Incorporation By Reference

August 8, 2011

We just read Scharff v. Wyeth, 2011 U.S. Dist. Lexis 85132 (M.D. Ala. Aug. 2, 2011). Substantively, it's all about the application of the statute of limitations, and we don't usually blog about statute of limitations issues (except class action tolling, which Scharff did not address) due to their fact-bound and state-specific nature.

In that respect, however, we do note the interesting, albeit quite arcane, discussion of choice of law where a case is dismissed in an MDL and refilled in another jurisdiction. That might be worthy of an MDL practice post some day ... but not today.

Further, to the extent there are interesting substantive law issues in Scharff, we couldn't say much about them, because it's an HT case, and we're too involved in that litigation to speak publicly about it.

But there is one thing in Scharff – purely procedural – that we'd like to bring to our readers' attention.

Have you ever had an opponent try to "incorporate by reference" a lengthy document (such as a brief) filed in some other case and not tell either you or the court what exactly this other document is supposed to accomplish? We have, and it's frustrating to try to guess what the other side is, or is not, trying to do with that document. We're also torn in such a situation between not responding at all, or perhaps overresponding to an argument the plaintiff hasn't really thought of. We're not helping our clients if we do a better job of presenting the other side's arguments than it does.

Well, Scharff is one of the few cases we've ever seen where the court actually bothers to say something about this type of abuse of incorporation by reference. Here's the holding on that point – stripped of all case-specific information:

> Finally, [plaintiff] also attempts to produce evidence [supporting her argument] by incorporating by reference a brief filed by another plaintiff in the case [citation omitted]. The court has multiple concerns with [plaintiff's]

one-line incorporation-by-reference as it relates to her burden of establishing prima facie evidence. . . . None of these concerns are favorable for her cause.

* * * *

Second, [plaintiff's] one-line mention of the [other] brief does not include any argument of how [it is relevant] to these facts. See, e.g., Resolution Trust Corp., 43 F.3d at 599 ("There is no burden upon the district court to distill every potential argument that could be made based upon the materials before it on summary judgment. Rather, the onus is upon the parties to formulate arguments . . . ."). [Plaintiff] asks this court to assume her burden of locating and citing relevant evidence . . ., and to comb through 937 pages of briefing and exhibits to pull out the facts necessary to bear her tolling burden. The implied request is declined. See, e.g., Tolen v. Ashcroft, 377 F.3d 879, 883 (8th Cir. 2004) (Where the plaintiff "failed to cite to specific portions of the record" in opposing summary judgment, "[t]he district court was not required to wade through his voluminous 'Exhibit 1' to find the existence of triable issues[.]"); Jaurequi v. Carter Mfg. Co., 173 F.3d 1076, 1085 (8th Cir. 1999) ("[A] district court is not obligated to wade through and search the entire record for some specific facts which might support the nonmoving party's claim.") The [incorporated] brief does not aid [plaintiff's] cause.

Scharff, 2011 U.S. Dist. Lexis 85132, at *47-50.

So there. If some lazy opponent comes along and tries the old incorporation trick to avoid having to articulate his/her own arguments on an issue, now we've got something to cite that specifically condemns the practice.