

Sixth Circuit Practice Tip: You Can't Renew a Motion for Judgment as a Matter of Law Never Made in the First Place.

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The bar exam, so the saying goes, is like fording a river that is a mile wide but only an inch deep. Cliché though it may be, the analogy serves as a useful reminder that the exam tests candidates largely on settled, black-letter law rather than novel questions typical of law school exams. Most readers, I assume, will have had at least one experience preparing for and taking the bar exam, and most, I further assume, will have at least one line of questioning forever burned into their brains, regardless of utility to later practice. For me, that line of questioning is civil procedure, and more specifically, judgment as a matter of law (“JMOL”). Lest I be tempted to believe I latched onto this rule because I’m a litigator, the reality is I remember the rule because it’s so simple: if you fail to move for JMOL before the case is submitted to the jury, you can’t make a *renewed* JMOL motion after a verdict has been rendered. Simple. Settled. And an inch-deep.

I was therefore surprised to learn that the Sixth Circuit had never expressly decided the question—*i.e.*, whether a party can make a renewed motion for JMOL under FRCP 50(b) if it has not made a pre-verdict JMOL motion under FRCP 50(a). In [Hanover American Insurance Co. v. Tattooed Millionaire Entertainment](#), the Sixth Circuit linked arms with its sister circuits and held, unequivocally (and to the great relief of bar review courses everywhere), “no.”

Unusual Procedural Posture

Tattooed Millionaire arises from insurance fraud for ostensible arson, burglary, and vandalism of the historic House of Blues music studio in Memphis, Tennessee. Chris Brown, owner of Tattooed Millionaire Entertainment production company and the House of Blues, along with studio lessees John Falls and Daniel Mott, filed an approximate \$10.5 million claim with Hanover Insurance for property damage and theft extending from a November 5, 2015 break-in at the studio. Hanover’s investigation revealed that the receipts on which the insurance claims were based were fraudulent, and that Brown had been the “unfortunate victim” of three remarkably similar arson events in just four years, each leading to insurance claims for lost musical equipment.

At trial, the jury found that Brown and Mott had made material misrepresentations to Hanover and were liable for insurance fraud. Falls, on the other hand, was different. Rather than faulting Falls for insurance fraud, the jury found Hanover had breached its contract with Falls, who was entitled to recover his policy limits of \$3 million for business property and income losses. Following the jury

verdict, Hanover filed a motion under FRCP 50(b) for renewed JMOL as to Falls. Notwithstanding Falls' argument that Hanover forfeited *renewed* JMOL by failing to first move for JMOL under FRCP 50(a), the district court granted Hanover's Rule 50(b) motion, turning the tables on Falls who now owed Hanover \$250,000 in repayment for the insurance advance he received before trial.

On appeal, Hanover argued that it had, in fact, made a Rule 50(a) motion "because before the case was submitted to the jury, all parties agreed on the record, with the district court's blessing, to reserve and preserve all Rule 50 motions." Put differently, Hanover argued that it either made a Rule 50(a) motion or the district court *deemed* such a motion to have been made, and the Sixth Circuit ought to hold such a ruling sufficient to satisfy the strictures of Rule 50. To be sure, the district court sent "mixed signals" to the parties as to when and even whether they should actually make Rule 50(a) motions, or "simply be taken as a given" that such motions were deemed to have been made. Nevertheless, Hanover made a proper Rule 50(a) motion as to Tattooed Millionaire Enterprise and Brown, but, curiously, not as to Falls.

Sixth Circuit Establishes Bright-Line Rule

The Sixth Circuit panel in *Tattooed Millionaire* (Boggs, J., Guy & White, J.J.) left no doubt that failure to make a pre-verdict Rule 50(a) motion irredeemably precludes a post-verdict Rule 50(b) motion. First, the court was persuaded that Hanover's Rule 50(a) motion as to Brown and Tattooed Millionaire Enterprise, but *not* Falls, showed that Hanover understood the district court's signals to mean an actual, not deemed, Rule 50(a) motion was needed to preserve a Rule 50(b) motion post-verdict.

Second, the panel made clear that even if the district court believed it could simply "deem" Rule 50(a) motions made as if on the record, it has no power to do so. Turning to the text of Rule 50(a), the court stressed that such a motion "*must* specify the judgment sought and the law and facts that entitled the movant to the judgment." The court explained that Rule 50(a)'s specificity requirement is rooted in the Seventh Amendment's jury right (as well as basic fairness), and "informs the opposing party of the challenge to the sufficiency of the evidence and affords a clear opportunity to provide additional evidence that may be available" before the case is submitted to a jury.

Third, the court's holding is a clear admonition to litigants that when a rule is clear—as is Rule 50(b)'s prerequisite that a 50(a) motion have been made—ambiguity from the bench will not save a party from failure to comply with a rule's plain requirements. Agreeing with the Ninth Circuit in *Tortu v. Las Vegas Metropolitan Police Department*, the Sixth Circuit panel found "meritless" the argument that ambiguous statements from the district court could "absolve" a litigant of their procedural obligations under the clear requirements of Rule 50.

Finally, the court rejected Hanover's policy arguments that courts should entertain a Rule 50(b) motion in the absence of a preceding 50(a) motion if the 50(b) motion raises only pure questions of law. The court explained that such policy arguments, while "not without some merit," fail because: (1) it goes against the plain meaning of the Rule (and the explicit instructions in the Notes to the Rule); (2) it presents a constitutional issue under the Seventh Amendment's guaranty of a jury trial in civil suits because Rule 50(a) "requir[es] that parties raise important issues *before* the case is submitted to the jury"; (3) it creates perverse incentives to "sandbag" legal arguments rather than "lay one's cards on the table and enable[] the other side to counter them"; and (4) it would be incongruous for the court to prohibit a Rule 50(b) motion from proceeding because it was too dissimilar from the litigant's Rule 50(a) motion (as the court held in *Ford v. Cnty. of Grand Traverse*, 535 F.3d 483 (6th Cir. 2008)), but then say it would be happy to hear a Rule 50(b) motion when the

litigant made no Rule 50(a) motion at all.

In sum, a litigant cannot make a Rule 50(b) motion if it has not previously made a Rule 50(a) motion. Full stop.

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