When Asking for Relief Is Not Enough: Eleventh Circuit Affirms a First Dismissal With Prejudice

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A fundamental principle of preservation is that the lower court must have had an opportunity to address an issue before an appellate court will reverse an order based on that issue. In most circumstances, a specific request for relief is sufficient to preserve an issue for appellate review. But the Eleventh Circuit recently confirmed that simply asking for relief is not necessarily enough.

In *Newton v. Duke Energy Florida* , 895 F.3d 1270 (11th Cir. 2018), the district court granted the defendants' motion to dismiss a putative class action complaint challenging the Florida Renewable Energy Technologies and Energy Efficiency Act. In opposing the motion, plaintiffs requested that if the district court dismissed, it should grant leave to amend. The district court granted the motion to dismiss, but did so with prejudice. The plaintiffs then moved for reconsideration under Rule 60(b), expressly seeking leave to amend and contending they could cure the complaint's deficiencies by asserting a new theory. Reconsideration was denied.

The Eleventh Circuit affirmed. It held that the plaintiffs' request to amend in their opposition to the motion to dismiss was "irrelevant" and "possessed no legal effect" because it failed to comply with Rule 7(b)'s requirement that a request for a court order be made "by motion."

Further, the Eleventh Circuit held that the request for leave in plaintiffs' Rule 60(b) motion was not legally sufficient. Although the Rule 60(b) motion generally described the additional allegations the plaintiffs would add to the amended complaint and how the amendment would address the deficiencies in the original complaint, the Eleventh Circuit held that it "clearly" failed to satisfy the standard for amendment because it "barely scratche[d] the surface" of what the new complaint would say and did not include a copy of the proposed amended complaint.

It is worth noting that *Newton* seems to take a more rigid position than other recent authority from the Eleventh Circuit. For example, in an unpublished decision, the Eleventh Circuit stated that "[t]his Court has assumed that a request to amend included in a response to a motion to dismiss . . . is 'the functional equivalent of a motion' for leave to amend." *U.S. ex rel. Chase v. HPC Healthcare, Inc.* , 723 Fed. App'x 783, 793 (11th Cir. 2018) (quoting *U.S. ex rel. Atkins v. McInteer* , 470 F.3d 1350, 1362 (11th Cir. 2006)).

Nevertheless, the best practice at this point is not to rely solely on a request for leave to amend contained within an opposition memorandum. While it doesn't hurt to explain in the opposition memorandum that, should the court disagree with your position, you will seek leave to file an amended pleading, filing a separate motion for leave — with a copy of the proposed amended pleading attached — is the cleanest way to satisfy this preservation requirement.

Preservation Issues:

As always, the local rules of your jurisdiction will establish the proper procedure for your circumstances. In most situations, however, a request for leave to amend should be made by separate written motion that identifies with particularity the substance of the amendment or, better yet, attaches a copy of the proposed amended pleading.

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