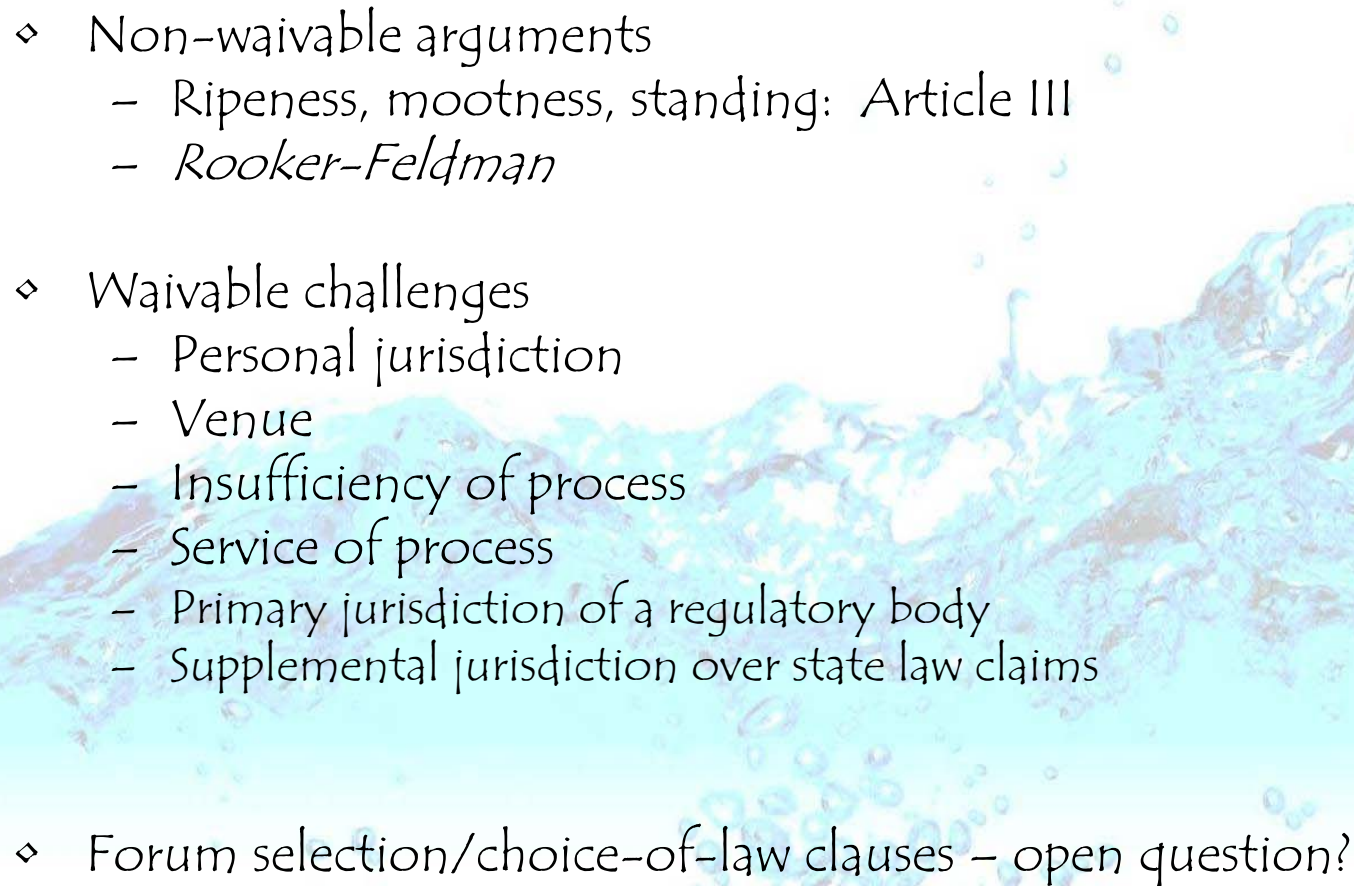
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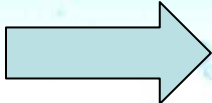
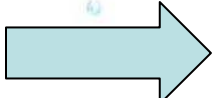
# Watch Out for the Waives: A Late-Summer CLE on How Good Lawyers Waive Good Arguments on Appeal

The Third Circuit Bar Association & The Federal  
Practice Committee of the Pennsylvania Bar  
Association Continuing Legal Education  
August 25, 2010, 2:30 – 4:45 p.m.  
The Fairmont Hotel, Pittsburgh

# Forum & Justiciability

- ◇ Non-waivable arguments
    - Ripeness, mootness, standing: Article III
    - *Rooker-Feldman*
  
  - ◇ Waivable challenges
    - Personal jurisdiction
    - Venue
    - Insufficiency of process
    - Service of process
    - Primary jurisdiction of a regulatory body
    - Supplemental jurisdiction over state law claims
  
  - ◇ Forum selection/choice-of-law clauses – open question?
- 

# Forum & Justiciability (cont.)

- ◇ Right to enforce an arbitration agreement
  - Waived through participation in litigation
  - The court determines if such a waiver occurs
  - Key factor: Prejudice
- ◇ Right to argue that arbitration clause is unenforceable:
  - Submitted to arbitration voluntarily?  
 Waived
  - Submitted to arbitration over objection?  
 Not waived

# Waiver of right to trial by jury

- Participation in a bench trial without objection
- Contesting other party's right to try a case to a jury



# Failing to Assert an Affirmative Defense

- ◇ What is an affirmative defense?
  - vs. general defense
  - Examples
    - ◇ Collateral estoppel
    - ◇ *Res judicata*
    - ◇ Failure to mitigate damages
    - ◇ Statute of limitations
  - *In re Sterten*, 546 F.3d 278 (3d Cir. 2008)

# Waivers of Privileges and Immunities

- ◇ Immunity from Suit
- ◇ Qualified immunity
  - Not necessarily waived by failure to raise it until summary judgment stage
  - Court evaluates the litigant's efforts to make a "reasonable modicum of diligence;" prejudice (*Eddy v. Virgin Islands Water & Power Auth.*, 256 F.3d 204 (3d. Cir. 2001))

# Evidentiary Rulings

- ◇ Unsuccessful motion in limine seeking the exclusion of evidence
  - No formal objection required at trial IF:
    - Pre-trial motion outlining reasoning and case citations filed
    - and-
    - Definitive ruling in district court
  - ◇ Failure to advance a specific ground for the admissibility of evidence or assertion of wrong ground
  - ◇ "Inviting error"

# Failure to Raise an Issue Below

Guiding Principle: A court should not be reversed on grounds that were never urged or argued in the court below.

But: not a jurisdictional bar

- Court may consider issues raised first time on appeal if the case:
  - ◇ has important implications
  - ◇ raises a question of 1<sup>st</sup> impression in the first time in this Circuit

# Failure to Raise an Issue Below (cont.)

- ◇ When appealing an order granting summary judgment, an appellant:
  - generally may not advance new theories or raise new issues
  - may not argue for the first time on appeal that she was entitled to more discovery

# Failing to Properly Preserve Objections to Jury Instructions

- ◇ Proposing an instruction that differs from the charge given is insufficient to preserve an objection
- ◇ Must be made before the jury retires
- ◇ Excused where the district court "made a definitive ruling on the record" (Fed. R. Civ. P. 51(d)(1)(B))
- ◇ If no objection, reviewed for "clear error"

# Failure to Convince District Court to Consider an Argument

- ◇ Court's failure to consider an issue does not necessarily preclude appellate review
- ◇ Appropriate "when the factual record is developed and the issues provide purely legal questions, upon which an appellate court exercises plenary review"  
(*Hudson v. United Bank v. LiTenda Mortgage Corp.*, 142 F.3d 151 (3d Cir. 1998))

# Failure to Convince District Court to Provide Its Reasoning

- ◇ Appeals courts expect district court to show *how* it exercised its discretion
  - E.g., Adopting a party's proposed FFCL
- ◇ Disclosure of reasoning required when a district judge grants summary judgment
  - Insufficient to list factors without further explanation and without balancing the factors

# Failure to Convince District Court to Provide Its Reasoning (cont.)

- ◇ "Subordinate" factual findings required in support of ultimate findings, especially re: credibility findings
- ◇ "A reasoned opinion" is required when certifying a judgment for interlocutory review under Rule 54(b)

# Failure to Object to a Jury's Verdict

- ◇ Special verdict or general verdict accompanied by interrogatories?
  - Special verdict: Does not require objection prior to jury dismissal
  - General verdict: Requires objection prior to jury dismissal



# Forgetting to File/Renew a Motion for Judgment as a Matter of Law

- ◇ Waiver of right to argue entitlement to judgment as a matter of law due to insufficiency of evidence
  - Must file a Rule 50(a) motion and a Rule 50(b) motion
  - Applies to jury trials only

# Interlocutory Appeals

- ◇ An interlocutory appeal is never mandatory. But: will the issue be mooted if you wait?
- ◇ Rule 23(f) class cert decisions



# Failure to File a Notice of Appeal on Time

- ◇ A court may not waive the requirements of Fed. R. App. P. 4, even for good cause
- ◇ A Rule 60(b) motion tolls the time to appeal only if timely filed
- ◇ Effect of a notice of appeal filed prior to resolution of a post-trial motion
- ◇ Failure to **cross appeal** forbids an attack on the decree with a goal of expanding one's rights or lessening an adversary's rights

# Failure to Comply with Procedural Rules or Deadlines

- ◇ Criteria for the excuse of defects in a notice of appeal – see *U.S. v. Carelock*, 459 F.3d 437 (3d Cir. 2006)
- ◇ Dismissal of appeal for failure to comply with FRAP or court rules
- ◇ New court rule



# Seriatim Appeals

When case is remanded and a second appeal is taken post-remand



Appellant waives all arguments that could have been raised in prior appeal



Waive the Waiver Issues



Thank you for coming.  
Please join us for a reception on  
Reed Smith's 12<sup>th</sup> floor terrace.