Bar Association for the Third Federal Circuit

# On Appeal

Summer 2011
Volume V, Number 2

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## CASE OF INTEREST: *STATE OF NEW JERSEY V. MERRILL LYNCH & CO.*, 640 F.3D 545 (3D CIR. MAY 18, 2011)

By Andrew J. Hughes, Blank Rome LLP

The United States Court of Appeals for the Third Circuit recently ruled that a defendant waived the right to remove a case to federal court by executing a forum selection clause providing that "exclusive jurisdiction…shall lie in the *appropriate courts of the State [of] New Jersey*." *State of New Jersey v. Merrill Lynch & Co., Inc.*, 640 F.3d 545, at *1 (3d Cir. 2011) (emphasis added). In that case, the plaintiff, a division within New Jersey's Department of Treasury (the "State"), purchased preferred stock from the defendant, Merrill Lynch. *Id.* at *2. The parties subsequently executed a Share Exchange Agreement (the "Agreement"), in which the State agreed to convert its preferred shares to common stock, so long as the terms of conversion were as favorable as the terms governing the exchange of other stockholders' preferred shares. *Id.*

One year later, the State sued Merrill Lynch in the Superior Court of New Jersey, alleging that Merrill Lynch breached the Agreement by converting another shareholder's preferred shares on terms more

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## RULES COMMITTEE PREPARES TO PROPOSE REFORMS IN THIRD CIRCUIT APPENDIX REQUIREMENTS

### Survey of Other Circuits Reveals Widely Disparate Requirements

By Robert A. Zauzmer, Office of United States Attorney (Philadelphia) and Peter Goldberger, Law Office of Peter Goldberger

The Rules Committee is presently assessing the Third Circuit's procedures and requirements for the filing of an appendix, with the goal of making a proposal on behalf of the 3CBA for reform of the local rules on this subject. The Committee has undertaken a survey of the rules of all of the Circuits, and found that with the advent of electronic case filing (ECF), an evolution is underway regarding appendix requirements, with the Circuits varying widely in their approaches.

It is the appellant's responsibility to file an appendix, and that filing can be voluminous. The Third Circuit decrees, for instance, that in addition to the contents described in Federal Rule of Appellate Procedure 30(a)(1), "[r]elevant portions of a trial transcript, exhibit, or other parts of the record referred to in the briefs must be included in the appendix at such length as may be necessary to preserve context." 3d Cir. LAR 30.3. Traditionally, the appendix is filed on paper, with four copies sent to the Court; an appendix often consists of multiple volumes. Although there is some "wiggle room" in the term "relevant" (LAR 30.3(a) clarifies that transcript portions are not necessarily "relevant" simply because they are referenced in a Statement of Facts, for example), there is no gainsaying that the Third Circuit is justly known as a "fat appendix" circuit, compared to many of the others. For instance, in a criminal appeal in which the defendant challenges the sufficiency of the evidence of conviction, the pertinent trial transcripts, plus documentary exhibits and/or tape transcripts, often run to thousands of pages and must under the Rule be included in the appendix.

With the adoption of ECF, the Third Circuit has also required that the appendix be filed electronically, while providing that electronic filing is not necessary if the parties use a specific citation convention in

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## CASE OF INTEREST: *STATE OF NEW JERSEY*—continued from page 1

favorable than those granted to the State. *Id.* at *2-3. Merrill Lynch removed the action to the United States District Court for the District of New Jersey, arguing that there was federal question jurisdiction because the case involved a "strong federal interest" and issues under the Securities Exchange Act were embedded in the complaint. *Id.* at *3. The District Court considered Merrill Lynch's federal-question argument to be "extremely dubious," but ultimately did not reach the issue and instead remanded the case to New Jersey state court based on the Agreement's forum selection clause. *Id.* at *4.

Merrill Lynch appealed to the Third Circuit, arguing that the Agreement's forum selection clause permitted the parties to file suit in any court—state or federal—located in New Jersey. *Id.* at *8. According to Merrill Lynch, the phrase "appropriate courts of the State [of] New Jersey" encompassed both state and federal courts because: (1) it referred to "courts" in the plural; and (2) the word "of" denoted only the geographic location of the "appropriate courts." *Id.*

The Third Circuit found, as an initial matter, that it had jurisdiction over Merrill Lynch's appeal. Although Courts of Appeals generally have "no jurisdiction over appeals from orders remanding a matter to state court" under 28 U.S.C. § 1447(d), an exception exists where the remand is based on a forum selection clause rather than on § 1447. *Id.* at *4-5 (citing *Foster v. Chesapeake Ins. Co., Ltd.*, 933 F.2d 1207, 1211 (3d Cir. 1991)). Dealing next with the proper construction of a forum selection clause, the Court concluded that it need only look to the "plain and ordinary meaning" of the clause and need not find "clear and unequivocal" waiver of the right to remove to federal court. *Id.* at *7-8.

The Court then rejected both of Merrill Lynch's arguments and affirmed the District Court's remand order. It did not agree that because New Jersey has a single unified court system, the plural "courts" in the forum selection clause must encompass federal courts. *Id.* at *8. The Court concluded that the use of the plural "is best read as a vestigial reference to the many tribunals comprising the Superior Court of New Jersey, not the federal district courts in the state." *Id.*

The Court went on to join "the vast majority of our sister circuits [which] have held that forum selection clauses like the one at issue here required remand to the state court." *Id.* at *11 (citing First, Fourth, Fifth, Ninth, and Tenth Circuit cases). Focusing on the operative preposition of the forum selection clause ("courts *of* the State [of] New Jersey"), the Court invoked the reasoning of other circuits regarding the distinction between "of" and "in":

> *[I]n* a state expresses the parties' intent as a matter of geography, permitting jurisdiction in both the state and federal courts of the named state. On the other hand, *of* a state connotes sovereignty, limiting jurisdiction to the state courts *of* the named state. The Fifth Circuit put it more pithily: "Federal district courts may be *in* [a state], but they are not *of* [that state]."

*Id.* at *9 (internal quotation marks and some alterations omitted) (citing *Find Where Holdings, Inc. v. Sys. Env't Optimization, LLC*, 626 F.3d 752, 755 (4th Cir. 2010), and *Dixon v. TSE Int'l Inc.*, 330 F.3d 396, 398 (5th Cir. 2003) (per curiam)).

The holding of *Merrill Lynch* will have a significant impact in this Circuit because a commonly used forum selection clause, providing for exclusive jurisdiction in the "courts of…New Jersey," precluded the defendant from removing a case to federal court. Going forward, if a party in this Circuit wants to keep open the option to litigate in federal court, that party must draft its forum selection clause carefully. For example, a forum selection clause should provide for jurisdiction "in all courts *in* the State of New Jersey," or, better yet, "in the *federal or state courts* in the State of New Jersey."

## JUDGE GARTH HONORED IN DEDICATION OF ATRIUM OF NEWARK'S MARTIN LUTHER KING, JR. FEDERAL BUILDING AND U.S. COURTHOUSE

By Jed Goldstein, Gibbons P.C.

On June 24, the Atrium of Martin Luther King, Jr. Federal Building and United States Courthouse in Newark, New Jersey was dedicated to Senior Circuit Judge Leonard I. Garth of the United States Court of Appeals for the Third Circuit. The dedication ceremony was a fitting tribute to Judge Garth, who has served with distinction on the Third Circuit bench since 1973. In his thirty-seven (and counting) years of service, Judge Garth has made many significant contributions to the Third Circuit and has influenced many who have come to know him. An emblematic example is Judge Garth's most famous former law clerk, Justice Samuel Alito. At his 2006 confirmation hearing after his nomination to the U.S. Supreme Court, Justice Alito spoke to the Senate Judiciary Committee about the significant influence that Judge Garth had on him. Justice Alito recalled that Judge Garth "taught all of his law clerks that every case has to be decided on an individual basis, and he really didn't have much use for any grand theories."

At the Dedication, Justice Alito had another opportunity to praise his mentor. He described Judge Garth as a "judge's judge," emphasizing Judge Garth's belief in the Third Circuit as a unique institution, his practice of scrutinizing every Third Circuit opinion (regardless of whether he sat on the panel), and his unwavering commitment to precedent.

The dedication was kicked off by Chief Judge Theodore McKee, who made light of Judge Garth's penchant for wearing blue and white polka dot bow ties through a colorful photo display. Indeed, several former law clerks who attended the dedication also wore such bow ties to honor Judge Garth. Judge Ruggero Aldisert spoke about Judge Garth's significant contributions to the Third Circuit as well as his legendary preparedness. And in a moving and personal tribute, Judge Maryanne Trump Barry thanked Judge Garth for mentoring her since she was an Assistant United States Attorney and further spoke of her admiration of Judge Garth's total mastery of the rules and record.

Judge Garth's remarks were modest, but heartfelt, thanking his family, colleagues, and law clerks. His name can now be seen in large letters in the Atrium of the Courthouse, which stands as a fitting dedication for his many contributions to the Third Circuit.

## SUPREME COURT REJECTS EXPANSIVE 'STREAM OF COMMERCE' THEORY OF PERSONAL JURISDICTION

### Due Process Requires That a Defendant Purposefully Target Activities Toward a Particular State in Order to be Subject to Jurisdiction There

By Kim M. Watterson and Paige H. Forster, Reed Smith LLP

In late June, the U.S. Supreme Court issued two opinions clarifying the criteria that must be satisfied before a court may constitutionally exercise personal jurisdiction over a defendant—*J. McIntyre Machinery, Ltd. v. Nicastro* and *Goodyear Dunlop Tires Operations, S.A. v. Brown*. Both decisions involved product liability suits asserted against non-U.S. manufacturers, but both have relevance as well for domestic corporations defending lawsuits under any liability theory. The decisions were highly anticipated because the cases, *J. McIntyre* in particular, were expected to resolve a decades-old debate about the contours of the so-called "stream of commerce" theory of personal jurisdiction. The Court delivered.

Two plurality opinions issued almost 25 years ago in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987), injected the "stream of commerce" metaphor into the vernacular of the personal jurisdiction inquiry. In dicta, Justice O'Connor (joined by three other Justices) wrote that "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant…indicat[ing] an intent or purpose to serve the market in the forum State, [is required… [A] defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State." *Id.* at 112. Justice Brennan (joined by three other Justices) disagreed that "additional conduct" is required to justify the exercise of personal jurisdiction. In Justice Brennan's view, "As long as [the defendant]…is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise." *Id.* at 117 (Brennan, J., concurring) (emphasis added).

Since *Asahi*, the stream of commerce theory of personal jurisdiction has been the subject of great debate—including about (1) whether the theory is controlling law and (2) what a plaintiff must prove in order to establish jurisdiction under the theory. Taking the theory to its extreme, the New Jersey Supreme Court held in *J. McIntyre* that "courts can exercise jurisdiction over a foreign manufacturer… so long as the manufacturer knows or reasonably should know that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states." The U.S. Supreme Court reversed.

Ironically, *McIntyre* resulted in three opinions with no single opinion commanding the majority—similar to *Asahi*, the notoriously splintered case the Court set out to clarify. But with regard to basic principles, *McIntyre* is not as fractured as it first appears. Both the plurality and the concurrence, a total of six justices, agreed in rejecting the New Jersey Supreme Court's sweeping jurisdictional rule—namely, that jurisdiction can be based on the defendant's targeting of the U.S. market as a whole even when the defendant took no actions directed toward the state in which the plaintiff has sued. The plurality and concurrence also agreed in rejecting Justice Brennan's *Asahi* stream of commerce analysis insofar as that analysis made foreseeability—the defendant's ability to anticipate being haled into a jurisdiction because it is foreseeable that its product could end up there—the "touchstone of jurisdiction." Slip op. at 7.

Foreseeability, according to the *McIntyre* plurality, is not enough to satisfy the due process principles that underlie the jurisdictional question. Instead, the defendant's conduct—and, more specifically, its conduct directed toward a *particular* state—are the constitutionally-required relevant considerations. Consequently, actions targeting the U.S. market in general are not enough. Without proof that the defendant engaged in conduct specifically aimed at getting its product into a particular state, personal jurisdiction does not lie just because the product made its way there—no matter how foreseeable it might have been that the product would end up there.

In *McIntyre*, a British manufacturer sold a machine to an independent U.S. distributor, who in turn sold it to the plaintiff's employer. The machine that allegedly injured the plaintiff in New Jersey was one of only a handful of the defendant's products that made their way to that state. Applying the framework of analysis it announced, the U.S. Supreme Court held that the New Jersey court lacked jurisdiction because the plaintiff did not establish that the defendant "engaged in conduct purposefully directed at New Jersey." Slip op. at 11.

The plurality made sure to mention both the scope of the opinion's applicability and the practical consequences flowing from the framework of analysis that was announced. First, the principle that "personal jurisdiction requires a forum-by-forum…analysis" holds equally true for foreign and domestic defendants. *Id.* at 8-9, 10. Second, the plurality took the time to mention the practical significance of its ruling—noting the "undesirable consequences" of a foreseeability-based approach, including the "significant expenses…incurred just on the preliminary issue of jurisdiction. Jurisdictional rules should avoid these costs whenever possible." *Id.* at 10.

In a concurring opinion, Justice Breyer, joined by Justice Alito, agreed that a defendant's actions directed toward a particular state must be the focus of the personal jurisdiction inquiry. However, he wrote separately to note his concern that the plurality opinion is too "broad" and may foreclose jurisdiction in cases involving electronic commerce, such as where "a company targets the world by selling products from its Web site" or "consigns the products through an intermediary (say, Amazon.com)." Concurring slip op. at 4. In turn, the dissent (authored by Justice Ginsburg and joined by Justices Sotomayor and Kagan) would have embraced a foreseeability-based analysis, explaining that a conduct-based analysis will allow defendants to structure their conduct in order to avoid jurisdiction. According to the dissent, a conduct-based inquiry is not constitutionally required, nor are its results fair.

*McIntyre*'s companion case, *Goodyear*, placed the stream of commerce analogy within the larger framework of the personal jurisdiction inquiry—explaining that the "[f]low of a manufacturer's products into the forum" through the stream of commerce "may bolster an affiliation germane to *specific* jurisdiction" but is not relevant to the *general* jurisdiction inquiry. Slip op. at 10.

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## FROM THE PRESIDENT'S DESK

I had the privilege of attending the Third Circuit Judicial Conference in Philadelphia in May, as did many of you. I'm pleased to report that the event was once again a resounding success and included several significant contributions by the 3CBA. We sponsored the pre-dinner reception on the opening day of the conference, and several judges thanked us for an excellent opportunity for refreshments and relaxed conversation.

The 3CBA's two programs were also well received. Judges D. Michael Fisher, Thomas Hardiman and Gene Pratter participated in a panel on appellate waivers along with Donna Doblick and Peter Goldberger (members of the 3CBA Board of Governors). Later, I had the privilege of participating in a panel on interlocutory appeals that included Judges D. Brooks Smith, Julio Fuentes, and Stanley Chesler. (The 3CBA is going to work to package these presentations as standalone CLEs, and then take them on the road within the Circuit. Stay tuned for announcements.)

Also at the Conference, 3CBA representatives had the opportunity to meet with our liaison judges: D. Michael Fisher, Dolores Sloviter, Julio Fuentes, and Thomas Ambro. The judges were appreciative, and everyone present was pleased to look back and see that since our founding in 2007, the 3CBA has followed through on its goals: to improve the standards of federal appellate practice, assist with creating improved local practice rules, aid the Court in the administration of justice, and promote bench-bar relations.

If you missed the Judicial Conference, I highly recommend that you watch for announcements and register for the next one. In the meantime, take the opportunity to get involved with the 3CBA. Register for a CLE program near you, add your voice to the Rules Committee, propose an article for this newsletter, and keep up with events and announcements at our website, thirdcircuitbar.org. As always, if you have any questions or comments, feel free to contact me.

*Steve*
Stephen M. Orlofsky

## NEW AMICUS CURIAE DISCLOSURE REQUIREMENTS AFFECT BOTH THE AMICUS AND THE PARTY IT SUPPORTS

By David J. Bird, Reed Smith LLP

Last December, Federal Rule of Appellate Procedure 29 was amended to require the disclosure of new information about the authorship and funding of amicus briefs filed in federal appeals. The new requirements concern the relationship between an amicus, the parties to an appeal, and other third parties not before the court. For that reason, the new rule should be carefully considered not only by counsel representing an amicus, but also by counsel who represent parties coordinating with an amicus.

Under new Rule 29(c)(5), an amicus brief must include a statement that indicates whether:

> (A) a party's counsel authored the brief in whole or in part;
>
> (B) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and
>
> (C) a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person[.]

The new disclosure requirements apply to all amicus briefs, except those filed on behalf of the United States or its officers or agencies or a state. They are modeled on Supreme Court Rule 37.6, which was adopted in 1997 and which mandates similar disclosures in amicus briefs submitted to the U.S. Supreme Court.

According to the Advisory Committee notes accompanying the new rule, the disclosure requirements are intended "to deter counsel from using an amicus brief to circumvent page limits on the parties' briefs" and to "help judges to assess whether the amicus itself consider the issue important enough to sustain the cost and effort of filing an amicus brief." Fed. R. App. P. 29(c)(5) cmt (2010).

**The Funding of Amicus Briefs.** The new rule requires the disclosure of the identity of a person or entity (other than the amicus, its members, or its counsel) only when that person or entity makes or agrees to make a monetary contribution intended to underwrite the costs of authoring and filing and serving an amicus brief. According to the Advisory Committee notes, it is not necessary to disclose information about a party's or counsel's "payment of general membership dues to an amicus." Fed. R. App. P. 29(c)(5) cmt (2010).

**The Authorship of Amicus Briefs.** The text of the new rule further requires a statement disclosing whether "a party's counsel authored the brief in whole or in part." The key word here is "authored." The disclosure rule does not appear to be triggered when a party's counsel contacts a potential amicus, supplies the amicus or their counsel with copies of relevant pleadings, briefs, or other documents, discusses the case, or solicits the amicus's support. Nor is the rule triggered by the sharing of drafts of the party's brief or the amicus's brief. To the contrary, the Advisory Committee notes expressly recognize "that coordination between the amicus and the party whose position the amicus supports is desirable, to the extent that it helps avoid duplicative arguments" and that "mere coordination—in the sense of sharing drafts of briefs—need not be disclosed." Fed. R. App. P. 29(c)(5) cmt (2010) (citing Gressman et al., *Supreme Court Practice* 739 (9th ed. 2007).

The passage from *Supreme Court Practice* referenced by the Advisory Committee states that *"coordination and discussion"* between party counsel and amicus counsel "regarding their respective arguments" need not be disclosed. *Id.* at 739 (emphasis added). The same passage goes on to note that "[o]ften some form of consultation and communication is both appropriate and essential" if an amicus brief is to meet the requirements and expectations of the Supreme Court. *Id.* To this end, party counsel may review an amicus brief prior to

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## RULES COMMITTEE PREPARES TO PROPOSE…—continued from page 1

the briefs to identify each cited document which is available in the district court's electronic record. Either method—electronic filing, or additional citations—is quite laborious. For electronically filed appendices, not all needed documents will necessarily be available to counsel in native PDF format, potentially requiring extensive scanning, renumbering of pages after volumes are compiled, and the addition of a cover and table of contents. Then, given the system's size limitation of five megabytes per transmission, multiple uploads of partial volumes may be required.

Other Circuits' practices vary widely, the Rules Committee has found, ranging from the Sixth Circuit, which generally requires no appendix at all (except for documents not available as part of the district court's electronic record), to the Third Circuit's provision for both paper and electronic filing of a full traditional appendix. Specifically:

- The First, Fourth, Eighth, and Tenth Circuits require the filing of a traditional appendix on paper only.
- The Second and D.C. Circuits require the filing of a traditional appendix both on paper and electronically.
- The following Circuits require the filing only of "record excerpts," which are generally much less voluminous than an appendix: the Fifth (paper and electronic, but with a strict limitation on the number of pages), Seventh (paper only), Ninth (paper only), and Eleventh (paper only, with significant exceptions, but with burdensome and idiosyncratic binding rules).
- The Sixth Circuit ordinarily requires no appendix.

This is an opportune time to reconsider the need for and function of an appendix, and in the upcoming months the Rules Committee intends to discuss and set forth proposals for the Third Circuit. For instance, at the extreme, Committee members are discussing whether the appendix in anything like its present form serves a purpose justifying the attendant costs and labor, given that the parties may now readily cite by docket and page number to district court dockets bearing almost all materials pertinent to an appeal.

Any input from members of the 3CBA would be welcome, and may be sent to Bob Zauzmer (bob.zauzmer@usdoj.gov) and Peter Goldberger (peter.goldberger@verizon.net), co-chairs of the Association's Rules Committee. In addition, please share with us any other ideas for improvements in Third Circuit rules and procedures.

## NEW AMICUS CURIAE DISCLOSURE REQUIREMENTS…—cont'd from page 4

filing to "identify inaccuracies," "avoid repetition" of matter already presented in the party brief, and offer advice that "the amicus counsel rewrite, delete, or add certain matter," without becoming an author of the amicus brief "in whole or in part." *Id.*

This guidance seems applicable not only to practice in the Supreme Court but also to practice in the federal appellate courts under the new Rule 29(c)(5). If party counsel and amicus counsel can coordinate, share drafts, and discuss their respective arguments in advance of filing (as the Advisory Committee notes indicate), the concept of authoring a brief "in whole or in part" must mean something more substantial than reviewing, commenting, and editing a few sentences. *Id.* "Just how much more…must depend on the individual situation as well as the common sense and good faith of counsel." *Id.* But, in borderline situations, party counsel should defer to amicus counsel's judgment.

Like its Supreme Court counterpart, new Rule 29(c)(5) should be understood by party counsel and amicus counsel as discouraging party counsel from taking over the drafting or redrafting of substantial portions of an amicus brief. Although coordination and discussion between party and amicus counsel is permitted and desirable, the views expressed in an amicus brief ultimately should be views of the amicus, not a party, and the brief itself ultimately should be the work product of the amicus counsel, not the party counsel.

## SUPREME COURT REJECTS EXPANSIVE 'STREAM OF COMMERCE' THEORY…—continued from page 3

Reviewing the two bases of personal jurisdiction, the opinion noted that "general or all-purpose jurisdiction" arises when a corporation's "affiliations with the State are so continuous and systematic" that it is "essentially at home in the forum State." *Id.* at 2. "[S]pecific or case-linked jurisdiction," on the other hand, arises when there is a connection "between the forum and the underlying controversy." *Id.* at 2.

The Court ruled that the North Carolina court did not have either general or specific personal jurisdiction over a Turkish subsidiary of a U.S. corporation. There was no general jurisdiction because the subsidiary's contacts with North Carolina—namely, sales of "a small percentage of [its] tires (tens of thousands out of tens of millions…)" within the state—did not render it "essentially at home" there. *Id.* at 13. And there was no specific jurisdiction either, because the allegedly defective product (a bus tire) never went into North Carolina, but instead injured U.S. citizens who were traveling in France. Thus, *Goodyear* builds on *McIntyre* by explaining when the newly-clarified stream of commerce analogy is relevant to the personal jurisdiction inquiry.

The two personal jurisdiction cases—*McIntyre* especially—allow a defendant to fight jurisdiction in any state where it has not "purposefully availed" itself of the privilege of conducting activities even if its products make their way to that forum. Under *McIntyre*, courts going forward will look at the defendant's conduct in targeting the forum state, rather than the foreseeability that the defendant would be sued there. The decision adds clarity and concreteness to the personal jurisdiction inquiry.

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