

Wednesday, January 9, 2008

**Filing more than timely is cheaper than the needles-and-pins alternative.**

Photo from website of U.S. District Court (W.D. Mi.). Some courts are more merciless than others in treating certain court filing deadlines as jurisdictional with no wiggle room whatsoever. Consequently, the best thing to do when meeting court filing deadlines that are jurisdictional or possibly jurisdictional is to overcover risk (let alone any court filing deadline whatsoever, unless a timely extension motion is filed that is likely to win) by correctly calculating the deadline early on (beware counterintuitive results), and by filing well in advance of the filing deadline. The last thing one needs is to have a filing deadline missed because of problems with mail, weather, sudden illness or death in the lawyer's family, couriers, unexpected court closings (e.g., Virginia's Lee-Jackson day -- memories of the confederacy) or even a lawyer filing a document personally only to miss the deadline by being stopped for speeding or by a car accident along the way. Sometimes a lawyer has no control over missing a court filing deadline. For instance, sometimes a client does not come to a lawyer for help until the deadline has passed. If that happens, it would seem prudent for the lawyer to put in writing to the client and the file that the lawyer was only hired after the possible deadline passed. Why is a blog entry even needed on this topic? Apparently missed filing deadlines are so common (see the addenda below) that the Supreme Court took up the matter during this term, and issued an unfavorable opinion for those missing the deadline for filing monetary claims against the United States (in this instance, a property loss claim). *John R. Sand & Gravel v. U.S.*, *U.S.* (Jan 8, 2008). Granted that Justices Stevens and Ginsburg dissented, but that is small comfort for the losing party, nor the huge attorneys' fees likely paid for this case to wend its way from the Court of Federal Claims to the U.S. Court of Appeals (Fed. Cir.) to the Supreme Court (where huge time and effort is needed to file a persuasive cert. petition, where the Supreme Court only considers one to two percent of cases presented to it) followed by tremendous time to draft meticulously and persuasively-written and argued briefs, and more time to practice oral arguments moot-court style to make a tough job of Supreme Court oral argument come across at once as effortless, fully credible, fully flexible, and fully persuasive. Curiously, the federal government's lawyers did not preserve the statute of limitations argument in this *John R. Sand & Gravel v. U.S.*, case, and instead succeeded on the merits in the Court of Federal Claims. On the losing party's appeal to the Federal Circuit, an amicus/friend of the court mentioned the matter to the Federal Circuit, and the Federal Circuit decided it had the responsibility to address the issue sua sponte/without request of the parties, and decided in favor of the federal government. The Supreme Court did the same. Jon Katz.

ADDENDUM I: Last fall, one of the nation's largest corporate law firms, Morrison & Foerster, lost its motion for leave to file a late attorney's fee motion, where the late filing could have been avoided had the law firm dispatched its courier more than forty-five minutes before the court's closing time, which was not done. *Toshiba American Information Systems v. New England Technology, Inc.* (C.D. Ca. Nov. 14, 2007). Curiously, it does not appear that electronic motions filing is available at the federal court where the problem took place. Had such electronic filing been available, this late filing likely would not have occurred in the first place. Second, in such a highly populated area of California as this, sending a courier so late in the day danced too much on the edge of risk.

ADDENDUM II: Here is an update to another Supreme Court filing deadline matter that I blogged about over one year ago. In that instance, a veteran Supreme Court litigator for Northwest Airlines mistakenly thought his ninety-day deadline for filing a certiorari petition with the court started April 17, 2006 (when it actually started April 13), and filed his cert. petition ninety days after April 17. Someone at the Supreme Court learned that April 13 was the date of the lower court's order that was the subject of the appeal, making the cert. petition four days late. Northwest immediately filed a motion to accept the petition out of time, in *Petition No. 06M7, Northwest Airlines, Inc., Petitioner, v. Spirit Airlines, Inc.* On October 2, 2006, the Supreme Court denied Northwest's motion. A silver lining in this otherwise sad story for Northwest's lawyer is the collegial action of former solicitors general Charles Fried (for Reagan) and Seth Waxman (for Clinton) accepting the Northwest lawyer's request for an amicus brief from them, which they filed jointly. Fried did not bill a penny for this effort, and underlined the importance of collegiality among lawyers, and the existence of such collegiality among Supreme Court advocates.

Posted by Jon Katz in Constitutional Law at 00:00