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FEDERAL COURT SPACE REDUCTION AND THE THIRD CIRCUIT

The Honorable D. Brooks Smith
U.S. Court of Appeals for The Third Circuit

In late 2013, the Judicial Conference of the United States (JCUS) began implementation of an unprecedented cost-containment initiative for the nation's federal courts. Effective October 1 of that year, the federal judiciary adopted what it called a "no net new" policy by which every circuit would be required to offset any increase in usable square footage by an equivalent reduction within the same fiscal year.

But the JCUS did not just undertake a "freeze" in its space and facilities growth. It went further. In tandem with "no net new," the federal judiciary set out on an ambitious course to reduce its space footprint by 3 percent with an aggressive timeline of accomplishing this goal by the end of Fiscal Year (FY) 2018. To ensure that these policy goals are achieved, each circuit has formulated a space and rent management plan that specifies how that circuit will meet its space reduction target. Those plans, together with twice a year updates, are submitted to the Space and Facilities Committee of the JCUS for review – a committee that I chair.

Cost containment is being aggressively pursued by the federal courts in the wake of sequestration and ever-tightening federal budgets. The "no net new" and space reduction policies reflect the judiciary's realistic assessment that budgetary constraints will be with us for years to come. And they reflect not only a responsible commitment by the judiciary to fiscal restraint, but also a recognition that we

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3D CIRCUIT HOLDS THAT APPELLANT'S FAILURE TO PROVIDE THE TRANSCRIPT OF A SUMMARY JUDGMENT ORAL ARGUMENT FORFEITS THE APPELLANT'S SUMMARY JUDGMENT CHALLENGE

Lehman Bros. Holdings, Inc. v. Gateway Funding Diversified Mortgage Services, L.P., 785 F.3d 96 (3d Cir. May 7, 2015)

Howard J. Bashman
Law Offices of Howard J. Bashman, Willow Grove
Matthew Stiegler
Law Office of Matthew Stiegler, Philadelphia

When an appellant fails to include a transcript necessary for an appeal, but the appellee provides that transcript, the appellant's mistake may seem inconsequential. But, in *Lehman Bros. Holdings v. Gateway Funding Diversified Mortgage Services*, inconsequential it surely was not. There, the Third Circuit held that the appellant Gateway's failure to provide the appellate court with the transcript necessary to evaluate whether or not Gateway had abandoned (during a telephonic summary judgment oral argument) the same argument it was now seeking to raise on appeal, in seeking reversal of the district court's entry of summary judgment, warranted forfeiture of that argument.

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RULE 50, WAIVER, AND APPEALS OF SUMMARY JUDGMENT DENIALS—THE CIRCUIT WEIGHS IN ON A WIDENING CIRCUIT SPLIT

Colin E. Wrabley and Jorge Rojas
Reed Smith LLP, Pittsburgh

Preserving issues for appeal is a crucial, ever-present consideration for trial counsel, and it looms at all stages of trial. Of particular salience is the requirement that a party raise arguments relating to the sufficiency of evidence supporting a claimant's cause of action in Rule 50 motions—both before a jury verdict.

Recently, in *Frank C. Pollara Group, LLC v. Ocean View Investment Holding, LLC*, 784 F.3d 177 (3d Cir. 2015), the Third Circuit addressed an unsettled Rule 50 preservation issue, which the Supreme Court did not definitively resolve in *Ortiz v. Jordan*, 131 S.Ct. 884 (2011): whether a party's failure to raise so-called "purely legal questions" in Rule 50 motions at trial waives them on appeal, even where the questions had been previously raised and rejected at summary judgment. The Circuit sided with the majority of circuits and acknowledged that "purely legal questions" raised before trial need not be raised later at the Rule 50 stage in order to be preserved for appeal. But it found that the "purely legal question" exception did not apply to prevent a waiver on the facts before it,

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FEDERAL COURT SPACE REDUCTION AND THE THIRD CIRCUIT

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must "put people first." The judiciary's share of the federal budget is less than two-tenths of one percent, yet we experienced a proportional impact on our appropriations as a result of sequestration's automatic, across-the-board cuts. The results were devastating. Sequestration led to a reduction in court staffing of more than 3,000 full-time employees. It also created havoc for federal public defender programs, which experienced a loss of 400 positions. By looking for savings in our utilization of space and facilities, the federal judiciary is attempting to free up available funding to provide the level of staffing required to operate what is already a lean and efficient branch of government.

For FY 2015, Congress provided the Third Branch with $6.7 billion to fund all of its operations. Of that amount, more than $1 billion will be paid to the General Services Administration (GSA), the judiciary's landlord. With such a substantial portion of its annual budget allocated to rent, the judiciary has made reduction of its space footprint the primary objective of its ongoing cost-containment efforts. And those efforts have already been yielding significant savings.

As of the end of March of this year, our space reduction efforts have resulted in approximately 308,500 usable square feet (USF) being removed from the judiciary's rent bill. That figure represents 35 percent of the overall reduction target of 870,305 USF. In addition, it is anticipated that projects identified as currently underway will, if successfully brought to conclusion, yield another 52 percent of the reduction target.

Yet with all the progress that has been made so far, another 13 percent – or approximately 113,000 USF (net) – will have to be released in order for the judiciary to meet its goal. That is the challenge confronting courts and court units over the next three and a half years.

Here in the Third Circuit, we have been doing our share. With a total inventory of 2,089,548 USF in our space inventory, we were given a reduction goal of just under 65,000 square feet – or 3.1 percent of our holdings. To date, the Third Circuit Judicial Council has approved twenty-seven space reduction projects totaling about 74,304 square feet. Fifteen of the projects are complete and approximately 34,000 square feet has already been released. Third Circuit staff is working with GSA to develop three additional space release projects for FY 16. Those projects, if approved, would add another approximately 7,000 USF in reductions to the national effort.

Two major factors have contributed to the Third Circuit's early successes in achieving space reduction. First, in the wake of sequestration, Chief Judge Theodore A. McKee implemented a fiscal austerity program to be applied to both the use of space within the court units of the Circuit and the expenditure of funds that could be re-programmed from facility improvements to personnel. Quite simply, Chief Judge McKee's concerns were that the job security of court staff has priority over any short-term improvements in rented space. Our Circuit was the only one in the country to adopt such a policy. And that policy set the tone for our implementation of the national space reduction goals that were subsequently mandated by the Judicial Conference.

The other major factor that has profoundly aided our Circuit in its efforts to meet its space reduction goal has been a positive working relationship with Region 3 of the GSA. They have not only cooperated with our facilities staff in release projects; they have also offered creative solutions to give back space in instances where the agency's own space release criteria seemed at first to present obstacles. Moreover, GSA has offered assistance to fund tenant improvements on projects when needed.

Nationally, the JCUS has not just issued mandates for space reduction. Recognizing from the outset that the judiciary will need to *spend* money to downsize so that it can ultimately save money in long-term rent, the Conference allocated $30 million in FY 14 and $25 million in FY 15 for space reduction projects.

The federal court "family" all across the nation is working toward achieving our space reduction goals. As I described our initiative at a meeting of the JCUS, chaired by Chief Justice Roberts, in March of last year: "District by district, city by city, building by building – this effort is grass roots at its core, and is dependent in large measure on the relationships of chief judges, judges, and unit executives across the country."

Those relationships, and the commitment of judges and staff to "putting people first," are paying off. We are demonstrating once again to both Congress and the public that we, in the judiciary, are good stewards of taxpayer dollars. And the Third Circuit is in the vanguard of those circuits that are demonstrating innovative and efficient methods of space reduction.

3D CIRCUIT HOLDS THAT APPELLANT'S FAILURE TO PROVIDE THE TRANSCRIPT OF A SUMMARY JUDGMENT ORAL ARGUMENT FORFEITS THE APPELLANT'S SUMMARY JUDGMENT CHALLENGE

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The case arose when Lehman sued Gateway, seeking indemnification for certain mortgage-loan losses. Both sides moved for summary judgment, and Gateway asserted a contractual argument, claiming that a clause in the indemnification agreement extinguished Gateway's liability. The district court ruled that Gateway abandoned this contractual argument during a telephonic oral argument, and it granted in part Lehman's summary judgment motion. Some three months after the telephonic argument, Gateway hired outside counsel to replace the in-house attorney who had been its counsel of record in the district court at the time of the argument.

On appeal, appellant Gateway — still represented by the outside counsel — argued that it had not abandoned its contractual argument during the telephonic argument. But Gateway did not order a transcript of the telephonic argument, later claiming that it was unaware that a transcript existed. A careful review of the district court's docket entries reveals a "minute entry" for the telephonic summary judgment oral argument listing a court reporter.

To its ultimate detriment, Gateway argued in its opening brief on appeal that "there is no record to support the [District] Court's position that Gateway 'abandoned' this argument." Once appellee Lehman filed a transcript of the telephonic summary judgment oral argument as a supplemental appendix, Lehman was able to demonstrate to the Third Circuit that the district judge had not been entirely without support in concluding that Gateway's original counsel had stated to the district court during that argument that the issue now being advanced on appeal did not need to be addressed in considering whether summary judgment should be granted.

In a published opinion written by Judge Hardiman and joined by Judges Greenaway and Krause, the Court held that Gateway's failure to include the transcript in the record violated Rule 10 of the Federal Rules of Appellate Procedure. Rule 10(b)(2) requires appellants to include a transcript of all evidence relevant to any finding or conclusion that the appellant argues is unsupported. The Court further held the error warranted forfeiture of Gateway's lead argument on appeal that the district court should have ruled that the indemnification agreement extinguished Gateway's liability. (In a footnote, the Court added that, even if Gateway had not forfeited its claim, the Court likely would find no abuse of discretion in the district court's ruling that counsel abandoned the claim during the telephonic argument.)

In concluding that this case presented "the unusual situation where forfeiture is appropriate," the opinion contained strong language directed at Gateway. The Court described as "untrue" Gateway's argument that there was no record to support the district court's abandonment finding. It found "cavalier" Gateway's argument that its omission of the transcript was irrelevant because the other side supplied it. And it rejected as a "weak post hoc justification" Gateway's asserted failure to realize that a transcript of the telephonic argument was available. Finally, the knock-out punch: "Gateway's Rule 10 violation at best shows a remarkable lack of diligence and at worst indicates an intent to deceive this Court."

Counsel aiming to avoid such a catastrophic result will note several points:

- As explained above, in this case the district court docket entry for the telephonic oral argument noted the presence of a court reporter. If you want to know if a proceeding can be transcribed, the district court docket entries are the first place to look. Careful review of the docket will avoid many appellate blunders.
- Appellants can reduce the risk of omitting an essential transcript by following FRAP 30(b)(1)'s procedure for reaching agreement with the appellee on the appendix contents before filing the opening brief. It is not known whether the parties did so here.
- Even when appellant's counsel believes that a particular transcript is unavailable, FRAP 10(c) provides a procedure by which counsel may prepare a statement of the evidence to create a record of what happened. Had Gateway's counsel followed that procedure instead of arguing in its brief that there was no record to support the district court's abandonment finding, forfeiture might have been avoided.
- Third Circuit LAR 30.3 requires parties to include relevant portions of the transcript in the appendix, and it provides that, any time you challenge the sufficiency of the evidence to support a determination, you must provide all the evidence that supports the challenged determination. This local rule underscores counsel's duty to provide the Court with all the transcripts needed to decide the issues presented.
- While Lehman, the appellee here, escaped condemnation from the appellate court, the rules also impose responsibility for the contents of the appellate record and appendix on the appellee. FRAP 10(b)(3)(B) obligates appellees to designate any additional transcripts needed for the appeal. (Rule 30(b)(1) addresses this too.) The Third Circuit's case-opening paperwork requires the appellant to communicate to the appellee what additional transcripts, if any, the appellant is ordering and, in civil cases, what issues the appellant intends to raise on appeal. Here, Gateway disclosed to Lehman toward the outset of the appeal that it was challenging the district court's grant of summary judgment, that it considered the court's abandonment finding incorrect, and that it had not ordered a transcript of the telephonic argument. These disclosures would have allowed Lehman to fulfill its duty to designate the missing transcript to be ordered, likely preventing Gateway's Rule 10(b)(2) error from ever occurring.

The time for Gateway to seek either panel or en banc rehearing has now expired, without any request for further review. As a result, the Third Circuit's ruling in *Lehman Bros.* now stands as a warning to counsel to ensure that transcripts necessary to appellate review are made a part of the record and appendix on appeal, on pain of forfeiture.

RULE 50, WAIVER, AND APPEALS OF SUMMARY JUDGMENT DENIALS—THE CIRCUIT WEIGHS IN ON A WIDENING CIRCUIT SPLIT

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thereby demonstrating the sort of careful analysis the Circuit will undertake in determining whether the exception applies. Ultimately, *Ocean View* reaffirms that prudent counsel should raise all issues in its Rule 50 motions that he or she may wish to raise on appeal.

Ocean View involved a Virgin Islands tort dispute between a contractor and real estate developers. The developers eventually moved for summary judgment, arguing that because a contract governed the parties' relationship, the "gist of the action" doctrine barred the contractor's tort claims.[1] The district court rejected the gist of the action argument, denied summary judgment, the case proceeded to trial, and a jury found for the contractor. During and after trial, the developers moved for judgment as a matter of law under Rule 50, but they failed to assert their gist of the action argument in either motion. On appeal, however, the developers did assert their gist of the action argument, and the contractor responded that the argument had been waived because it had not been raised at the Rule 50 stage.

The Third Circuit began its analysis of the waiver issues with a close look at the Supreme Court's decision in *Ortiz v. Jordan*. There, the defendants, two prison administrators, moved for summary judgment, claiming qualified immunity in a prison guard-inmate sexual assault case. Summary judgment was denied and the case proceeded to trial, but the defendants did not re-assert the qualified immunity defense in their Rule 50 motions. On appeal, the Sixth Circuit concluded that the defendants' failure to raise qualified immunity at the Rule 50 stage did not effect a waiver because qualified immunity presented an issue of a "purely legal nature," and therefore need not be raised in Rule 50 motions. The Supreme Court reversed, holding that, as a general rule, arguments rejected at summary judgment must be raised at the Rule 50 stage at trial in order to be preserved for appeal. *Ortiz*, however, did not address whether arguments of a purely legal nature were exempt from that preservation requirement because the defendants' qualified immunity challenge "hardly present[ed] purely legal issues capable of resolution with reference only to undisputed facts." *Ortiz*, 131 S.Ct. at 892; *see also Nolfi v. Ohio Kentucky Oil Corp.*, 675 F.3d 538, 545 (6th Cir. 2012) (concluding that *Ortiz* "le[ft] open the possibility that cases 'involv[ing] ... [only] disputes about the substance and clarity of pre-existing law' may still be considered,") (quoting *Ortiz*, 131 S.Ct. at 892).

In light of *Ortiz*, the Circuit concluded in *Ocean View* that, in order to preserve an "earlier dispositive argument," litigants must raise it in their Rule 50 motions—"unless that argument presents a pure question of law that can be decided with reference only to undisputed facts." Thus, "neat abstract issues of law" that relate to "disputes about the substance and clarity of pre-existing law . . . fit the exception to the rule requiring that arguments be preserved in Rule 50 motions." But issues that contain a "factual component," and "turn on what occurred, or why an action was taken or omitted," must be "directed to the judge who saw and heard the witness and had the feel of the case which no appellate printed transcript can impart[.]"

Applying this understanding of the "purely legal question" exception to the Rule 50 preservation requirement, the Circuit found that the exception did not apply, and the developers were barred from re-asserting their gist of the action argument on appeal. The developers' gist of the action argument was based upon the "existence of contractual privity" between the parties, which in turn "depend[ed] on certain predicate facts [that] were vigorously disputed" and required the resolution of disputed factual questions."

In *Ocean View*, the Third Circuit expressly aligned itself with the majority of circuits in recognizing a "purely legal question" exception to the Rule 50 preservation requirement. Those circuits take the position that such an exception squares with Rule 50 because, unlike a "Rule 50 motion [which] preserves for appeal a challenge to the legal sufficiency of the evidence" and secures a litigant's ability to "step back in time to determine whether the evidence was sufficient for summary judgment," purely legal questions are unaffected by any "changed facts or credibility determinations at trial[.]" *Feld v. Feld*, 688 F.3d 779, 782 (D.C. Cir. 2012) (internal citations and quotations omitted). Conversely, circuits that have rejected the exception have stressed that administering the exception requires courts "to engage in the dubious undertaking of determining the bases on which summary judgment is denied and whether those bases are 'legal' or 'factual.'" *Id.* (internal citations omitted).

The Supreme Court may eventually resolve the conflict in the circuits over the need to re-assert purely legal challenges at the Rule 50 stage in order to preserve those challenges on appeal. In the meantime, regardless of the circuit in which one tries a case—including the Third—"prudent counsel would do well to preserve the [legal] issue in a Rule 50 motion," even where the issue appears to be "purely legal," because "the basis for the court's denial at summary judgment may be difficult to discern[.]" *Wolfgang v. Mid-America Motorsports, Inc.*, 111 F.3d 1515, 1521-22 (10th Cir. 1997); *Chemetall GMBH v. ZR Energy, Inc.*, 320 F.3d 714, 719 (7th Cir. 2003).

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[1] The gist of the action doctrine is a common law theory "designed to maintain the conceptual distinction between breach of contract claims and tort claims," and generally prohibits tort recovery for breaches of contract. *Ocean View*, 784 F.3d at 186 (citation omitted).

A CLOSER LOOK AT THE 3D CIRCUIT'S RECENT EN BANC CASES OFFERS LESSONS FOR PRACTITIONERS

Matthew Stiegler
Law Office of Matthew Stiegler, Philadelphia

Can a middle-school student be punished for wearing an "I ♥ boobies" bracelet to school?[1] Can a defendant be prosecuted using evidence from a GPS tracker that police hid on his car without a warrant?[2] Can police take DNA samples from everyone they arrest?[3] These are among the questions that have led the Third Circuit in recent years to rehear cases en banc.

Since Chief Judge Theodore McKee became chief in 2010, the Third Circuit has issued 18 en banc rulings. (At least two more are pending as of this writing.[4]) Eighteen cases in five years is not many: the court decides about 2,500 cases a year, so it grants en banc rehearing in less than one of every 600 decided cases. That's generally in line with the overall circuit-court en banc rate. In recent years the highest en banc rates have been in the Ninth (roughly one en banc ruling for every 400 decided cases), Seventh, and Fifth Circuits, while the lowest have been in the Second (one lone en banc ruling out of more than 13,000 cases decided over the past five years) and Fourth Circuits.[5]

The Third Circuit's en banc cases run the substantive gamut. Of the 18 most recent en banc rulings, six were criminal and 12 were civil. Of the civil cases, two were immigration, two bankruptcy (both asbestos-related), one habeas corpus, one class action, and six other civil cases; three of the civil cases involved school-student rights and a fourth involved whether schools have a duty to protect students from bullying. So if there has been any trend in the Court's recent en banc grants, criminal-law and education-related cases have been somewhat overrepresented.

For Third Circuit practitioners, two lessons jump out from the recent en banc cases:

- **Your best hope for getting en banc rehearing might be to seek an overruling of a prior panel precedent.** Four of the last six Third Circuit en banc decisions overruled prior circuit precedent. In three of those four, the overruled precedent had made the Third Circuit an outlier among its sister circuits. Two other factors leading to recent en banc overrulings: subsequent Third Circuit and Supreme Court cases had eroded the precedent, and the precedent caused confusion and uneven results. So don't let an existing panel precedent stop you from considering rehearing.
- **Don't wait until after the panel has ruled to argue why the Circuit precedent should be overruled.** Panels lack the power to overrule prior precedent, so you may be tempted to hold your arguments about overruling a precedent for your rehearing petition, after the panel has ruled. But the court's recent en banc cases suggest that's a mistake. When the Third Circuit grants rehearing en banc to overrule a prior decision, it usually does so before the panel rules, per 3d Cir. IOP 5.5.4 (requiring internal circulation of all published and split-panel unpublished opinion drafts). Of six recent cases where the court overruled a precedent, rehearing was granted *before* the panel had ruled in five. Counsel would be wise to include their en banc arguments in their briefs.

En banc rehearing is exceedingly rare, and many petitions are filed with no chance of being granted. But a clearer picture of the court's recent en banc rehearing cases can help counsel decide when rehearing is realistic and what arguments will interest the court most.

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[1] *B.H. v. Easton Area School Dist.*, 725 F.3d 293 (3d Cir. 2013) (en banc).
[2] *United States v. Katzin*, 769 F.3d 163 (3d Cir. 2014) (en banc).
[3] *United States v. Mitchell*, 652 F.3d 387 (3d Cir. 2011) (en banc).
[4] *See United States v. Jermel Lewis*, No. 10-2931 (reargued en banc 2/19/15) and *Dennis v. Sec., Pa. Dept. of Corr.*, No. 13-9003 (rehearing en banc granted 5/6/15).
[5] The relevant data is available at www.uscourts.gov; through 2013 it was collected in table S-1, and in 2014 was collected in table B-10.

PRESIDENT'S NOTE

Peter Goldberger
President, Third Circuit Bar Association

The Third Circuit Bar Association is pleased to bring to our members the latest edition of our newsletter. I think you will find it to be another outstanding issue. Two articles draw lessons from recent Circuit decisions that will help you in your practice. In one article, you will find a thoughtful discussion by Colin Wrabley and Jorge Rojas of how to avoid issue-preservation pitfalls under Federal Civil Rule 50. In another, you will find an in-depth discussion of a recent decision where the appellant was penalized by forfeiture of a critical issue because counsel failed to designate an essential transcript for production (and thus for inclusion in the record and then the appendix). No one who handles Third Circuit appeals, civil or criminal, can afford to disregard this decision. But with the guidance provided by our Board member Howard Bashman and Association member Matthew Stiegler (both of whom maintain essential blogs, here and here, covering developments in appellate case law) you will learn how attention to the federal and local rules of appellate procedure can assure that you avoid a similar disaster in your own practice.

I would venture to say that few of us appreciate the administrative and budgetary issues our Circuit faces, on top of its weighty responsibility to dispose fairly and efficiently of a heavy load of appellate cases. I certainly did not, until I read Judge Smith's fascinating discussion – part alarming and part reassuring – of how the Circuit is dealing with a mandate to decrease its space-occupied footprint. Finally, some of the mysteries of the en banc process are illuminated in Matt Stiegler's analysis of which (and how few) cases have received that most unusual level of review in recent years.

I also want to call our members' attention to the outstanding contribution made in the past few months by our Association's Committee on Rules of Procedure, led by Board members Deena Jo Schneider and David Fine. When the Court proposed changes to its attorney discipline rules that sparked controversy and objections from a number of practitioners, our Committee took the lead in communicating those concerns to the Court in a constructive fashion, along with suggestions for revisions to the proposed amendments. We are confident that the final revision, whenever it is issued, will reflect our Committee's efforts as well as the Court's responsiveness.

Thank you for your continued support of our Association as we continue to move forward in service to your needs and to those of the Court of Appeals.

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