

Appellate Law Section December 2017 Newsletter

I hope everyone had a nice Thanksgiving and are enjoying the Holiday Season. Periodically, the Appellate Law Section Newsletter will provide a summary of a recent appellate-court decision or a new rule or statute that impacts both trial and appellate practice.

To this end, this Newsletter provides an excellent summary of a very recent Supreme Court decision addressing the timeliness of a notice of appeal under the Federal Rules of Appellate Procedure, which provides principles that may also apply to perfecting appeals in state courts. The article was provided by Wylan Ackerman, the immediate past Chair of the Section, and written by Jonathan Small, an associate at Wylan's firm, Robinson + Cole. The article appears in one of the firm's blogs: <https://www.massappellateblog.com/2017/11/u-s-supreme-court-to-appellant-time-is-on-your-side/>.

U.S. Supreme Court to Appellant – Time Is On Your Side

We have written previously on this blog about the importance of a timely notice of appeal in the Massachusetts Appeals Court. The issue bears revisiting in the federal courts following the decision by the United States Supreme Court in *Hamer v. Neighborhood Housing Services of Chicago*, No. 16-659 (November 8, 2017).

Justice Ginsburg, in her characteristic trenchant prose, introduced the issue in *Hamer* as follows:

This case presents a question of time, specifically, time to file a notice of appeal from a district court's judgment.

The decision then distinguished between restrictions on subject-matter jurisdiction, such as the time limitations imposed by 28 U.S.C. § 2107(c), and "mandatory claim-processing" rules, such as the time limitations imposed by Federal Rule of Appellate Procedure 4(a)(5)(C). Ultimately, the Court ruled that, unlike the jurisdictional rules established by Congress, the claim-processing rules that set forth time limitations, such as those found in Rule 4(a)(5)(c), do not implicate a court's subject-matter jurisdiction, and can be waived or forfeited.

Hamer involved an appellant whose employment discrimination suit was dismissed by the district court on summary judgment. After the judgment of dismissal was entered, her counsel filed a motion to withdraw and a motion for an extension of the appeal filing deadline, to give the appellant sufficient time to find new counsel for the appeal. The district court granted both motions, allowing a 60-day extension of the appeal deadline, even though Rule 4(a)(5)(C) confines such extensions to 30 days.

Addressing the issue *sua sponte*, the Seventh Circuit Court of Appeals concluded that the 30-day time limitation in Rule 4(a)(5)(C) is jurisdictional, and the district court's extension of time beyond that allotment was therefore ineffectual. On that basis, the court dismissed the appeal.

The Supreme Court reversed. Acknowledging that earlier opinions by the Court "have sometimes overlooked th[e] distinction" between jurisdictional limitations and claim-processing rules or elements of a cause of action, Justice Ginsburg explained that "a provision governing the time to appeal in a civil action qualifies as jurisdictional only if Congress sets the time." These provisions cannot be waived or forfeited and may be raised at any time, including *sua sponte*, by the reviewing court.

By contrast, claim-processing rules, which serve to promote the orderly process of litigation by prescribing certain procedural steps at specified times, are not set by Congress and do not invoke the subject-matter jurisdiction of the Court and may be waived or forfeited.

Rule 4(a)(5)(C) is a claim-processing rule. It provides:

No extension [of time for filing a notice of appeal] under this Rule 4(a)(5) may exceed 30 days after the prescribed time [for filing a notice of appeal] or 14 days after the date when the order granting the motion is entered, whichever is later.

Fed. R. App. P. 4(a)(5)(C). Significantly, this time limitation does not appear in 28 U.S.C. § 2107(c), which provides:

(c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause. In addition, if the district court finds—

(1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and

(2) that no party would be prejudiced,

the district court may, upon motion filed within 180 days after entry of the judgment or order or within 14 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

28 U.S.C. § 2107(c).

The statute does not state how long an extension for “excusable neglect or good cause” may run.

Because Rule 4(a)(5)(C) is the only source of the 30-day limitation on extensions of the appeal period for “excusable neglect or good cause,” it is not jurisdictional and can be waived or forfeited. Accordingly, the Seventh Circuit erred when it held that the appeal was jurisdictionally barred as untimely.

Hamer provides a helpful discussion of the jurisdictional and rules-based authority of federal appellate courts. In this case, the appellant may have avoided the loss of her appeal rights, but the decision also underscores the importance of understanding the appeal process following a judgment entered by the trial court.

Many thanks to Wystan for this fine article.

Amelia Island Winter Meeting. Registration is now open. Please register as soon as possible, as activities are filling up!