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Circuit Court Warns: Don’t Raise Too Many Issues on Appeal

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It’s the appellate lawyer’s eternal challenge: How many issues to raise on appeal? Several years ago, Judge Kethledge offered a not-so-gentle reminder to lawyers in the Sixth Circuit about the importance of limiting issues on appeal when he opened an opinion with the following sentence: “When a party comes to us with nine grounds for reversing the district court, that usually means there are none.”

Earlier this month, the Sixth Circuit’s sister circuit in ***Pierce v. Visteon Corp.***, 7th Cir. Case No. 14-2542, gave us another reminder about the importance of limiting issues on appeal when it criticized a plaintiffs’ lawyer for presenting 13 separate issues for decision on appeal in a certified class action. The case involved Visteon Corporation’s alleged failure to give notice of continued health insurance coverage to former employees under the Consolidated Omnibus Budget Reconciliation Act of 1985. Judge Easterbrook, writing for the Court, summarized the appeal as really involving just three issues: “the penalties are too low, the class too small, and the attorneys’ fees too modest.” The Seventh Circuit viewed the 13 issues raised on appeal as “violating the principle that appellate counsel must concentrate attention on the best issues.” The Court noted parenthetically that “[t]o brief more than three or four issues not only diverts the judges’ attention but also means that none of the issues will be addressed in the necessary depth; an appellate brief covering 13 issues can spend only a few pages on each.”

The Seventh Circuit’s view on issue-raising is in accord with the prevailing view among the appellate bar. Indeed, as Judge Ruggerio Aldisert writes in his excellent book, *Winning on Appeal: Better Briefs & Oral Argument* (a must read for all appellate lawyers): “The most important decision you make in writing a brief is to limit the issues to about three, no more.” *Winning on Appeal* 129 (2d ed. 2003).

Of course, as seasoned appellate practitioners know, this is only the general rule. Sometimes it may be necessary to raise multiple issues on appeal, especially in criminal cases.

In *Visteon*, by contrast, the 13 different issues were viewed as overboard. The Seventh Circuit also highlighted other shortcomings by plaintiffs’ counsel. First, plaintiffs’ counsel ignored an express request by the Court at oral argument for supplemental briefing to address an issue raised under the federal civil rules. Second, plaintiffs’ counsel took positions on appeal that threatened to undermine the clients’ interests. Indeed, the lead argument in counsel’s brief urged the Court to remand because some of counsel’s clients “will get *too much* money!” (Italics and exclamation mark in

original). As the Court commented, “it is unfathomable that the class’s lawyer would try to sabotage the recovery of some of his own clients.” Third, and finally, plaintiffs’ counsel’s brief writing was “careless to boot; it conveys the impression of ‘dictated but not read.’” The Court excerpted two sentences from the brief as an example: “This Court should be entered a high daily statutory penalty in this matter. Respectfully, the award of the District Court to the contrary law and an abuse of discretion.”

What’s the bottom line takeaway from *Visteon*?

- Be cautious in raising too many issues on appeal.
- Proofread your appellate brief.
- Make sure to submit a supplemental brief if the Court requests it at oral argument. (And do so timely.)
- Proofread your appellate brief again.
- Don’t advocate against your client’s position.

Solid advice for lawyers practicing in the Sixth Circuit.

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