

In the
United States Court of Appeals
for the
Eighth Circuit

R. J. ZAYED,
in His Capacity as Court-Appointed Receiver for The Oxford Global Partners, LLC,
Universal Brokerage FX, and Other Receiver Entities,
Plaintiff-Appellant,

v.

ASSOCIATED BANK, N.A.,
Defendant-Appellee.

*Appeal from a Decision of the United States District Court for the District of Minnesota (Minneapolis),
No. 13-cv-00232-DSD · Honorable David S. Doty*

**MOTION TO DETERMINE WHETHER ISSUES RAISED
BY APPELLEE WITHOUT HAVING FILED A CROSS-APPEAL
ARE WITHIN THE SCOPE OF THIS APPEAL**

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**MOTION TO DETERMINE WHETHER
ISSUES RAISED BY APPELLEE WITHOUT HAVING FILED
A CROSS-APPEAL ARE WITHIN THE SCOPE OF THIS APPEAL**

Appellant respectfully requests clarification of the issues subject to briefing in this appeal. Two of the issues raised in Appellee's recently filed principal brief (*in pari delicto* and *res judicata*) address matters not reached by the district court, not addressed in Appellant's principal brief, and not subject to any prior cross-designation of the issues. If this Court were to grant the relief Appellee requests with respect to those two newly-raised issues, such a grant would enlarge the scope of Appellee's rights under the judgment. Appellee did not cross appeal.

Therefore, it is unclear what scope of issues should be addressed in Appellant's Reply. This is so regardless of whether this Court assigns jurisdictional or prudential limits to Appellee's approach. To resolve this question, Appellant respectfully asks to clarify the scope of issues in this appeal, including a conditional request to enlarge the Reply word limit. Appellant is also filing a separate motion to extend the Reply deadline pending a determination of this motion.

I. PROCEDURAL BACKGROUND

This is an appeal from a Rule 12(b)(6) dismissal. Appellant is a federal equity Receivership appointed by the United States District Court for the District of Minnesota. The District Court appointed the Receiver to replace the

management of a multitude of entities used to facilitate the second largest Ponzi Scheme in the history of the State of Minnesota. The Receiver acts under a mandate to maximize the Receivership estate for the benefit of defrauded investors. The Receiver's principal brief explains more about the Receivership and its powers under its appointment.

The Receiver brought the underlying action against Appellee Associated Bank ("the Bank"). The Complaint alleges four "aiding and abetting" counts, whereby the Bank helped the Ponzi Scheme flourish. The Bank moved to dismiss on four different bases:

(1) The Receiver's claims are allegedly barred by the doctrine of *in pari delicto*;

(2) The Receiver's claims are allegedly barred by *res judicata* based on an unsuccessful action by several investors in Wisconsin state court (the *Grad* case);

(3) The Receiver allegedly lacks prudential standing; and

(4) The Complaint allegedly fails to plead the Bank's "actual knowledge" of and "substantial assistance" to the Ponzi Scheme, under Minnesota aiding-and-abetting law and applicable pleading standards.

The District Court granted the Bank's motion, but only as to basis (4) (insufficiency of the allegations). It did not reach bases (1), (2) or (3). The District Court later denied the Receiver's request (by letter brief) to file a motion to

reconsider the dismissal with prejudice, to convert it to one without prejudice, so as to allow the filing of an Amended Complaint. The Receiver filed a timely notice of appeal. The Bank did not cross appeal.

As required by this Court's rules and directives, on November 14, 2013, the Receiver filed its Statement of Issues on Appeal. The Receiver notified the Court and the Bank that three issues will be involved, respectively addressing the sufficiency of the Complaint on "actual knowledge," the sufficiency of the Complaint on "substantial assistance," and the erroneous denial of leave to amend. The Statement of Issues thus addressed only basis (4) noted above, since the district court did not reach bases (1), (2) or (3). The Bank did not serve or file any counter-statement of issues.

The Receiver timely filed its principal brief on December 20, 2013, without having sought any extension of time. The principal brief (comprising 10,252 words, almost 4,000 below the permitted limit) restricted itself to the three issues mentioned above – "aiding and abetting" pleading sufficiency with regard to "actual knowledge" and "substantial assistance," and the erroneous failure to allow leave to amend. The Bank then filed an unopposed motion for enlargement of time to file its Appellee's principal brief. The Court granted in part the Bank's motion, extending the Bank's deadline to February 11, 2014.

Through its principal brief filed on February 11, for the first time, the Bank notified the Court and the Receiver of its intent to inject additional issues into this appeal. One of the Bank's issues recites: "3. Is dismissal of this action independently warranted by the *in pari delicto* doctrine? Or by *res judicata*?" (Appellee Br. 1-2, citations omitted). These correspond to bases (1) and (2) argued below, but not addressed by the District Court. The Bank argues these issues on pages 46-55. On page 46, the Bank admits that "the district court did not reach these issues because it dismissed for failure to allege aiding and abetting," but argues that this Court may affirm "on any basis supported by the record," quoting *Spirtas Co. v. Nautilus Ins. Co.*, 715 F.3d 667, 670 (8th Cir. 2013).

The Bank's brief omits mention that either of these two defenses, if allowed, would enlarge its rights under the judgment. The Bank's brief omits mention that it did not cross appeal, and did not previously cross-designate these new issues. The Bank's brief also omits mention of the "cross appeal rule," which limits the presentation of alternative grounds for affirmance to those that do not enlarge the appellee's rights under the judgment unless the appellee had also filed a cross appeal. The Bank's brief includes 13,963 words – just a few below the outer limit.

Because of the lack of clarity of what issues remain to be briefed in this appeal, the Receiver respectfully requests clarification. If the Court deems the Bank's new issues are properly within the scope of briefing, the Receiver would

then respectfully request an enlargement of its Reply from the 7,000 word limit to a 10,000 word limit.

II. ARGUMENT

The Court should hold that the Bank's principal brief exceeds the permitted scope of issues on appeal, which should not include *in pari delicto* or *res judicata*. The Bank might have raised the *in pari delicto* and *res judicata* defenses in this Court. But to do so would have required a cross appeal. Whether this failure is jurisdictional (as many circuits find but the Supreme Court has not yet decided) or prudential (as this Court has suggested in somewhat analogous circumstances), no reason exists to permit the disorderly presentation of new issues as the Bank requests. By not cross appealing, the Bank has also prejudiced the Receiver. The Reply word limit is 7,000 in a normal appeal, and 14,000 where there is a cross appeal.

The Supreme Court explained many years ago when a cross-appeal is necessary. A cross appeal must be filed when the appellee challenges the judgment below or seeks "to enlarge[] his own rights there under or to lessen the rights of his adversary." *United States v. Am. Ry. Express Co.*, 265 U.S. 425, 435 (1924). This is an exception to the usual rule permitting arguments seeking affirmance on a different ground. *Id.* The cross appeal rule has been referred to as

“inveterate and certain.” *Morley Const. Co. v. Maryland Cas. Co.*, 300 U.S. 185, 191 (1937).

This Court has applied the cross appeal rule, stating in dictum that it is a “non-jurisdictional rule of practice that can be avoided in the discretion of the court.” *Gross v. FBL Fin. Svcs., Inc.*, 588 F.3d 614, 621 (8th Cir. 2009) (finding no reason to depart from the rule). In support of this dictum finding it non-jurisdictional, the *Gross* Court cited this Court’s prior decision in *Kessler v. Nat’l Enterprises, Inc.*, 203 F.3d 1058, 1059-60 (8th Cir. 2000), but this reliance was misplaced. *Kessler* did not address the Court’s jurisdiction in the *absence* of a cross appeal. In fact, the appellee in *Kessler* did file a cross appeal. *Id.* This Court instead addressed whether an argument within an *existing* cross appeal that could have been raised in an initial appeal should be considered on a second appeal following remand. *Kessler* precluded the new argument (dismissing the cross appeal) based on its prudential review of whether to allow a second appeal to have arguments omitted from a first appeal. *Kessler* did not reach the question of whether, in the first appeal, the omission of that same argument created a jurisdictional bar within that first appeal.

The Supreme Court has recognized the circuit split over whether the failure to file a cross appeal raises a jurisdictional bar against consideration of cross-appeal issues. *Greenlaw v. United States*, 554 U.S. 237, 245 (2008) (noting First

Circuit case holding it “mandatory and jurisdictional”); *see also Coe v. County of Cook*, 162 F.3d 491, 497 (7th Cir. 1998) (criticizing but recognizing it as jurisdictional); *Johnson v. Teamsters Local 559*, 102 F.3d 21, 29 (1st Cir. 1996) (no jurisdiction over untimely cross appeal); *EF Operating Corp. v. Am. Bldgs.*, 993 F.2d 1046, at 1048-49 & n.1 (3d Cir. 1993) (jurisdictional); *Francis v. Clark Equip. Co.*, 993 F.2d 545, 552-53 (6th Cir. 1993) (jurisdictional); *Savage v. Cache Valley Dairy Ass’n*, 737 F.2d 887 (10th Cir. 1984) (no jurisdiction over untimely cross appeal). While holding the rule “firmly entrenched,” the Supreme Court declined to decide whether the rule is jurisdictional. *Greenlaw*, 554 U.S. at 245.

Whether jurisdictional or not, the central question is whether a disposition on grounds of *in pari delicto* or *res judicata* would enlarge the Bank’s rights under a judgment that only addresses the sufficiency of a pleading under Fed. R. Civ. P. 8 and 12(b)(6). If these two defenses give the Bank greater rights than they already have, then they have waived them by not filing a cross appeal. That is indeed the case.

A judgment of *in pari delicto* would certainly expand the judgment in the Bank’s favor. If the Bank were to prevail on that defense, then it would be empowered to contend that all hypothetical claims of any form by any of the Receivership entities – even those that are not yet ripe because they are hidden by the Bank’s concealment, thus tolling any limitations period – would be doomed.

That is because this defense, if successful, imposes a complete bar against one “wrongdoer” seeking relief against another. Such an outcome would bar claims beyond the four counts the Receiver actually brought, or any hypothetical additional counts that might have been brought. By analogy to patent law, when an accused infringer achieves a noninfringement victory, but does not cross appeal to raise a rejected patent invalidity argument, the infringer has waived invalidity. *Radio Sys. Corp. v. Lalor*, 709 F.3d 1124, 1132 (Fed. Cir. 2013). Patent invalidity (which operates against the patentee for all time and all future hypothetical infringements) has a greater reach than mere noninfringement of one specified device, even though the outcome under either theory sought by the appellee is “affirmance.” *Id.*

A judgment of *res judicata* would also expand the judgment in the Bank’s favor. Under this defense, the Bank would contend that all future hypothetical counts whose gravamen is the Bank’s assistance in defrauding investors – no matter what form, and regardless of whether it is ripe or presently-unknowable – would be barred. The Tenth Circuit has already held that the cross appeal rule precludes arguing *res judicata* in the absence of a cross appeal, when the appellee’s victory below was based on lack of standing. *Hous. Auth. Of Kaw Tribe v. City of Ponca City*, 952 F.2d 1183, 1195-96 (10th Cir. 1991).

It is in fact beyond debate that the present dismissal under Rule 12(b)(6) is less encompassing than the dismissal that the Bank seeks under these two more broad reaching equitable defenses. *See, e.g., ANR Pipeline Co. v. La. Tax Comm'n*, 646 F.3d 940, 949 (5th Cir. 2011) (“While appellees may wish to have this claim decided on the merits once and for all, they have failed to sufficiently raise the issue on appeal and have failed to file a cross-appeal arguing that the claim should have been dismissed on Rule 12(b)(6) grounds rather than Rule 12(b)(1) grounds.”); *EF Operating Corp.*, 993 F.2d at 1049 (“[W]here an appellant files an appeal seeking review of a summary judgment for the appellee, the appellee must cross-appeal to contest the district court’s adverse ruling on [*i.e.*, failure to address] his motion to dismiss for lack of personal jurisdiction.”); *Johnson v. United States Fire Ins. Co.*, 586 F.2d 1291, 1294 n.7 (8th Cir. 1978) (“Although USFIC argues in its brief that it owes nothing because Condition H of the policy makes actual payment of the ‘retained limit’ by Industrial or its underlying insurer a condition precedent to USFIC’s obligation to pay any excess, USFIC did not appeal from the district court’s judgment. The rule is inveterate and certain that in the absence of a cross-appeal, an appellee cannot ‘attack the decree (of the trial court) with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary.’”).

III. CONCLUSION

For the foregoing reasons, the Receiver respectfully requests clarification of the scope of this appeal, namely that issues related to *in pari delicto* and *res judicata* are not within the permitted range of issues, and need not be briefed. In the alternative, the Receiver respectfully requests an enlargement of its Reply to 10,000 words, from 7,000.

Dated: February 14, 2014 Respectfully Submitted,

/s/Robert P. Greenspoon

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CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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