

A P P E L L A T E

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APPELLATE RULE AMENDMENTS ADD NEW CLASS OF CASES TO THOSE COVERED BY LONGER APPEAL PERIODS

By Emily J. Hanlon

Lawyers handling matters involving the federal government are likely aware that a longer period applies for appealing a final judgment in federal court. Instead of the usual 30-day appeal period, a 60-day period applies when the United States, a federal officer, or federal agency is a party to a case. Recent amendments to the Federal Rules of Appellate Procedure have now expanded this class to include matters in which U.S. officers or employees who have been sued in their individual capacity are parties.

Effective December 1, 2011, amendments to Federal Rule of Appellate Procedure 4(a)(1)(B) added this new class of cases to the 60-day appeal period. By way of the Appeal Time Clarification Act of 2011, Congress amended the identical provision found at 28 U.S.C. § 2107. See S. 1637 & H.R. 2633, 112th Cong. (1st Sess. 2011). Federal Rule of Appellate Procedure 40(a)(1) was simultaneously amended to include this new class of cases in the category of cases governed by the 45-day period, as opposed to the 14-day period, for filing a Petition for Panel Rehearing after entry of an appellate decision.

The goal of these amendments was to clarify that the longer periods also apply in cases where a current or former U.S. officer or employee is sued in an individual capacity. The new language in Rule 4(a)(1) and Rule 40(a)(1) encompasses “a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States’ behalf — including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.” Previously, the longer periods applied only to cases

where “the United States or its officer or agency is a party.” Longer appeal periods are necessary in cases where the United States or its officers or agencies are a party because “the Department of Justice needs time to review the case, determine whether an appeal should be taken, and secure the Solicitor General’s approval for that appeal.” H.R. Rep. 112-199 (2011). This reasoning is likewise applicable in cases where a U.S. officer or employee is sued in an individual capacity. *Id.*

The Rules Committee adopted the “including all instances” safe harbor provisions following the amended rule’s public comment period. The concern was raised that a party might rely on the longer appeal period in a good faith belief that the case involved a current or former U.S. officer or employee sued in an individual capacity for acts or omissions in the course of his or her job duties, only to risk the appeal being held untimely by a court that later concluded that the relevant act or omission had not occurred in connection with federal duties. See Report of the Advisory Committee on Appellate Rules, at pp. 3-4 (May 28, 2010), available at http://www.ca9.uscourts.gov/datastore/uploads/FR_Appellate_Proc_Amend_12-1-11.pdf (last visited March 14, 2012).

The resulting safe harbor provisions make clear that the longer periods apply in any case where the United States represents the officer or employee at the time of entry of the relevant judgment, or where the United States files the appeal on the officer or employee’s behalf — regardless of what a court ultimately rules about the officer or employee’s duties. The Committee Note explains that under new Rule 4(a)(1)(B)(iv),

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for example, a case automatically qualifies for the 60-day appeal period if: (1) a legal officer of the United States has appeared as counsel for the officer or employee and has not withdrawn his or her appearance at the time of entry of the judgment or order appealed from, or (2) a legal officer of the United States appears as counsel for the officer or employee on the notice of appeal.

Lawyers handling matters involving current or former U.S. officers or employees should be aware of these new, longer time periods, but should exercise caution in taking advantage of them. Even with the safe harbor provision, the safest route for a party appealing an adverse judgment or seeking rehearing of an adverse appellate decision may be to seek review within the shorter time frames applicable to the vast majority of cases in federal court. ♦

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For more information about our Appellate Practice Group or to speak with a member of the group at a particular Schnader office location, please contact:

*Carl A. Solano, Co-Chair
215-751-2202
csolano@schnader.com*

*Hon. Timothy K. Lewis, Co-Chair
202-419-4216; 412-577-5290
tlewis@schnader.com*

*Emily J. Hanlon
215-751-2833
ehanlon@schnader.com*

www.schnader.com

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