BAR ASSOCIATION FOR THE THIRD FEDERAL CIRCUIT

# On Appeal

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## THIRD CIRCUIT BAR ASSOCIATION WELCOMES JUDGE PATTY SHWARTZ TO THE BENCH

Donna M. Doblick, Reed Smith LLP

On April 9, 2013, the U.S. Senate confirmed Patty Shwartz to the Third Circuit seat vacated when Judge Maryanne Trump Barry took senior status.

Prior to joining the Third Circuit, Judge Shwartz was a magistrate judge in the U.S. District Court for the District of New Jersey, a position she held since 2003. In that role, more than 4,000 civil cases were referred to Judge Shwartz, the parties consented to her jurisdiction in whole or in part in over 70 civil cases, she regularly presided over preliminary proceedings in felony cases, and she handled more than 20 misdemeanor cases with the parties' consent. Before serving as a federal magistrate judge, Judge Shwartz worked for 14 years in the U.S. Attorney's Office in New Jersey (1989-2003), where she received numerous commendations and recognitions, and ultimately rose to the positions of Chief of the Criminal Division and Executive Assistant U.S. Attorney. Since 2009, Judge Shwartz also has served as an adjunct professor of law at Fordham University School of Law, teaching a course on Discovery and the Pretrial Process.

Judge Shwartz was born in Paterson, New Jersey, and received her B.A. with highest honors from Rutgers University in 1983. She went on to receive her J.D. from the University of Pennsylvania Law School in 1986, where she was named the Outstanding Woman Law Graduate. She then worked briefly as an associate attorney at Pepper Hamilton LLP, and later served as a law clerk to U.S. District Judge Harold A. Ackerman (D.N.J.) from 1987 to 1989.

Judge Schwartz's chambers will be in Newark: U.S. Post Office & Courthouse, Room 477, P.O. Box 999, Newark, NJ 07101-0999; (973) 645-6596.

The President and Board of Governors of the Bar Association for the Third Federal Circuit warmly welcome Judge Shwartz to the Court!

## THIRD CIRCUIT JUDGES TO PRESENT "A VIEW FROM THE BENCH"

### 3CBA Assists Allegheny County Bar Association With Unique CLE Tradition

Paige H. Forster, Reed Smith LLP

Most years, in the spring and fall, the Third Circuit travels west from Philadelphia and sits in Pittsburgh. In conjunction with the court's spring sitting, the Federal Court Section of the Allegheny County Bar Association has developed a unique tradition of hosting a continuing legal education program and reception.

Called "A View from the Bench," the CLE, which will take place this year on May 14, focuses on the past year's developments in Third Circuit case law as explained by those who decide the cases—the Third Circuit judges themselves. The format of the CLE has evolved over the years, and this year the ACBA is reprising the successful structure of last year's event. Judges D. Brooks Smith, D. Michael

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FOR MORE INFORMATION ABOUT THE THIRD CIRCUIT BAR ASSOCIATION, PLEASE CONTACT US AT:
3cba@thirdcircuitbar.org
OR VISIT US AT:
www.thirdcircuitbar.org

## CASE OF INTEREST *Tellado v. IndyMac Mortgage Services*, 707 F.3d 275 (3d Cir. 2013)

By David J. Bird, Reed Smith LLP

Can a plaintiff sue a bank that that has acquired the assets of a failed bank for claims that relate to acts or omissions of the failed bank? No, according to *Tellado v. IndyMac Mortgage Services*, 707 F.3d 275 (3d Cir. 2013). (opinion available **here**).

In *Tellado*, the Third Circuit agreed with three other circuits that claims relating to a failed bank must be pursued through a statutory process administered by the FDIC as the receiver for the failed bank. If the plaintiff fails to follow and exhaust the administrative process, a court is barred from exercising jurisdiction over the plaintiff's claims. And because of the jurisdictional bar, a court must dismiss any artfully pled action against an acquiring bank that relates to alleged wrongdoing that could have been addressed in the administrative process.

*Tellado* ensures that: (1) claims against failed depository institutions are resolved in an orderly manner; (2) plaintiffs are not able to plead around the rules governing the receivership of failed institutions; and (3) other banks do not become entangled in litigation related to assets that they have acquired from the FDIC as a receiver.

**FIRREA's Administrative Claims Process And Jurisdictional Bar**

Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") in response to the savings and loan crisis in the 1980s. FIRREA gives the FDIC authority to act as the receiver or conservator for a federally insured depository institution that has failed. As receiver, the FDIC is empowered to wind up the affairs of the failed institution efficiently and expeditiously. When it is appointed receiver, the FDIC seizes control of the institution and markets and sells the institution's assets to another, solvent institution. The assumption of any liabilities of the failed institution is a matter of contract between the acquiring institution and the FDIC as receiver.

FIRREA establishes a specific administrative process for handling and resolving claims against the failed institution and the FDIC as receiver. In particular, any claim relating to an act or omission of the failed institution or the FDIC as receiver must be submitted to the FDIC by the claimant and then resolved by the FDIC within statutory time limits. If a claim is disallowed, the claimant may seek judicial review in an appropriate district court. However, if a potential claimant fails to follow the administrative claims procedures within the prescribed time period, the claim must be disallowed "and the claimant shall have no further rights or remedies with respect to such claim." 12 U.S.C. §§ 1821(d)(3)-(11). Furthermore, no court shall "have jurisdiction over" such a claim. 12 U.S.C. § 1821(d)(13)(D).

**The Tellados' Efforts To Circumvent FIRREA**

In June 2007, Jose and Maria Tellado refinanced an existing mortgage on their home in Philadelphia with IndyMac, a federally chartered savings bank. In July 2008, IndyMac failed and was placed into FDIC receivership. In March 2009, the FDIC transferred the Tellados' loan and other loans formerly owned by IndyMac to OneWest Bank, FSB. OneWest assumed only certain liabilities associated with the loans, under a master purchase agreement with the FDIC as receiver. Although the FDIC published and issued a notice to all potential IndyMac claimants concerning the process and deadline for submitting claims related to IndyMac, the Tellados did not file any claim concerning their IndyMac mortgage refinancing.

In August 2009, the Tellados sent a notice of cancellation to their mortgage loan servicer. In the notice, the Tellados stated that when they refinanced their mortgage loan, they did not receive a proper statutory notice of their right to cancel the transaction, supposedly required by state law, and that they wished to cancel the loan pursuant to the Pennsylvania's Unfair Trade Practices and Consumer Protection Law (UTCPL). When OneWest did not respond, the Tellados filed suit in Pennsylvania state court, and OneWest removed the case to federal court. OneWest then filed motions to dismiss for lack of subject matter jurisdiction and failure to state a claim and for summary judgment. The district court denied all these requests for relief, held a bench trial, and ruled in the Tellados' favor.

**The Tellados' Action Against OneWest Is Barred**

On appeal, a Third Circuit panel reversed the judgment, holding the Tellados' claims against OneWest were barred by their failure to follow and exhaust administrative remedies under FIRREA. The panel noted that the Third Circuit already had construed FIRREA as establishing a statutory exhaustion requirement, but that it had not previously addressed whether FIRREA's jurisdictional bar applies to claims against an acquiring bank based on the alleged conduct of the failed depository institution or the receiver. The Court held that the bar did apply. While the Tellados' claims were "*formally*" against OneWest (not IndyMac) they were "*functionally*" against the failed institution—i.e., the claims "related" to the alleged malfeasance of the failed institution.

The Tellados argued that FIRREA should not bar their suit because OneWest's failure to respond to their notice of cancelation was independent conduct that occurred after FIRREA's administrative claims process and that could not have been remedied through that process.

The panel rejected that argument because the gravamen of the Tellados' claims related to acts or omissions of IndyMac. The fact that the Tellados sent a cancellation notice to OneWest after FIRREA's administrative claims process did not change the fact that the Tellados' action related to alleged wrongdoing by IndyMac that could have been addressed and resolved through FIRREA's administrative claims process. Indeed, the Court made clear that plaintiffs could not circumvent FIRREA's administrative claims process and jurisdictional bar by drafting a complaint "strategically" to focus on subsequent conduct of an acquiring bank.

The panel's decision was in accord with similar decisions of the Sixth, Ninth and D.C. Circuits. *See Benson v. JPMorgan Chase Bank, N.A.*, 673 F.3d 1207, 1211 (9th Cir. 2012); *Am. Nat'l Ins. Co. v. FDIC*, 642 F.3d 1137, 1144 (D.C. Cir. 2011); *Vill. of Oakwood v. State Bank & Trust Co.*, 539 F.3d 373, 386–87 (6th Cir.2008). The panel's decision supports important federal policies designed to ensure the prompt wind-up of all disputes related to failed institutions, and demonstrates that a plaintiff usually cannot avoid statutory limitations on action by pleading claims strategically.

## ANOTHER MEMBER OF YOUR AUDIENCE

### Writing With Judges And Their Law Clerks In Mind

Kevin L. Jayne,[1] Reed Smith LLP

Most litigators have encountered the sage advice that when writing to a court, you must "know your audience." In the appellate context, knowing your audience means understanding the perspective and motivations of those who decide your case. That allows you to present the facts and the law in a way that will maximize the potential for a favorable ruling for your client.

The most obvious members of the audience are, of course, judges. This may be in the form of a single judge deciding a motion or a panel of judges deciding the merits of an appeal. But the serious legal advocate may also want to take note of another member of that audience—law clerks. That is because it is generally recognized that law clerks play an important role in the judicial process, which can include reading briefs and the record, performing legal research, preparing bench memoranda, and even discussing the merits of a case with the judge. With the law clerk's unique role in mind, this article seeks to provide a few points on how an advocate can consider the law clerk when writing to a court.[2]

**Write With The Generalist In Mind**

Legal writing guru Bryan Garner has noted that brief-writers tend to follow one of two modes—the research mode and the intuitive mode.[3] As Garner describes it, most lawyers write using the research mode, where you research the answer first and write later based on what you found. But the most experienced brief-writers often work in the intuitive mode. That is, they've worked in the law for so long that they know its contours fairly well and can outline a brief without any research—only tweaking arguments depending on what they subsequently find in the cases.

A corollary of Garner's research vs. intuitive classification of brief writing is that when *examining* a legal brief, experienced (i.e., intuitive) legal minds know many substantive areas of the law, can quickly understand most legal issues, and often have little need for extensive background information on the applicable law. Certainly, most judges would fall into this camp.

On the other hand, inexperienced (i.e., research-oriented) legal minds may only know one or two substantive areas of the law, do not quickly grasp difficult legal issues, and can typically benefit from more background information on the applicable law. Law clerks generally can be described this way. [4]

So what does the difference in the amount of experience—what Garner calls intuition— between judges and law clerks mean for those who are writing to a court? Here are some points to keep in mind:

- When writing to a court, assume that both judges and their law clerks will be independently examining and subsequently communicating about your submission. Thus, the writing should provide not only everything that an experienced judge would need to decide the case in your favor, but also enough basic background information on the law so that the law clerk will be able to understand the legal issues in a way that favors your position. (Who knows, there probably are instances when a generalist judge will be thankful for a little extra background information.)
- When litigating in a specialized or complex area of the law, such as intellectual property or bankruptcy, some basic legal background can become critically needed information. Take the time to provide a clear procedural and substantive roadmap that will help orient or re-orient both judges and law clerks alike.
- Think about whether providing a citation to a treatise will help inform those who may not know a particular substitutive area, particularly if the treatise presents information in a way that is helpful to your position.
- Keep in mind, however, that you do not need to provide a dissertation on the evolution of the law dating back to the Magna Carta. In fact, too much information or over-particularization is just as dangerous to the goal of clarity as is a failure to provide background information.
- Be careful with jargon, acronyms, and abbreviations! Although many judges may be familiar with the sea of shorthand that is sometimes encountered in brief writing, other judges become irritable when trying to digest "alphabet soup."[5] In addition, excessive use of jargon will require law clerks to keep flipping back to earlier sections of the brief to figure out what something in shorthand means. This, of course, interrupts the flow of your argument. Except for the most commonly used shorthand (e.g., FBI, DOJ), stick to writing things out.
- When it comes to providing the history of the case, omit unnecessary dates. Specific dates are occasionally needed to illuminate questions like statutes of limitations—but most often, they are distracting and unnecessary. Try deleting dates and checking whether your narrative is still clear. Stick to facts that are salient because they are either dispositive or will add to the reader's understanding of the case in a helpful way.

**Don't Be Afraid To Follow "The Grammar Girl" Or Break Out The Bluebook**

Typically, law clerks tend to be newly minted lawyers only a year or two removed from drafting that (possibly unpublished) 108-page law review article. And what do former law review members think is really important? Grammar and the Bluebook. Whatever point you are in your career, it's never a bad idea for you as a professional legal writer to brush up on your grammar and Bluebook skills. That way, you can avoid making small mistakes that will distract your audience.

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## REVISIONS TO FEDERAL RULES OF APPELLATE PROCEDURE TINKER WITH FORMAT OF APPELLATE BRIEFS

Paige H. Forster, Reed Smith LLP

The July 2012 edition of this newsletter contained an article regarding a proposed change to Federal Rule of Appellate Procedure 28 ("Briefs"), which, at the time, had yet to be submitted by the Standing Committee to the Judicial Conference for approval. The proposed change has since been approved by the Judicial Conference and the United States Supreme Court, resulting in a new requirement that briefs contain simply "a concise statement of the case" rather than a "statement of the case" followed by a separate "statement of facts."

As currently written, Rule 28(a)(6) requires the "statement of the case" to "briefly indicat[e] the nature of the case, the course of proceedings, and the disposition below." Fed. R. App. P. 28(a)(6). Rule 28(a)(7) provides a separate requirement for a "statement of facts." Fed. R. App. P. 28(a)(7).

The amendment to Rule 28 consolidates Rules 28(a)(6) and (a)(7), requiring instead "a concise statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record."

As previously reported by Jonathan Klein of Gibbons, P.C., the amendment was proposed because the separate statements currently required under Rules 28(a)(6) and (a)(7) may impede a logical presentation of the issues. The revised rule permits a brief writer to "weave those two statements together and present the relevant events in chronological order." *See* **Appellate Rules Advisory Committee, Proposed Amendments to the Federal Rules of Appellate Procedure**.

The revisions to Rule 28—as specified in the **Supreme Court order** amending the Rules of Appellate Procedure—"shall take effect on December 1, 2013, and shall govern in all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings then pending." Barring any action by Congress, therefore, the amendment to Rule 28 will take effect at the end of this year.

## WRITING WITH JUDGES AND THEIR LAW CLERKS IN MIND

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**Interaction With Court Staff**

This final section has nothing to do with writing. But, frankly, it may be the most important piece of advice that I can give as a former law clerk: always, always, always treat those who work at the courthouse with patience and respect. Court staff are people who work on your cases and interact with the judges who decide your cases on a day-to-day basis. Follow this advice because it is in your nature or follow it because it makes good business sense for your clients, but just follow it.

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1. Litigation Associate at Reed Smith LLP, Philadelphia, PA; Law Clerk to the Honorable Jerome A. Holmes, U.S. Court of Appeals for the Tenth Circuit, 2011–2012; Law Clerk to the Honorable Deborah A. Batts, U.S. District Court for the Southern District of New York, 2009–2011; J.D., University of Pittsburgh School of Law, 2005; B.A., Gettysburg College, 2001. The opinions expressed herein are mine alone, and do not reflect the views of my past or present employer(s). I thank Paige H. Forster, Esq. and Colin E. Wrabley, Esq. for their helpful contributions.
2. This article does not intend to suggest that law clerks engage in judicial decision-making or otherwise occupy an elevated position among count staff. All court staff are equally charged with helping judges complete their duties efficiently and effectively.
3. *See* Bryan A. Garner, The Winning Brief 25 (1999).
4. I suppose there is an exception to every rule. For instance, I imagine that Supreme Court Justice John Paul Stevens probably picked up on the contours of the law pretty quickly during his clerkship days.
5. *See, e.g., Nat'l Ass'n of Regulatory Util. Comm'rs v. U.S. Dep't of Energy*, 680 F.3d 819, 820 (D.C. Cir. 2012) ("Here, both parties abandoned any attempt to write in plain English, instead abbreviating every conceivable agency and statute involved, familiar or not . . . .").

## FROM THE PRESIDENT'S DESK

In Western Pennsylvania, the arrival of spring means that the weather warms up, the trees leaf out, and the Third Circuit comes to Pittsburgh for a week-long sitting. The Court's annual sojourn provides the opportunity for a terrific CLE. Called "A View from the Bench," this year's event will be held May 14 with a panel of three Third Circuit judges, as well as distinguished moderators. Read more about it on page 1.

This yearly CLE is a great experience for all who attend. And as someone who has been involved with the planning for this event over the years, I can share that it's also a great experience for those behind the scenes. Judges Smith, Fisher, and Hardiman have contributed a significant amount of time to planning and preparation, helping to identify key developments in Third Circuit law over the past year. The judges are supported by a committee from the Allegheny County Bar Association Federal Court Section—and for the past two years, the 3CBA has provided an assist to the ACBA. We've been involved in planning meetings and have contributed to the preparation of the CLE materials, which include brief summaries of the past year's published cases.

The 3CBA's efforts meet two of our organization's goals. By assisting with and publicizing this great CLE opportunity, we help provide educational programs to raise the standard of practice in the Third Circuit. And we also help facilitate bench-bar relations, as judges and practitioners—many of them 3CBA members—work together to create an informative and engaging program.

I plan to be at the Third Circuit Review on May 14, and I hope to see many of you there as well. As always, if you have any questions or ideas, feel free to reach out to me or one of the board members listed on the last page of this newsletter.

*Lisa B. Freeland*

President, Bar Association of the Third Federal Circuit

## THIRD CIRCUIT JUDGES TO PRESENT "A VIEW FROM THE BENCH"…

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Fisher, and Thomas M. Hardiman will speak on the panel. Moderators will be Magistrate Judge Cynthia R. Eddy (Western District of Pennsylvania) and the deans of Pittsburgh's law schools, Ken Gormley (Duquesne University School of Law) and William "Chip" Carter, Jr. (University of Pittsburgh School of Law).

The judges on the panel, assisted by a committee of Federal Court Section attorneys and Magistrate Judge Eddy, have worked to identify the most noteworthy and interesting cases of the past 12 months. The panelists, with support from the moderators, will discuss developments in civil and criminal case law and touch upon a wide variety of topics, most likely including constitutional law, arbitration, torts, employment, and criminal sentencing—among others.

For the second year, the 3CBA is supporting the ACBA Federal Court Section in its organizing efforts, including assisting with comprehensive summaries of Third Circuit case law (which are provided to all attendees) and helping with publicity. Event chair Thomas May, who is also a 3CBA member, said, "The 3CBA's support has been valuable to the ACBA in organizing this unique event. We hope to see many 3CBA members at the courthouse in Pittsburgh for the CLE program and reception, which is open to all."

"A View from the Bench: Third Circuit Judges Present Notable Cases of the Past Year" will take place on Tuesday, May 14, 2013 at the United States Post Office and Courthouse in Pittsburgh. The program will be from 2:30 to 4:30 p.m. The ACBA Federal Court Section reception, which immediately follows, offers a great opportunity to chat with fellow practitioners and judges.

The program has been approved for 2 hours of Substantive CLE credit in Pennsylvania. Registration is $75 for Allegheny County Bar Association Federal Court Section members, $90 for other Allegheny County Bar Association members, and $105 for all others. Online registration is available at the **ACBA website**.

## PRACTICE POINTER

### Third Circuit Reduces Required Number of Paper Copies of Briefs

Currently, Third Circuit Local Area Rule 31.1 requires parties to file ten paper copies (i.e., an original and nine copies) of each appellate brief.

The Court issued an Order (available **here**) on April 29 directing that as of May 1, 2013, parties will be required to file only seven paper copies (i.e., an original and six copies).

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