ARTICLES >>


By: Zach Lombardo

A recent Ninth Circuit decision highlights common barriers to litigation against federal agencies based on inadequate performance of their oversight and law enforcement duties.

Preserving Jury Verdict Objections for Appeal: *Reider v. Philip Morris USA, Inc.*, 793 F.3d 1254 (11th Cir. 2015)

By: Ellie Neiberger

An objection is waived for purposes of appeal unless trial counsel puts the trial court on notice of the specific basis for the objection, as illustrated by the Eleventh Circuit’s recent opinion on preservation of jury verdict objections.

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The Ninth Circuit Court of Appeals’ recent decision in San Francisco v. Department of Transportation illustrates the difficulties in challenging a federal agency’s action or inaction.

In this case, the Ninth Circuit affirmed the district court’s dismissal of two causes of action brought against the Pipeline and Hazardous Material Safety Administration (“Agency”), holding that the citizen suit provision of the Natural Gas Pipeline Safety Act of 1968 (“NGPSA”) does not authorize mandamus-type action and that the federal Administrative Procedure Act (“APA”) does not allow challenges to the Agency’s enforcement and funding decisions.

The lawsuit arose out of a 2010 Pacific Gas & Electric Company gas pipeline explosion in San Bruno, California, which resulted in multiple deaths and injuries and widespread property damage. San Francisco contended that the explosion was the result of improper regulation by the Agency, which sets the minimum standards for regulation of natural gas pipelines and oversees and funds the various state regulatory commissions. San Francisco, fearing recurrence, sued the Agency alleging that it failed to comply with its enforcement duties under the NGPSA. San Francisco first sought declaratory and injunctive relief to compel the Agency to comply with its duties under the Act. After this claim was dismissed by the district court with leave to amend, San Francisco amended its complaint to include claims under the APA, arguing that the Agency (1) acted arbitrarily and capriciously and (2) failed to act. The district court also dismissed the amended complaint and San Francisco appealed.

The Ninth Circuit affirmed, holding that, based on the citizen suit provision’s plain statutory language, the NGPSA’s statutory structure and legislative history, and the structure of similar federal statutes, the citizen suit provision did not authorize mandamus-type relief. Instead, the citizen suit provision only authorized suits based on substantive statutory and regulatory violations. The court pointed to the Endangered Species Act and the Clean Air Act, contemporaries of the NGPSA which both have express provisions that allow causes of action for non-performance of non-discretionary duties. Further, the Ninth Circuit concluded that San Francisco’s claim brought pursuant to the APA was unreviewable because the Agency’s decisions about whether to take enforcement action and approve or deny funding requests were matters committed to the Agency’s discretion. The Ninth Circuit concluded that while “San Francisco has presented very troubling allegations about the Agency’s approach to monitoring the [California Public Utility Commission’s] regulation of intrastate pipelines,” neither the Act nor the APA authorized its claims.

The Ninth Circuit’s decision highlights the challenges in bringing suits against federal agencies based on the performance or nonperformance of agency oversight and enforcement duties. Unless the agency statute expressly provides for a cause of action against the agency for failure to perform a non-discretionary duty, there is no cause of action, not even through the APA.

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Preserving Jury Verdict Objections for Appeal: *Reider v. Philip Morris USA, Inc.*, 793 F.3d 1254 (11th Cir. 2015)

By: Ellie Neiberger

A basic principal of appellate review—and the one that is most critical for trial practitioners—is that objections and arguments not timely raised at the trial level are waived for purposes of appeal. This general rule is familiar and easy enough to recite. But preservation issues are often more difficult in practice, as illustrated by a recent Eleventh Circuit Court of Appeals decision addressing jury verdict objections.

In *Reider v. Philip Morris USA, Inc.*, 793 F.3d 1254 (11th Cir. 2015), the Eleventh Circuit considered the plaintiff's appeal from a judgment entered following a jury verdict. The plaintiff sued the defendant under Florida's Wrongful Death Act seeking damages for mental pain and suffering and loss of companionship based on the death of her husband. The jury rendered a verdict finding the defendant liable for the husband’s death but awarded the plaintiff zero damages.

Before the jury was dismissed, the plaintiff's attorney objected to the verdict on two grounds: (1) the zero damages award was inconsistent with the finding of liability, given that the plaintiff's evidence on damages was not controverted; and (2) contrary to the court's instructions, the jury reduced the damages by apportionment of fault. The plaintiff's attorney asked the trial court to require the jury to re-deliberate solely on the amount of damages. This request was denied and the plaintiff's attorney moved for a mistrial on the same basis. The trial court denied the motion in an oral ruling, which was followed by a written order finding that verdict was not inconsistent. On appeal, the plaintiff argued that the finding of liability and zero damages award resulted from an unlawful compromise between the jurors (i.e., the jury compromised by finding the defendant liable in exchange for awarding no damages). The plaintiff argued that the “compromise verdict” argument was preserved by her post-verdict objections because she “articulated the hallmarks of a compromise verdict” when arguing that ‘the zero damages finding was inconsistent with the determination of liability’ and ‘that the verdict indicate[d] the jury disregarded the court's instructions.’” She also argued that the trial court was on notice of her compromise verdict claim because an “inconsistent verdict is a type of compromise verdict.”

The Eleventh Circuit concluded that the plaintiff's claim that the verdict was inconsistent did not preserve a compromise verdict claim for appeal. The court began its analysis by explaining the differences between an inconsistent verdict and a compromise verdict. It stated that a “verdict is inconsistent when there is ‘no rational, non-speculative way to reconcile ... two essential jury findings.’” *Id.* at 1259. An inconsistent verdict objection must be raised before the jury is dismissed because the remedy is to send the jury back for further deliberations to resolve the inconsistency. On the other hand, a verdict is the result of an unlawful compromise where the jurors “resolve their inability to make a determination with any certainty or unanimity on the issue of liability by finding inadequate damages,” *Id.* at 1260. The remedy for a compromise verdict is to grant a new trial on liability and damages. *Id.* Therefore, a compromise verdict objection must be raised by filing a motion for new trial within 28 days after the judgment is entered. *Id.* (quoting Fed. R. Civ. P. 59(b)).
The court explained that, although objections need not be made “with polished lucidity” or with “certain magic words,” trial counsel must say enough to put the trial court on notice of the nature of the objection.

The record showed that the plaintiff did not put the trial court on notice that she was raising a compromise verdict claim. First, the plaintiff’s counsel expressly objected on the basis that the verdict was “inconsistent.” Second, the only remedy the plaintiff’s counsel requested was to send the jury back for further deliberations on damages, which is only available for an inconsistent verdict—not a compromise verdict. Third, the fact that the trial court specifically characterized the plaintiff’s argument as an inconsistent verdict objection in its oral and written rulings showed that it did not believe the plaintiff was attempting to raise a compromise verdict objection. Finally, the plaintiff did not attempt to correct the trial court’s misunderstanding by filing a motion for reconsideration or a separate motion for new trial. As a result, her compromise verdict claim was not preserved for appellate review.

This case serves as a reminder that appellate courts will not only refuse to consider completely new issues raised on appeal but that they will also refuse to consider arguments based on a different theory than that raised before the trial court. It emphasizes that it is incumbent on trial counsel to not only be specific in objections but to correct the trial court’s mischaracterization or other apparent misunderstanding of the basis for an objection.

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