

Careful What You Ask For: Think Twice Before Asking the Appellate Court to Uphold Pleadings You Failed to Fix in the Trial Court

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In *Jackson v. Bank of America, N.A.*, 898 F.3d 1348, 1358 (11th Cir. 2018), the Eleventh Circuit reminded appellate lawyers that just because they *can* appeal a case does not necessarily mean they should.

In *Jackson*, counsel for the plaintiff homeowners filed a 14-count complaint, claiming that the foreclosure obtained by the defendants was improper. The defendants moved for a more definite statement pursuant to Federal Rule of Civil Procedure 12(e) on the grounds that the complaint was a shotgun pleading that omitted key dates and facts, making it impossible to reasonably answer.

Plaintiffs' counsel did not oppose the motion and instead filed an amended complaint that did little to address the deficiencies of the initial complaint. Defendants then moved to dismiss for failure to state a claim, and the district court dismissed with prejudice.

In a scathing opinion, the Eleventh Circuit affirmed on alternative grounds. Among other things, it described the amended complaint as an "incomprehensible shotgun pleading" that "patently violat[e]d Federal Rule of Civil Procedure 8," and excoriated plaintiffs' counsel's failure to correct these deficiencies when the district court gave it a chance. Indeed, that plaintiffs did not oppose the motion for a more definite statement, the court concluded, "operated as an acknowledgement" of the complaint's defects.

The Eleventh Circuit held that the district court should have dismissed the amended complaint with prejudice without addressing the merits because "the amended complaint was incomprehensible." It further held that although normally the district court is required to point out the defects of a pleading to afford the party a proper opportunity to correct them, that was not necessary here where the defendants' motion for a more definite statement "fully explained the defects" of the complaint and plaintiffs' counsel agreed to file an amended complaint fixing these defects. But counsel did not then do so.

The appellate court chastised plaintiffs' counsel for "attempting to prosecute an incomprehensible pleading to judgment [and] obstruct[ing] the due administration of justice in the District Court" and then "urging this Court to uphold the sufficiency of the amended complaint."

But the Eleventh Circuit did not stop at affirming the dismissal. *Sua sponte*, the court held that plaintiffs' counsel's appeal was frivolous under Federal Rule of Appellate Procedure 38. Citing his repeated requests for extensions in both the district court and appellate court, the Eleventh Circuit blasted the attorney's motive to delay or prevent the completion of defendant's foreclosure, which the court called an abuse of judicial process.

The court affirmed the judgment and instructed plaintiffs' counsel to show cause why he should not pay the appellees double costs and their expenses, including the attorney's fees.

Practice Tip

Be careful what you agree to in the district court and what you ask for in the appellate court. If trial counsel agreed to but failed to cure a defective pleading in the trial court, appealing a dismissal with prejudice may not cure the defects. Even worse, counsel or the client may end up owing fees as a result of the appeal.

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