Schnader
ATTORNEYS AT LAW

Schnader Harrison Segal & Lewis LLP

CALIFORNIA DELAWARE JAKARTA* NEW JERSEY NEW YORK PENNSYLVANIA WASHINGTON, D.C.

APPELLATE

ALERT

MAY
2015

ARE FEDERAL APPELLATE COURTS GROWING IMPATIENT WITH PROCEDURAL ERRORS? — RISKS FOR CLIENTS AND THEIR COUNSEL

By Carl A. Solano and Bruce P. Merenstein

On May 7, 2015, the U.S. Court of Appeals for the Third Circuit affirmed a district court's grant of partial summary judgment in a dispute about an indemnification agreement. That decision, *Lehman Bros. Holdings, Inc. v. Gateway Funding Diversified Mortg. Servs., L.P.*, 2015 U.S. App. LEXIS 7536, would not normally command a great deal of attention — but for the way in which the court reached its result. The court held that Gateway, the party that unsuccessfully opposed partial summary judgment, waived its right to maintain its appeal because it failed to order a transcript of the underlying proceeding in the trial court. That decision, and some strong words by the court in its opinion, have raised concern within the Third Circuit Bar that the court may be becoming more rigid in its application of procedural rules.

The issue before the court was whether Gateway had abandoned a contractual defense to liability during a telephonic oral argument held by the district court. Gateway denied doing so, and claimed there was no record to support Lehman's claim to the contrary. In fact, however, the oral argument had been transcribed and Gateway had failed to file a copy of the transcript with the court, in violation of Federal Appellate Rule 10(b) ("the appellant must . . . order . . . a transcript of [relevant] parts of the proceedings" and "include in the record a transcript of all [relevant] evidence"). Gateway claimed that it believed the argument had not been transcribed, and pointed out that its error was corrected when Lehman filed the transcript with its own appellate brief, but the court described Gateway's argument as "cavalier." Treating the case as "an opportunity to emphasize the importance of following the rules," the court held that Gateway's appeal from the summary judgment decision was "forfeited" by its failure to comply with Rule 10, explaining that Gateway's violation "at best shows a remarkable lack of diligence and at worst indicates an intent to deceive this Court."

Third Circuit practitioners have often noted that court's preference for deciding cases on their merits, rather than on procedural technicalities, and it is too early to predict that the *Lehman* decision signals some fundamental change in that attitude. The court made clear that dismissals on such grounds are "not favored" and should occur "sparingly," and said it was dealing with an "unusual situation." That the court viewed the case as an "opportunity" to teach a lesson, and that it did so even though Lehman's provision of the missing transcript prevented the Rule 10 error from depriving the court of relevant information, shows that it would be dangerous to ignore this decision, however.

For better or worse, recent decisions like *Lehman* signal that federal appellate courts may be losing patience with procedural errors and what they view as unacceptable advocacy. In *In re Shipley*, 135 S. Ct. 779 (U.S., Dec. 8, 2014), for example, the U.S. Supreme Court issued an order to show cause as to why a lawyer should not be disciplined for filing a petition for certiorari drafted by his client that was so full of impenetrable jargon, prose, and style that it failed to meet the requirement of the Court's Rule 14.3 that a petition be stated "in plain terms." The Court accompanied the show cause order with a denial of the cert. petition, *see Sigram Schindler Beteiligungsgesellschaft MBH v. Lee*, 135 S. Ct. 759 (U.S., Dec. 8, 2014), and, although it ultimately discharged the disciplinary order without imposing sanctions, *In re Shipley*, 2015 U.S. Lexis 1883 (U.S., Mar. 23, 2015), the discharge order included a pointed reminder that counsel are responsible "as Officers of the Court" for compliance with the rules and may not delegate that responsibility to others.

On April 23, 2015, the Advisory Committee on Rules of Appellate Procedure approved a proposed amendment that would reduce the permissible length of federal appellate briefs. A primary reason for the suggested reduction: federal appellate judges believe they receive briefs that are too wordy and too long in the majority of cases. Although appellate practitioners pleaded for retention of the current limits because they are needed in complex appeals, the judges emphasized that there are so many lawyers filing unnecessarily long briefs that they prefer shortening the limits for everyone and then granting extensions only in appropriate cases. (The proposed amendment still needs approval by additional authorities, including the U.S. Supreme Court.) Punctuating the judges' point is a recent decision by the Federal Circuit, *Pi-Net Int'l, Inc. v. JPMorgan Chase & Co.*, 2015 U.S. App. LEXIS 7126 (Apr. 20, 2015) (non-precedential), in which it dismissed an appeal because the appellant tried to stretch its brief beyond even the current word limits by deleting spaces between words so that a word processing program would not count them separately.

Faced with lawyers who fail to follow — or even flout — the procedural rules, appellate courts' loss of patience is understandable, and it therefore should come as no surprise that a more stringent application of the rules is a result. This atmosphere creates a difficult environment for appellate practitioners and their clients. It is essential that counsel be completely familiar with all applicable rules and practices in the court where a case is pending, and that counsel maintain complete fidelity toward those rules and practices. While reasonable lawyers may disagree about whether decisions like *Lehman* went too far, such decisions may frame the rules of appellate advocacy in the future, and neither lawyers nor their clients can afford to risk non-compliance.◆

For more information about Schnader's Appellate Practice group or to speak with a member of the firm, please contact:

Carl A. Solano
Chair, Appellate Practice Group
215-751-2202
csolano@schnader.com

Bruce P. Merenstein
Vice chair, Litigation Department
215-751-2249
bmerenstein@schnader.com