UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-3659

NOREEN A. BRZOZOWSKI,
Appellant

v.

CORRECTIONAL PHYSICIAN SERVICES, INC.;
PRISON HEALTH SERVICES, INC.
Appellee

BEFORE: SCIRICA, Chief Judge, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, CHERTOFF, WEIS,* GARTH,[1]* and BECKER*, CIRCUIT JUDGES

SUR PETITION FOR PANEL REHEARING
WITH SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not

* As to Panel Rehearing Only

[1] Judge Garth's Opinion Sur Denial of Rehearing is attached.

having voted for rehearing by the court *en banc,* the petition for rehearing is DENIED.

BY THE COURT:

/s/ Joseph F. Weis
United States Circuit Judge

DATED: April 5, 2004
CLW/cc: Harold I. Goodman, Esq.
Andrew J. Rolfes, Esq.

OPINION SUR DENIAL OF REHEARING

Brzozowski v. CPS, No. 02-3659

Garth, Senior Circuit Judge:

As a Senior Circuit Judge, I am restricted to voting for panel rehearing. *See* 28 U.S.C. § 46(c) (limiting voting for *en banc* rehearing to active circuit judges). I do not, however, vote for panel rehearing in this case because, even though I dissented from the majority opinion, I believe that voting for panel rehearing would be futile.

On the other hand, if I were not precluded from voting for *en banc* rehearing, I would do so in this instance because I am convinced that the majority opinion has materially changed the three-factor formula announced by Judge Greenberg in *Rego v. ARC Water Treatment Co. of Pennsylvania,* 181 F.3d 396 (3d Cir. 1999), for determining when successor liability is appropriate. In my opinion, the majority has read out of the *Rego* formula the third factor, which considers the ability of the predecessor company to provide adequate relief directly to the plaintiff. *See Rego,* 181 F.3d at 402. This cannot, and should not, be condoned because it modifies the jurisprudence of this Circuit, an act that lies beyond the authority of a three-judge panel. *See* 3d Cir. Internal Operating Procedures § 9.1 (explaining that only the entire court, sitting *en banc,* may overrule a precedential opinion).

Of further concern to me is the majority's failure to acknowledge, and give effect to, the equitable underpinnings of *Rego* and the successor liability doctrine under the circumstances of this case, where the equities all favor the successor company.