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Seventh Circuit Foregoes Rehearing En Banc

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By Michael T. Brody

Rehearing en banc is rare in the U.S. Court of Appeals for the Seventh Circuit. A losing party in the Seventh Circuit has as great a chance of persuading the U.S. Supreme Court to grant certiorari as it does to persuade the Seventh Circuit to grant rehearing en banc.

One way the Seventh Circuit makes rehearings en banc unnecessary is Circuit Rule 40(e), which permits the Seventh Circuit to resolve differences before issuing an opinion. If a panel has approved a proposed opinion that would overrule a prior decision of the Seventh Circuit or create a conflict with another circuit, Circuit Rule 40(e) provides the decision may not be published until it is first circulated to the active members of court who may decide whether to rehear the panel's proposed opinion. (The panel has discretion to circulate in the same manner an opinion that would create a new rule or procedure.) If the full court does not rehear the case and the panel publishes its opinion after compliance with the rule, the resulting opinion will contain a footnote indicating that the opinion has been circulated to the entire court and the court has not granted rehearing.

Circuit Rule 40(e) undoubtedly reduces the number of rehearings en banc. If the full court has already considered whether to adopt a rule, filing a rehearing petition asking the court to reconsider that decision will likely be futile. Moreover, compliance with the procedure may dissuade a panel from issuing a decision that would overrule prior decisions of the court or create a split with other courts of appeals.

Two recent Seventh Circuit decisions interpreting Circuit Rule 40(e) may reflect division of opinion within the court about the role of en banc review and when plenary consideration of contested issues is appropriate.

In the first case, *Casillas v. Madison Avenue Associates*, 926 F.3d 329 (7th Cir. 2019), a Seventh Circuit panel held a plaintiff did not allege injury in fact. The plaintiff brought suit under a Fair Debt Collection Practices Act provision requiring debt collectors to notify consumers that they must respond to a debt collection letter in writing. The panel found the harm the plaintiff alleged she suffered was a "bare procedural violation, divorced from any concrete harm," and therefore insufficient to satisfy the injury-in-fact requirement of Article III, see *Spokeo v. Robins*, 136 S. Ct. 1540, 1549 (2016); 926 F.3d at 339. The panel's decision created a circuit split. In compliance with Circuit Rule 40(e), the panel circulated the opinion to the full court. A majority did not favor a hearing en banc and the panel released its opinion.

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Chief Judge Diane Wood, Judge Ilana Rovner and Judge David Hamilton dissented from the decision not to hear the case en banc. To these dissenting judges, the panel's opinion was an important enough issue to "warrant plenary consideration by the en banc court." Procedurally, demanding proof of injury at the pleadings stage, ran the risk of pushing a merits judgment into the Article III injury-in-fact inquiry and result in fact pleading. Substantively, the dissenting judges questioned the application of the standing requirement. Far from being a "picky procedural gaffe," the procedural

requirement that objections be noted in writing was grounded in the substantive interests the procedural right was designed to protect.

While the dissent from the denial of en banc rehearing raised questions concerning the merits, the dissenters' main complaint was procedural. The dissenting judges concluded that creating a split in the circuits on an issue recently addressed by the Supreme Court should be the subject of a full adversarial presentation.

More recently, the same dissenting judges expressed similar views in dissenting from denial of rehearing en banc in *Federal Trade Commission v. Credit Bureau Center*, ___ F.3d __, 2019 WL 3940917 (7th Cir. Aug. 21, 2019). In that case, the FTC brought suit under Section 13(b) of the FTC Act, seeking restitution under a statute that permits the FTC to seek restraining orders and injunctions. In 1989, the Seventh Circuit held the statute authorized awards of restitution. But the *Credit Bureau Center* panel disagreed—relying on the statute's text authorizing suits "to enjoin" a practice, and not other varieties of equitable remedies, as well as on intervening Supreme Court decisions holding that allowing "implied equitable remedies" is inappropriate when a statute contains "'elaborate enforcement provisions'"—and held the statute did not authorize an action for restitution, (quoting *Meghrig v. KFC W.*, 516 U.S. 479, 487-88 (1996)). In so holding, the panel agreed with the views recently expressed by Judge Diarmuid O'Scannlain calling on the Ninth Circuit to revisit its own precedent, (citing *FTC v. AMG Capital Mgmt., LLC*, 910 F.3d 417, 429 (9th Cir. 2018)). Because the panel's opinion overruled a prior decision, the panel circulated its opinion pursuant to Circuit Rule 40(e). A majority of judges did not call for rehearing, and the opinion issued.

Wood, Rovner and Hamilton again dissented from denial of rehearing. Wood explained that Circuit Rule 40(e) exists for two purposes: "to highlight a decision to create a conflict in the circuits, and to clean up earlier decisions whose soundness has been undermined by later legislation, Supreme Court activity, or a consensus among our sister circuits." Wood added that "the rule should not be used to defeat the court's profound commitment to oral argument—a commitment that sets us apart from most of the other circuits, and one that consistently improves the quality of our decision making." The dissenting judges faulted the panel for overruling a long-standing decision of the court "without the careful consideration that plenary en banc review would have provided," viewing Circuit Rule 40(e) as solely "an efficiency promoting rule for the relatively routine updates to our circuit law." The dissenting judges stated the decision of the panel may "erode[] our commitment to plenary consideration, along with oral argument, or every fully counseled case." To the dissenting judges, the court was making a mistake by acting "in a procedurally inappropriate way."

These two decisions are far from the only times the court has recently published a dissent in a case applying Circuit Rule 40(e). In *Coleman v. Labor and Industry Review Commission of Wisconsin*, 860 F.3d 461, 475 (7th Cir. 2017), for example, the court relied on the Circuit Rule 40(e) procedure to resolve a split in circuit authority. The dissenting judges did not take issue with the procedure, they concluded the Court chose the wrong case to overrule. In *Ruben v. Islamic Republic of Iran*, 830 F.3d 470, 487, 489 (7th Cir. 2016), the court relied on Circuit Rule 40(e). In dissent, Hamilton disagreed with the court's ruling. He noted the anomalous nature of the case, however. Due to recusals, a majority of the court would be unable to rehear the case.

The court's two recent cases may reflect factors not revealed in the opinions. It may be that en banc review in each case would have been futile—the refusal to conduct en banc review may reflect the court's judgment that the outcome was a foregone conclusion and further adversary proceedings would only prolong the inevitable. Nonetheless, the court may be changing its views. After many years of stability, the Seventh Circuit has four new members. In these two Circuit Rule 40(e) cases, the dissenting judges were longstanding members of the court, while newly appointed members of the Seventh Circuit authored one decision and joined the panel opinion in the other. Is the Seventh Circuit changing its views about oral argument and plenary consideration of changes in Circuit law? This development bears watching.

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