CARLTON FIELDS

All Hope is Not Lost: Raising a New Argument on Appeal

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Joseph H. Lang Jr.

James E. Parker-Flynn

Your client has brought you an appeal, and you quickly spot what looks like a winning argument. Unfortunately, it was never raised or argued below. Being a savvy appellate lawyer, you understand you cannot raise it for the first time on appeal. Time to move on, right? Not always.

In *Lopez Ventura v. Sessions*, --- F.3d ----, 2018 WL 5093238 (5th Cir. Oct. 19, 2018), the Fifth Circuit Court of Appeals granted relief to Manuel Lopez Ventura, based on a specific argument that was raised for the first time on appeal.

The short backstory is this. Lopez Ventura pleaded guilty in Louisiana to possessing AB-CHMINACA, a synthetic cannabinoid. After his conviction, he left the country, but later returned and applied to be admitted as a lawful permanent resident. By administrative order, the Board of Immigration Appeals (BIA) found him to be inadmissible, reasoning that AB-CHMINACA was a controlled substance on the date of his *conviction* in Louisiana. As it turns out, AB-CHMINACA was added to the federal schedules of controlled substances after Lopez Ventura was arrested but before he was convicted.

Although he argued to the Immigration Judge that AB-CHMINACA was not a controlled substance on the date of his offense, he did not specifically argue that there is a presumption against retroactive application of a federal statute. The Fifth Circuit granted his petition for review and determined, *inter alia*, that the argument could be pursued on appeal because *"[t]he presumption against retroactivity is merely a tool of statutory interpretation, not a separate claim for relief."* The court then reversed the BIA's order and remanded.

Preservation Issues

- "It is settled practice that to be considered on review, an issue must generally have been 'pressed or passed upon' in the tribunal a quo."
- But, "[t]he presumption against retroactivity is merely a tool of statutory interpretation, not a separate claim for relief."

Tip(s)

Although it is always best to preserve claims, issues, and supporting arguments with as much specificity as possible in the first instance, there are *limited* occasions where the introduction of new arguments on appeal in support of preserved claims or issues may be permitted. This case is an example of one such instance, but there are others as well. *See, e.g.*, *Yee v. Escondido*, 503 U.S. 519, 534 (1992) (in narrow circumstances, "[o]nce a . . . claim is properly presented, a party can make any argument in support of that claim" on appeal). Consequently, before losing all hope of introducing a new argument on appeal, consider whether the new argument is truly unpreserved or whether it might be framed in a way so as to be cognizable.