Appellate Law

A Potpourri of Hits and Misses in Appellate Law

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Upon Further Review

Instead of devoting an entire column to just one of the many appellate–related topics that I currently have in mind, this month I am going to try and address as many of them as possible in summary fashion.

• The Superior Court of Pennsylvania doesn't want you to be gaming its oral argument system: In previous years, the Superior Court would post on its website at the start of a calendar year an oral argument schedule showing which judges were assigned to which oral argument sessions for the entire year. Starting this year, however, the identities of the judges assigned to a given oral argument session will not be made public until the oral argument calendar for each session is completed.

Although it is difficult to believe that anyone was using that previously available information to try and obtain the most favorable oral argument panel conceivable, if you had been doing that, you can't do it anymore.

• If you don't like word-count limits for 3rd U.S. Circuit Court of Appeals briefs, you'll love supplemental briefing on rehearing en banc: In just a few weeks, I'm scheduled to argue a rather interesting case before the 3rd Circuit sitting en banc. The case involves antitrust law and a challenge to the certification of a nationwide settlement class of indirect purchasers seeking damages for alleged monopoly overcharges.

Late last year, the en banc court issued an order asking the opposing parties to file supplemental briefs addressing the issues of greatest interest to the en banc court. When my adversary filed an 81-page supplemental brief consisting of more than 19,000 words — an abundance of verbiage that may be related to opposing counsel's recent decision to add a law professor to its team — I was tempted to file a motion to strike for exceeding the 14,000-word limit without the court's permission.

Instead of doing that, however, I contacted an acquaintance in the 3rd Circuit's Clerk's Office, who advised me that word limits simply did not apply to this supplemental briefing; rather, the en banc court was seeking to obtain whatever assistance the parties could provide.

Thankfully, the court was willing to extend my side's originally allotted 10-day period in which to file a supplemental reply brief to 14 days, enabling us to fully digest and respond to the salient points in opposing counsel's lengthy supplemental brief.

• The doctrine of raise-or-waive applies even to formerly futile arguments, the Pennsylvania Supreme Court rules: Let's say that one of the ways your client can win its case is for the Supreme Court to overrule one of its existing

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precedents. Of course, if the case were easy, the client would not have hired you. Under the circumstances, one question that presents itself is whether you need to preserve the challenge to existing, binding precedent by presenting it to the lower courts, which are themselves powerless to overrule a higher court's decision.

In the decision issued in January in *Schmidt v. Boardman Co.* , Pennsylvania's highest court answered this question in the affirmative. In other words, even currently futile arguments must be raised and presented to each court at the appropriate time before they can provide a basis for Pennsylvania's highest court to overrule existing precedent. This holding comes as little surprise, because Pennsylvania's state appellate court system almost universally loves to find issues waived wherever possible.

But, all kidding aside, the decision in *Schmidt* strikes me as correct. The parties should know what issues may be in play on appeal based on what was argued to the trial court, instead of finding out for the first time when the case is at the very final rung of the appellate ladder that some new, potentially outcome determinative issue exists in the case that the opposing party had never previously identified.

• The U.S. Supreme Court sometimes likes waiver too, holding that the denial of summary judgment cannot be appealed following a trial on the merits: On Jan. 24, the court ruled in *Ortiz v. Jordan* that raising a potentially dispositive legal issue in a motion for summary judgment does not preserve that issue for appeal if the case then proceeds to a full trial on the merits. Rather, to obtain judgment as a matter of law following a trial, the party seeking to overturn the result of the trial must have sought judgment as a matter of law on those grounds at the appropriate times during and after the trial.

This decision confirms one of the cardinal rules of appellate issue preservation, which is when in doubt, it is best to take every possible step to preserve arguments for appeal instead of merely assuming that what was previously done to raise the argument will suffice.

In *Ortiz* , the defendants were undoubtedly aware of the defense to liability in question because they raised it at the summary judgment stage. It is unknown why counsel for defendants did not continue to raise the defense as a ground for judgment as a matter of law at the necessary times during and after trial, but as a consequence the victory that defendants achieved on appeal in the 6th Circuit was taken away from them by the U.S. Supreme Court.

• The Pennsylvania Superior Court cannot only summarily affirm, but it can also summarily vacate and remand: An appeal in which my clients prevailed last year before the Superior Court established a rule of law that controlled the outcome of more than a dozen other appeals that had been stayed by the Superior Court pending the outcome of the first case that presented those issues.

When the Superior Court ruled that the trial court erred in granting summary judgment based on statute of limitations grounds because the timeliness of filing those cases presented an issue requiring consideration and resolution by a jury on the facts of each case, that ruling necessitated setting aside numerous other entries of summary judgment that the trial court had issued in other, similar cases.

Because the outcomes of those other similar cases were clearly controlled by the Superior Court's decision in the first case to present these issues, the opposing parties agreed to file a joint uncontested motion to vacate and remand in the other yet-to-be-decided cases. Recently, the Superior Court has begun to grant those motions, saving that court needless effort and the parties and their clients the time and expense that otherwise would have been incurred had summary resolution been unavailable.

• Twenty years and two firsts: Later this year I will celebrate my 20th year in the private practice of appellate litigation. And while I am eagerly looking forward to my first en banc 3rd Circuit oral argument later this month, just last month I experienced another, slightly more humorous first.

I had been working behind the scenes consulting on a case that would likely soon be heading to appeal in Pennsylvania's state court system. Because I had not entered my appearance in the matter, and because my name had not appeared on any of the court filings, my involvement in the case was unknown to the opposition. One afternoon upon returning to my office from lunch, I received a voicemail message from the opposing party stating that a lawyer friend had recommended me as someone who could be of assistance now that the case was heading for appeal.

Of course, if the ethical rules governing attorneys make anything clear, it is that a lawyer cannot represent the opposing parties in the very same appeal. I promptly did all that I could do under the circumstances, which was to report my unavailability to serve as appellate counsel on that side of the case. Since then, this party has obtained other competent appellate counsel.

As the many lawyers and clients whom I have worked with over the past 20 years know firsthand, I am always most appreciative to receive a call from a potential new client. Especially in this economy, it is far preferable to have both sides of a potential appeal seeking to hire you than neither side.

But the main point of this story, at least to me, is that even while approaching 20 years in the practice of appellate litigation, there remain new enjoyable experiences to be had. And that, no doubt, is what helps keep the practice of law fun. •

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