providing written responses to a series of written follow-up questions from Committee members.

### **SUMMARY OF REASONS FOR OPPOSITION**

Many of the greatest judicial threats to environmental protections arise from cross-cutting issues, including constitutional rulings on the Commerce Clause, Takings Clause and access to the courts and standing, as discussed in detail in the Community Rights Counsel, Alliance for Justice and NRDC report, *Hostile Environment: How Activist Federal Judges Threaten Our Air, Water, and Land*  
<http://www.communityrights.org/CombatsJudicialActivism/HE/HEmain.asp>

In conjunction with the release of the *Hostile Environment* report, Earthjustice and twelve other national environmental groups wrote the Senate on July 18, 2001:

**we urge you to vote to confirm only those nominees who:**

- 1. Demonstrate a respect for the policy decisions made by elected representatives to protect public health and our natural resources as reflected in our environmental laws;**
- 2. Demonstrate superior qualifications for the position;**
- 3. Bring an objective, balanced approach to decision-making; and**
- 4. Demonstrate a commitment to protecting the rights of ordinary people and do not improperly elevate the interests of the powerful over those of individual citizens.**

**We urge you to ensure that each nominee affirmatively establish his or her qualifications for the critical and esteemed position of federal judge.**

No President has a mandate to appoint to the federal courts judges who are or may be hostile to laws protecting the environment and the public's health.

The mere absence of disqualifying evidence in a nominee's record should not constitute sufficient grounds for confirmation.

<http://www.earthjustice.org/policy/judicial/letter.html> (Emphasis added).

**The environmental and related concerns raised in the February 1, 2002 letter from environmental and public interest groups persist, as discussed below. In addition, serious new issues have arisen since the letter was sent, especially regarding the extreme views that Judge Smith espoused in a speech on the Commerce Clause and federalism, his willingness and ability to follow binding precedent, and his credibility and ethics.**

**As discussed in the detailed analysis below, Judge Smith's record includes very disturbing extreme views and rulings, especially on the Commerce Clause, takings and access to courts issues described in *Hostile Environment*. Judge Smith's record also raises very serious independent concerns about his willingness and ability to follow binding precedent, and his credibility and ethics, which also exacerbate and undermine Judge Smith's efforts to respond to concerns about his views and rulings on substantive issues.**

**Judge Smith has not been able to meet the standard set forth in the July 18, 2001 letter to the Senate, including the requirement "that each nominee affirmatively establish his or her qualifications for the critical and esteemed position of federal judge . . . ." This lack is most apparent on the first, third and fourth requirements in the July 18, 2001 letter.**

**Therefore, Earthjustice opposes and urges the Senate to oppose, Judge D. Brooks Smith's pending nomination to the United States Court of Appeals for the Third Circuit.**

## ANALYSIS

### **I. EXTREME VIEWS ON FEDERALISM/COMMERCE CLAUSE: (FEDERALIST SOCIETY SPEECH)**

Certain U.S. Supreme Court Justices and lower court federal judges have threatened a wide range of fundamental federal environmental and other protections by espousing extreme views on federalism. These views include attacking the longstanding acceptance of the Constitution's Commerce Clause as the source of Congress's authority to enact environmental and other safeguards and distorting the Eleventh Amendment to excuse states from complying with federal environmental and other laws. These conservative activist judges' agenda is described in detail in the Community Rights Counsel, Alliance for Justice and NRDC report, *Hostile Environment: How Activist Federal Judge Threaten Our Air, Water, and Land*

<http://www.communityrights.org/CombatsJudicialActivism/HE/HEmain.asp>

In a string of recent 5-4 rulings, the Supreme Court has rolled back critical protections for consumers, workers, women, minorities, the disabled and the environment and dramatically undercut Congress's power to remedy racial injustice and protect this country's most vulnerable populations.

A 1993 speech Judge Smith gave before the Pittsburgh Chapter of the Federalist Society strongly indicates that he would go far beyond even these rulings in curtailing federal authority and gutting existing protections. Indeed, Judge Smith's views most resemble -- and in some respects even go beyond -- the extreme views expressed by Justice Clarence Thomas in lone concurrences in recent cases.

Judge Smith stated that, in assessing the scope of federal powers, a judge should: "First, ask whether the subject matter at issue is within the power of the national government by express delegation in the text of the constitution, or impliedly through a historically honest reading of the necessary and proper clause. If not, stop!" Depending on his definition of "historically honest," this alone would nullify many of the most important protections enacted in the past few decades.

Judge Smith also expressed an extraordinarily narrow view of the "subject matter" within federal power. For example, regarding the Commerce Clause -- the Congressional power relied upon to enact most civil rights and environmental laws -- Judge Smith opined that "[t]he Framers' primary, if not sole, reason for giving Congress authority over interstate commerce was to permit the national government to eliminate trade barriers." *The Washington Post* stated in its Feb. 26<sup>th</sup> editorial, *Questions for Judge Smith*, "Judge Smith's speech is particularly disturbing for the remarkably constricted vision of federal power that he embraces. \* \* \* Senators should ask him how such an understanding can be squared--if it can--with modern civil rights and environmental statutes."

This cramped view of federal authority led Judge Smith to render an advisory opinion that the then-pending Violence against Women Act (VAWA) was presumptively unconstitutional "notwithstanding whatever "findings" Congress can muster regarding the alleged effect of domestic violence on interstate commerce." "Domestic violence," Judge Smith wrote "cannot even be said to fall into a "class" of activities that have substantial national consequences \* \* \*."

Judge Smith's speech went far beyond the Supreme Court's ruling:

as U.S. Sen. Orrin Hatch, R-Utah, explained at [the] hearing on Judge Smith's nomination to the 3rd U.S. Circuit Court of Appeals, the Supreme Court struck down only the civil remedy portion of the act. Sen. Hatch said he "couldn't disagree more" with the speech's characterization of the act, that he is "firmly convinced that there is nothing unconstitutional in the remainder of the act," including its criminal provisions, and that Judge Smith's criticisms misconstrue "the nature and scope of the act."

These comments are particularly telling coming from Sen. Hatch, who supports Judge Smith's nomination to a lifetime appeals court seat. Judge Smith's speech bolsters the very serious concerns expressed by Earthjustice and 26 other national environmental, women's rights and disability rights groups that his rulings show a disturbing pattern of bias in favor of powerful interests and disregard for the rights and needs of ordinary Americans.

Judge Smith's call to roll back congressional authority does distinguish, as the editorial notes, "between federal civil rights legislation, which was necessitated by the complicity of Southern states in institutionalized racial discrimination, and the Violence Against Women Act." It is hard to see, however, how this "institutionalized racial discrimination" exception would preserve many federal safeguards, from the Americans With Disabilities Act to many environmental laws.

Glenn Sugameli, Earthjustice, Federalist Society speech supports the case against Judge Smith, *Pittsburgh Post-Gazette*, Letter to the Editor, March 21, 2002 <http://www.post-gazette.com/forum/letters/20020321lets0321p1.asp> (last letter)

Judge Smith's responses to questions have not dispelled very serious concerns that, if confirmed to the Third Circuit, his views on federalism would result in decisions that would hold that the Commerce Clause does not provide constitutional authority for the federal government to enact and enforce a range of federal environmental and other safeguards.

For example, Congress is considering federal legislation to fill the gap created by the Supreme Court's non-constitutional ruling in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 121 S. Ct. 675 (2001) ("SWANCC") that interpreted the Clean Water Act as failing to extend to regulation of so-called "isolated"

wetlands. See *Hostile Environment* pp. 5-6. A written question from Senator Edwards (D-NC) asked: “If Congress made unquestionably clear that the Clean Water Act grants the Corps authority to regulate in the manner at issue in *SWANCC*, would the standards be constitutional?” Judge Smith replied: “I can imagine a number of factual scenarios under which such an Act would be constitutional.”

**Judge Smith’s carefully worded written reply to a specific question leaves too much room for an equal or greater “number of factual scenarios under which” he would rule that legislation responding to *SWANCC* would be unconstitutional. The open-ended nature of his response on this extremely important issue is particularly significant** because at Judge Smith’s hearing, Sen. Biden (D-DE) emphasized that in light of Judge Smith’s Federalist Society speech, “if he felt Smith were not being candid or advanced the argument that he couldn’t discuss issues that might come before him, “I’ll filibuster on the floor of the Senate” to defeat Smith, even though he had “never taken that step in my life.” Altoona judge fails to satisfy Biden’s concerns: Senator warns of filibuster, by Ann McFeatters, *Pittsburgh Post-Gazette*, February 27, 2002 <http://www.postgazette.com/headlines/20020227smith0227p4.asp>

## II. ANTI-ENVIRONMENTAL RULINGS

### A. Cost-Benefit/Risk-Utility and Duty to Warn: *Metzgar v. Playskool*

Judge Smith’s extreme reasoning and rulings in the following case have very disturbing implications for cost-benefit and risk assessment analysis and duty to warn issues that arise in toxic tort, pollution and other environmental and public health cases. See, e.g., <http://www.earthjustice.org/news/display.html?ID=119>  
<http://www.earthjustice.org/policy/profiles/display.html?Department=Office%20of%20Management%20and%20Budget>

In *Metzgar v. Playskool*, No. 92-CV-31 (W.D. Pa. Sept. 9, 1993), *rev’d*, 30 F.3d 459 (3d Cir. 1994), a Third Circuit panel, comprised of three Reagan appointees, reversed and strongly criticized Judge Smith’s decision that dismissed each of four claims in a case brought by the parents of a 15-month-old toddler who choked to death after swallowing a Playskool toy. The Third Circuit held that:

We disagree with the district court on its determination that the statistical risk of injury from the Playskool block to children like Matthew is so small as to preclude a finding of unreasonably defective design. We also address the district court’s construction of the “intended user” element of the strict liability cause of action. We reject the district court’s determination that the age guideline on the product packaging [Ages 1 ½ --5] precludes the manufacturer’s liability for safety when used by children, like Matthew, who may be shown to be developmentally within the age category, although chronologically slightly younger [15 months]. We also reject the district court’s dismissal of the failure to warn claims, brought both in strict liability and negligence. We cannot agree

that the danger of a small child choking on the block was obvious so as to negate any duty by Playskool to so warn.

30 F.3d at 460. Judge Smith dismissed the parents' design defect claim on the "risk-utility" grounds that there was not a "reasonable threshold of risk" that justified judicial intrusion into product design because only eleven children a year (out of a large population) died by choking on small toys. The Third Circuit reversed because: "we believe that an annual mortality rate of eleven is a 'reasonable threshold of risk' in this case. . . . a slight modification to the block design could virtually eliminate the choking potential without detracting from the block's utility." 30 F.3d at 462.

The Circuit Court also criticized and reversed Judge Smith's dismissal of both the strict liability claim, which was an issue for the court to decide, and the negligent failure-to-warn claim, which he refused even to allow a jury to consider. Judge Smith had found that the choking hazard was so obvious that no warning label was necessary. The Third Circuit stated that: "We cannot see how the purple Playskool block can be deemed as a matter of law an obvious safety hazard in the eyes of the relevant community, when Playskool itself believed that the block was safe for its intended use. . . . [T]he defendant did not proffer any evidence tending to show that the danger of asphyxiation was obvious. . . . The district court's dismissal of Metzgar's negligence claim on the basis of its determination that the danger to Matthew was obvious was tantamount to holding that no reasonable jury could conclude otherwise. Based on the evidence of record, we cannot agree." 30 F.3d at 465-66.

**In the *Metzgar* case the whole is even worse than the sum of the parts. Each of Judge Smith's four rulings is extremely disturbing. This is exacerbated by the tension between his rulings that the same risk was both too small to make a claim and too obvious to merit a warning. The many different grounds on which Judge Smith erroneously granted summary judgment indicated a willingness to distort the law in order to render a judgment favorable to the corporation and against Matthew's parents.**

#### **B. Takings: *Unity Real Estate Co v. Hudson***

In recent years, the so-called property rights movement has aggressively pressed courts to reinterpret the Takings Clause of the U.S. Constitution in a way that would force taxpayers to pay companies to comply with laws that protect people, property and the environment. Judge Smith's 1995 opinion in a takings case called *Unity Real Estate v. Hudson*, 889 F. Supp. 818 (W.D. Pa. 1995), strongly suggests that these property rights extremists would find a sympathetic ear in Judge Smith, at least in the many cases where there is no binding precedent precisely on point.

Unity Real Estate brought a takings challenge to the Coal Industry Retiree Health Benefit Act or the "Coal Act," a law passed in 1992 to enforce the coal industry's promise to provide coal workers with lifetime health benefits. 26 U.S.C. §§ 9701-9722. This promise

was threatened as coal companies broke collective bargaining agreements. Under the Act, each retiree's benefits are paid by the company for whom he or she most recently worked. Unity Real Estate was the surviving interest of numerous coal companies that had employed hundreds of mine workers. Unity was assigned 78 beneficiaries under the Coal Act. 889 F. Supp. at 821.

Unity sued, alleging that the Coal Act was a "taking" of property that required just compensation under the Constitution's Takings Clause, an argument that every court to rule on the issue had rejected. Judge Smith acknowledged that the "constitutionality of the Coal Act has been carefully considered - and upheld - by a number of courts," 889 F. Supp. at 821 (citing decisions by the 2d Circuit, 6<sup>th</sup> Circuit and other courts). Nevertheless, he granted a preliminary injunction preventing enforcement of the Act against Unity, finding Unity's takings claim was likely to succeed. *Id.* at 835.

Judge Smith's opinion heavily relies upon the proposition that if Unity were held responsible for its obligations under the Coal Act, it would be forced into bankruptcy. Because of this economic impact, Judge Smith concluded that "the nature of the governmental action must be determined in conjunction with the *effect* of the Act on the claimant here—the bankruptcy of Unity . . . . Thus, the true 'nature of the governmental action' here is more properly characterized as 'permanently appropriate[ing] \* \* \* the employer's assets for [the government's] own use.'" *Id.* at 833 (citation omitted) (brackets in original). The government, however, was not taking anything from Unity; the government was simply enforcing promises made to Unity's former employees. Moreover, companies are routinely required to obey the law and uphold their contractual obligations, even when this results in bankruptcy.

A year later, in a similar case, *Lindsey Coal Mining Co. v. Chater*, 90 F.3d 688 (3d Cir. 1996), the Third Circuit essentially overruled Judge Smith's opinion, concluding "every court of appeals to consider a 'takings' challenge to the Coal Act has rejected it. We endorse the reasoning of these cases." *Id.* at 695 (citations omitted). This ruling forced Judge Smith, begrudgingly, to "re-examin[e] Unity's takings claim." *Unity Real Estate v. Hudson*, 977 F. Supp. 717, 718 (W.D. Pa. 1997). He reiterated "that enforcement of the Coal Act will have a severe economic impact on Unity, and this Court continues to have concern over the wisdom of legislation that may have the effect of driving a company into bankruptcy," and still decried the Act's "harsh result" on Unity. *Id.* at 724. Judge Smith recognized, however, that the result "in no way flows from the exertion of control by the government over a property interest held by Unity. As such \* \* \* the Coal Act, as applied to Unity, does not offend the Fifth Amendment." *Id.* at 724-25. On appeal, the Third Circuit reaffirmed the no takings ruling in the aftermath of *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), concluding that lower courts "are bound to follow the five-four vote against the takings claim" in *Eastern Enterprises*. *Unity Real Estate v. Hudson*, 156 F.3d 1246, 1255 (3d Cir. 1999).

Judge Smith's answer to a written question from Senator Biden (D-DE) is technically accurate in stating that: "The Third Circuit never explicitly disagreed with my ruling in *Unity I*." Judge Smith's answer ignores, however, the analysis quoted below by judges

appointed by Republican Presidents in the 1999 *Unity* appeal. The Third Circuit decision exposes the sweeping implications and the fatal flaws in judge Smith’s original finding of a taking in reliance on the fact that Unity would be forced into bankruptcy.

“The constitutionality of the assessment should not depend on the happenstance of the assessed [company] at the time of the assessment. . . The assessment in both cases is based on the same theory of liability and should meet the same constitutional fate.” *Branch v. United States*, 69 F.3d [1571, 1577 (Fed. Cir. 1995)]

**Deciding for Unity and B & T because they will be forced into bankruptcy by the Coal Act would open up a Pandora’s Box that would throw into question every economic regulation imaginable. Companies could adjust their accounting practices to prove that any particular regulation would be enough to destroy them as profitable enterprises. . . .**

**A decision on these grounds would also open the door to plaintiffs attempting to choose government regulations from which they wanted to be excused. It is notable that B & T repeatedly discusses its other government-imposed obligations, which involve cleaning up polluted coal mines and paying out black lung benefits.**

178 F.3d at 675-77 (emphasis added). The Third Circuit discussed how: “For example, an employer could resist an increase in the minimum wage on the ground that the increased cost would drive it out of business. *Id.* at 677 n.17 (also citing anti-discrimination laws, and “various regulations that threaten the financial viability of specific businesses, including OSHA safety regulations, FTC franchising rules, ADA accessibility requirements, Endangered Species Act development restrictions, and EPA Superfund clean-up costs.”).

Thus, the Third Circuit’s decision very strongly condemned judicial reliance on the prospect of bankruptcy to find that a taking occurred, which is what Judge Smith had done in his 1995 decision. Judge Smith’s claim that “The Third Circuit never explicitly disagreed with my ruling,” misses the point and confuses the issue. Hiding behind the term “explicitly” cannot mask the basic fact that the Third Circuit strongly disagreed with an analysis that Judge Smith had employed in his 1995 ruling.

In addition, a unanimous First Circuit ruling explicitly criticized Judge Smith’s 1995 decision, noting that: “We are aware that a lone district court decision has determined, at the preliminary injunction stage, that the Coal Act violated the Takings Clause as applied to a particular operator. *See Unity Real Estate v. Hudson*, 889 F. Supp. 818, 835 (W.D. Pa. 1995). But this decision is not persuasive . . . .” *Eastern Enterprises v. Chater*, 110 F.3d 150, 161 n.8 (1<sup>st</sup> Cir. 1997).

**Judge Smith's 1995 opinion continues to be the only court decision that found that the Coal Act effected a taking. The many decisions denying Coal Act takings claims include:** *Holland v. Big River Minerals Corp.*, 181 F.3d 597, 606 (4<sup>th</sup> Cir. 1999), *aff'g* 1998 U.S. Dist. LEXIS 22908 (S.D.W.Va. 1998), *cert. denied*, 528 U.S. 1117 (2000); *Unity Real Estate v. Hudson*, 178 F.3d 649, 674-77 (3d Cir. 1999); *Association of Bituminous Contractors v. Apfel*, 156 F.3d 1246, 1253-54 (D.C. Cir. 1998) (Silberman, J.); *Eastern Enterprises v. Chater*, 110 F.3d 150, 161 n.8 (1<sup>st</sup> Cir. 1997); *Lindsey Coal Mining Co. v. Chater*, 90 F.3d 688 (3d Cir. 1996), *aff'g* 901 F. Supp. 959 (W.D. Pa. 1995); *Davon, Inc. v. Shalala*, 75 F.3d 1114 (7<sup>th</sup> Cir.), *aff'd* 882 F. Supp. 799 (S.D. Ind. 1995), *cert. denied*, 519 U.S. 808, 117 S. Ct. 50 (1996); *In re Blue Diamond Coal Co.*, 79 F.3d 516 (6<sup>th</sup> Cir. 1996), *aff'g* 174 B.R. 722 (E.D. Tenn. 1994), *cert. denied*, 519 U.S. 1055 (1997); *Barrick Gold Exploration, Inc. v. Hudson*, 47 F.3d 832 (6<sup>th</sup> Cir.), *aff'g* 823 F. Supp. 1395 (S.D. Ohio 1993), *cert. denied*, 516 U.S. 813 (1995); *In re Chateaugay Corp.*, 53 F.3d 478 (2d Cir.), *aff'g* 163 B.R. 955 (S.D.N.Y. 1993), *cert. denied*, 516 U.S. 913 (1995); *Anker Energy Corp. v. Consolidated Coal Co.* 177 F.3d 161, 169-174 (3<sup>rd</sup> Cir. 1999), *aff'g* 1998 U.S. Dist. 22176 (W.D.Pa. 1998); *Holland v. Pardee Coal Co., Inc.* 93 F. Supp.2d 706, 716-717 (W.D.Va. 2000), *rev'd in part on other, statutory interpretation grounds*, 269 F.3d 424 (4<sup>th</sup> Cir. 2001); *Holland v. Cardiff Coal Company*, 991 F. Supp. 508, 516-517 (S.D.W.Va. 1997); *Templeton Coal Co. v. Shalala*, 855 F. Supp. 990 (S.D. Ind. 1993); *A.T. Massey Coal Co., Inc. v. Massanari*, 153 F. Supp.2d 813, 825-833 (E.D.Va. 2001); *Bellaire Corp. v. Shalala*, 995 F. Supp. 125, 139-144 (D.D.C. 1997); See also cases rejecting due process challenges, e.g., *Holland v. Keenan Trucking Co.*, 102 F.3d 736 (4<sup>th</sup> Cir. 1996) (Wilkinson, C.J.); *Carbon Fuel Co. v. USX Corp.*, 100 F.3d 1124, 1137-39 (4<sup>th</sup> Cir. 1996).

### C. **Illegal Toxic Dumping/Whistleblowers: *Wicker v. Conrail***

After years of complying with company orders, employees at a Conrail rail repair yard grew increasingly concerned that the company's illegal dumping of toxic chemicals was making them sick. In 1994, they took the nearly unprecedented step of reporting the company to the Pennsylvania Department of Environmental Protection (DEP). When the DEP's environmental crimes section investigated, it confirmed these serious allegations. DEP found buried drums and visible soil contamination from solvents, degreasers and paints on large portions of the Conrail property. The DEP ordered Conrail to conduct a multi-million dollar clean-up operation.

Sixty-two Conrail workers then sued the company, claiming that the exposure to toxic wastes had made them sick. They sued under the Federal Employers' Liability Act (FELA), a "humanitarian" Act passed by Congress to abolish or modify a host of common-law restrictions that formerly barred railroad workers from recovering for work related harms. The Supreme Court has repeatedly held that FELA is to be "liberally construed" to implement Congress's "humanitarian" and "remedial purposes." *Conrail Corp. v. Gottshall*, 512 U.S. 532, 542-43 (1994).

Judge Smith dismissed the suits brought by all workers who had signed a general release in settling prior, unrelated, injury claims against the railroad. *Wicker v. Conrail Corp.*, No. 93 CA 41J (W.D. Pa.) (Memorandum and Order dated Dec. 31, 1996). To do so, Judge Smith had to ignore the plain language of FELA, which voids such general releases. See 45 U.S.C. § 55 (voiding "any contract \* \* \* the purpose of which shall be to enable [an employer] to exempt itself" from liability under FELA.") Judge Smith justified this departure from Congress's plain statutory text by reference to "economic analysis." In Smith's words: "Broadly worded releases negotiated with departing or retired employees, as a matter of economic analysis, do not permit a FELA employer to exempt itself from future liability \* \* \* [because] the liable employer under such a release pays the full discounted value of the known and unknown injuries of the settling parties." See *Wicker v. Conrail*, 142 F.3d 690, 695 n.2 (3d Cir. 1998) (quoting *Wicker v. Conrail*, 93 CA 41J, (W.D. Pa.) (Memorandum and Order dated Dec. 31, 1996 at 20.).

A three-judge Third Circuit panel that included two Reagan appointees unanimously reversed Judge Smith. Looking to the plain statutory language and binding Supreme Court precedent, the circuit court ruled that "claims relating to unknown risks \* \* \* may not be waived under § 5 of FELA." 142 F.3d at 701. **The Third Circuit concluded that "there is no evidence that any of the plaintiffs . . . was aware of the potential health risks to which he had been exposed. Therefore, they could not have properly waived these claims."** *Id.* at 702 (emphasis added).

#### **D. Attorneys' Fees and Access to Courts: *Ellison v. Shenango Inc.***

The willingness of judges to grant attorneys' fees to successful plaintiffs is essential to ensure access to justice and implementation and enforcement of environmental, civil rights, employee rights and other core values under statutes that contain citizen suit attorneys' fee provisions.

For example, the future of environmental and other public interest litigation will be seriously affected by how broadly or narrowly future Circuit court decisions apply a recent Supreme Court 5-4 decision denying attorney fees. In *Buckhannon Bd. and Care Home, Inc. v. West Virginia D.H.H.R.*, 121 S. Ct. 1835 (2001), the Court held under the Federal Housing Amendments Act and the Americans With Disabilities Act "that a plaintiff whose suit prompts the precise relief she seeks does not 'prevail,' and hence cannot obtain attorney's fees, unless she also secures a court entry memorializing her victory." *Id.* at 1849 (Ginsburg, J., dissenting). Previously, "every Federal Court of Appeals (except the Federal Circuit, which had not addressed the issue) concluded that plaintiffs in situations like Buckhannon's . . . could obtain a fee award if their suit acted as a 'catalyst' for the change they sought, even if they did not obtain a judgment or consent decree." *Id.* at 1851 (citing cases from 12 Circuits).

Each Circuit court will decide whether or not to distinguish *Buckhannon* and award fees based upon different circumstances and different language in key environmental and other statutes. Compare, e.g., *Barrios v California Inter-scholastic Federation*, 277 F.3d

1128, 1134 n.5 (9th Cir 2002) (fees granted where there was a private settlement) and *Johnson v. Dist. of Col.*, 190 F. Supp. 2d 34, 45 & n.3 (D.D.C. 2002) (same); *Center for Biological Diversity v. Norton*, 262 F.3d 1077, 1080 n.2 (10th Cir. 2001) (declining to apply *Buckhannon* to the Endangered Species Act, which does not require that there be a "prevailing party," and leaves fee awards to the court's discretion), with *Oil, Chemical & Atomic Workers Union v. DOE*, No. 01-5163 (D.C. Cir. May 10, 2002) <http://laws.findlaw.com/dc/015163a.html> (2-1 decision broadly denying fees)

Judge Smith's denial of attorneys' fees to a successful plaintiff in an ERISA case took an even harsher approach toward awarding attorneys' fees in ERISA cases than the Third Circuit's which historically has been more conservative on this issue than other Circuits. See *Ellison v. Shenango Inc.*, 956 F.2d 1268, 1278-79 (3<sup>rd</sup> Cir. 1992) (Fullam, J. concurring).

**Judge Smith's ruling threatened plaintiffs' access to justice, contradicted binding Third Circuit precedent in applying bad faith and ability to pay fees factors against the successful plaintiff rather than just against the offending parties, and went well beyond the Supreme Court's subsequent *Buckhannon* decision. The Third Circuit vacated his decision as an abuse of discretion on two grounds.**

Even though Judge Smith had ruled for the plaintiff, he "decided 'that it would be inequitable in the extreme to award attorney's fees.'" *Ellison v. Shenango Inc.*, 956 F.2d 1268, 1273 (3<sup>rd</sup> Cir. 1992), quoting Smith's Findings at 15. However, as the Third Circuit recognized: "prevailing plaintiffs under ERISA are limited to recovery of benefits owed them. . . . without a fee award, the prevailing plaintiff will not be made whole because fees will . . . come out or benefits he is entitled to under ERISA." 956 F.2d at 1274.

Charles E. Ellison had worked in various capacities for Shenango Inc. and its parent company, Shenango Furnace Co., from 1951 to 1986, when the company was bought out and Ellison was asked to resign. Ellison was awarded pension benefits, but, after internal debates, the company later decreased and then revoked them.

Ellison appealed, and Judge Smith granted him benefits but no attorney's fees, citing Ellison's "bad faith." Two judges who were appointed by President Reagan joined the Third Circuit majority opinion, which stated that, "[t]o the extent that it was proper for the district court to consider Ellison's actions in order to determine whether the Plan's response to them was made in good faith, we believe **its finding that Ellison acted in bad faith is clearly erroneous. . . . Absent much stronger evidence that this record presents, an ERISA plaintiff who brings a well-founded, successful claim for benefits cannot be found to have sought and obtained in bad faith benefits he is entitled to.**" *Id.* at 1276 (emphasis added). The concurring opinion "entirely agree[d]" stating that "**all he did was apply for a pension which he was entitled to receive.**" *Id.* at 1278 (Fullam, J., concurring) (emphasis added).

The Third Circuit also overturned and scolded Judge Smith's improper distortion of a factor required under prior Third Circuit precedent:

“the ability of the offending parties to satisfy an award of attorneys’ fees.” The district court made the following conclusion of law with respect to this factor:

The second factor . . . is evenly balanced. Shenango, Inc. could easily satisfy an award against the Pension Plan, while the plaintiff will receive a substantial lump sum payment from which fees can be paid. Findings at 16. **It was legal error to apply this factor directly to Ellison, the prevailing party. Ellison’s ability to pay is irrelevant to the court’s inquiry into the propriety of requiring an offending party to pay a prevailing party’s attorney’s fees and contradicts the statutory purpose of ERISA to protect pension benefits. Ellison’s receipt of a lump sum payment was the result of Shenango Inc.’s unlawful withholding and consequent delay in paying Ellison the pension benefits he was entitled to. It is incorrect to consider the lump sum Ellison belatedly received as a result of successful litigation as a source of funds out of which he can pay his attorney’s fees.**

956 F.3d at 1277 (citation omitted) (emphasis added).

**Judge Smith’s decision violating two Third Circuit rules to deny attorney’s fees to a prevailing party, is a very disturbing indicator of his willingness to deny attorneys fees that would prevent future plaintiffs from bringing environmental and other cases.**

### III. UNWILLINGNESS AND INABILITY TO FOLLOW PRECEDENT

A proven willingness and ability to follow binding precedent is especially important for any prospective Circuit Court judge, in light of the sweeping effect of their decisions and the absence of any meaningful appellate check on extreme rulings. The federal Courts of Appeal have become the final decision-makers on many critical, constitutional, statutory, and policy issues that will determine whether to roll back the clock or to uphold and enforce basic safety, health, and environmental safeguards.

Federal district Judge D. Brooks Smith’s trial level decisions do not bind other district judges. In contrast, if Judge Smith were to be confirmed to the Court of Appeals, all district court judges and three-judge appellate panels in the Third Circuit would have to follow any decision in which Judge Smith was joined by one other judge.

District judge decisions are generally subject to appellate review (with the major exception of rulings on interim, non-dispositive issues). In contrast, nearly every Circuit Court decision is the final word. Even in the fraction of cases where the Supreme Court is asked to review a Circuit Court decision, the high Court refuses over 99 percent of the time. Under the Supreme Court’s Rules and practice, it will generally not even cases just because they are wrongly decided, unless there is an additional factor such as a specific

conflict with a decision by a different Circuit. In fact, the Supreme Court has been shrinking its docket: it issued only 74 signed opinions last term, compared with 107 in 1991-92 and 141 in 1982-83.

It is particularly disturbing that the overwhelming majority of the judges who reversed Judge Smith's most controversial rulings were conservative judges who were selected by Republican presidents. See Glenn Sugameli, Earthjustice, Reversing Judge Smith, *The Washington Post*, Letter to the Editor, March 24, 2002, link at <http://www.earthjustice.org/policy/judicial/>

For example, this describes two of the three judges who unanimously reversed Judge Smith twice in the *Chambers* case. *In Re: Chambers Development, Inc. v. Passaic County Utilities Authority*, 62 F.3d 582 (3<sup>rd</sup> Cir. 1995); *In Re: Chambers Development*, 148 F.3d 214 (3<sup>rd</sup> Cir. 1998).

**The Third Circuit explained that its second, "mandamus" reversal of Judge Smith in the *Chambers* case was "a drastic remedy that a court should grant only in extraordinary circumstances in response to an act amounting to a judicial usurpation of power," 148 F.3d at 223 (citation omitted) (emphasis added). The Circuit Court held that Judge Smith had ruled "clearly contrary to our mandate" and "ignored both the letter and the spirit of our mandate" in its prior reversal. *Id.* at 225 (emphasis added).**

This language and other decisions among the more than 50 times in which Judge Smith has been reversed are examples of how Judge Smith contradicted binding precedent and raise very serious concerns about his willingness and ability to follow precedent.

#### IV. CREDIBILITY and ETHICS

Judge Smith has attempted to explain and justify many of his disturbing decisions and statements on environmentally related issues in written responses to questions from Senate Judiciary Committee members regarding his pending nomination to the Third Circuit. How to evaluate these responses is an important consideration.

Unfortunately, the ability of the Senate Judiciary Committee and other interested parties to rely upon Judge Smith's answers and Judge Smith's credibility and ethics have been undermined by several developments.

First, in a March 14, 2002 letter to the Senate Judiciary Committee, <http://www.independentjudiciary.org/resources/resourcedoc.cfm?ResourceDocID=81> one of the nation's leading legal and judicial ethics experts, Professor Monroe Freedman, the Lichenstein Distinguished Professor of Legal Ethics at Hofstra University Law School, concluded repeatedly and in detail that Judge Smith's conduct as a judge and his testimony and letter to the Committee was among the most serious violations of the

judicial disqualification statute, was “disingenuous” and persuade Professor Freedman “that he is not fit to serve as a Federal Circuit Judge”:

**Judge Smith’s violations of the Federal Judicial Disqualification Statute, 28 U.S.C. §455, in *SEC v. Black* and in *United States v. Black*, are among the most serious that I have seen. His disregard of his judicial responsibilities, and his disingenuous attempt to justify his conduct, persuade me that he is not fit to serve as a Federal Circuit Judge. . . .**

In view of this history, Judge Smith’s failure to recuse himself in *United States v. Black* is all the more egregious. **Judge Smith disingenuously says that he “briefly” presided over that case.** However, he presided over the case for four months, and he ultimately disqualified himself only after Black had made a motion to recuse him.

**Judge Smith is also disingenuous,** and betrays his continuing ignorance of his judicial responsibilities, when he says, **in his letter of February 25, 2002:** “I reminded [the parties in *United States v. Black*] of my earlier recusal and my wife’s employment at Mid-State Bank, but neither the U.S. Attorney’s Office nor Black suggested that I recuse myself.” . . .

Second, **Judge Smith was disingenuous in telling the parties that his wife was an officer of the Bank, but in withholding from them the fact that he and his wife had a substantial financial interest in the Bank.**

I respectfully submit, therefore, that Judge D. Brooks Smith committed repeated and egregious violations of judicial ethics; that to this day he has not informed himself of his obligations under the Federal Judicial Disqualification Statute; and that **he has been disingenuous before this Committee** in defending his unethical conduct. In my opinion, it would not be appropriate to honor him with advancement to a distinguished Federal Circuit Court.

(Emphasis added).

Second, very serious separate but related issues have arisen regarding Judge Smith’s lengthy failures to: 1) follow through with assurances he gave the Senate when they considered his lifetime federal district court nomination in 1988; and 2) comply with what appear to be the clear terms of judicial ethics provisions.

“[A]lthough Smith told the Senate in 1988 before he was confirmed as a district judge that the code of ethics for judges ‘would require my resignation from the club’ if it did not change its policy against admitting women, he admitted last year that he had not resigned until 1999. . . . The code of ethics for U.S. judges says that when a judge determines that an organization to which he belongs engages in ‘invidious discrimination,’ he or she may make an effort to have the organization discontinue such a

practice. If the group fails to do that, within two years of the judge's first learning of the discriminatory practices, he or she "should resign immediately from the organization." NOW fights judge's nomination: Pa. chapter says D. Brooks Smith belonged to biased gun club for 11 years after saying he would quit, By Ann McFeatters, *Pittsburgh Post-Gazette*, April 05, 2002 <http://www.post-gazette.com/nation/20020405smith0405p2.asp>

In 1988, Judge Smith was asked during his prior confirmation process what he would do, and when, if the Spruce Creek membership restriction continued. At that time, he clearly determined that the club practiced invidious discrimination; **his 1988 letter and testimony assured the Senate that while he would have "to await an annual meeting," if the discrimination continued, "adherence to the Code would require my resignation from the Club."**

**Despite this assurance, Judge Smith remained a member of the Club for 11 years as a sitting federal judge**, resigning only in late 1999 (coincidentally soon after the seat he has been nominated to fill came open). This was long after the code commentary was amended in 1992 to require resignation "in all events within two years of the judge's first learning of the [discriminatory] practices."

Judge Smith's recent answers to written questions from Sen. Schumer (D-NY) not only fail to lessen or dispel serious concerns, they actually raise further issues regarding Judge Smith's candor, credibility and substantive views on ethics.

Judge Smith misleadingly states that "In my 1988 letter to the Judiciary Committee, **I stated that I would resign** from the Spruce Creek Rod & Gun Club if it did not amend its by-laws to admit women as members." (Emphasis added). This indicates a mere intention to resign, which is inconsistent with the much stronger language in his 1988 letter (and his 1988 testimony) in which told the Committee that compliance with the ethics Code "would require my resignation." Judge Smith's 1988 letter assured the Committee that if efforts to open the club to women failed, "I believe that adherence to the Code **would require my resignation** from the Club." (Emphasis added). Similarly, he orally testified that "**I believe that I would be required to resign.**" (Emphasis added). This language from his 1988 letter and testimony is also inconsistent with Judge Smith's current answer that "**I believed** in 1988 that **my membership** in the Club **might implicate** Canon 2 . . . ." (Emphasis added).

Judge Smith's lengthy failure to follow through with his assurance to the Senate during his 1988 confirmation proceeding is extremely disturbing. This was one of the few issues that arose during his 1988 confirmation hearing. It is vital that nominees for judicial positions follow through on what they assure the Senate they will do during their confirmation hearing; the lifetime nature of federal judicial appointments means that the Senate only has one opportunity to exercise its constitutional advise and consent role. The only exception is in where a confirmed judge is subsequently nominated to a higher court, as is the case with Judge Smith.

Related, but independent concerns involve Judge Smith's apparent lengthy failure to comply with what he assured the Senate was required by the ethics code for judges. This ethical issue is even more serious when it is considered in conjunction with two cases in which Prof. Freedman's ethical opinion concluded that: "Judge Smith's violations of the Federal Judicial Disqualification Statute, 28 U.S.C. §455, in *SEC v. Black* and in *United States v. Black*, are among the most serious that I have seen."

## CONCLUSION

Earthjustice urges Senators to oppose the pending nomination of federal district Judge D. Brooks Smith to the United States Court of Appeals for the Third Circuit.